‘Giustizia consensuale’: A New Law Journal on Consensual Justice in Its Many Nuances and Forms

In recent years, the debate surrounding consensual justice and party autonomy has received increasing attention in the national and international arenas and has raised a broad array of questions. In the pressing need to observe this phenomenon from different perspectives lies the rationale behind a newly founded biannual journal, *Giustizia consensuale*. The journal, founded and directed by Prof. Silvana Dalla Bontà and Prof. Paola Lucarelli, features contributions in both Italian and English.

By adopting an interdisciplinary and holistic approach, the journal aims to investigate the meaning of consensual justice, its relation with judicial justice, and the potential for integrating – rather than contrasting – these two forms of justice. This investigation is premised on the relationship between justice and private autonomy as well as forms of integrative, participatory, and restorative justice. By being particularly suited for meeting the needs of an increasingly complicated and multi-faceted society, these forms of justice ultimately promote social cohesion and reconciliation. Against this backdrop, *Giustizia consensuale* strives to make a valid contribution to the discourse on conflict and the meaning of justice by fostering an interdisciplinary dialogue which encompasses both theory and practice.

The first issue of *Giustizia Consensuale* has just been released and it features:

Silvana Dalla Bontà (University of Trento), *Giustizia consensuale* (‘Consensual Justice – A Foreword’; in Italian)

Paola Lucarelli (University of Firenze), *Mediazione dei conflitti: una spinta generosa verso il cambiamento* (*Conflict Mediation: A Push for Cultural Change*; in Italian)

From the Italian Recovery and Resilience Plan to the guidelines of the Italian Ministry of Justice, the urgency of a reform to strengthen out-of-court dispute resolution procedures clearly emerges. Recovery and resilience become

fundamental objectives. Conflict mediation is the path chosen to achieve social cohesion and reconciliation. Promoting and strengthening this dispute resolution mechanism is important not only to reduce the judicial backlog, but also to empower the parties to self-tailor the solution of their conflict with the assistance of their attorneys. By fostering responsibility, self-determination, awareness and trust, mediation makes citizens and professionals protagonists in the process of change that combines judicial and consensual justice.

Francesco P. Luiso (University of Pisa), *La «proposta» del mediatore* (*The Mediator's 'Dispute Settlement Offer'*; in Italian)

The Italian Legislative Decree No. 28 of 4 March 2010 – implementing the Directive 2008/52/EC – enables, in certain conditions, the mediator to submit a settlement offer to the conflicting parties. In the case that the mediation fails, the judge, in the subsequent court proceedings, might sanction the non-accepting party when allocating procedural costs. Nonetheless, the aforementioned Legislative Decree does not compel the mediator to submit such a settlement offer. However, the mediation rules of some institutions oblige the mediator to make a settlement offer to the parties. Against this background, when ordering the parties to attempt mediation, some courts require them to file their mediation application with a mediation institution allowing the mediator to submit a settlement offer to the parties. In this article, the author argues that these court orders are against the above-mentioned Legislative Decree. In fact, this does not permit the judge to make any particular determination regarding the mediation procedure, the parties, or the mediator themselves. Furthermore, the author underlines how the judge could never take the mediator's settlement offer into consideration in the pending proceedings. While the judge grounds their decision on what is right and what is wrong, the mediator's settlement offer revolves around the needs and interests of the conflicting parties, thus impeding any comparison between their contents.

Antonio Briguglio (University of Rome 'Tor Vergata'), *Conciliazione e arbitrato. Conciliazione nell'arbitrato. Appunti sparsi fra diritto, psicologia e prassi* (*Conciliation and Arbitration. Conciliation in Arbitration. Notes on Law, Psychology, and Practice*; in Italian)

The article deals with the relationship between conciliation and arbitration within the overall ADR system. It first analyses the conceptual, legal and systematic

differences between conciliation and arbitration, with references to some areas of partial overlap (such as, for example, the one now opened by the Singapore Convention of 2019). The author then takes into consideration the parties' and adjudicators' different approaches to conciliation both in in-court proceedings and arbitration. Subsequently, the attention is focused on the attempt of conciliation in the course of the arbitral proceedings; on the so-called multi-step clauses that provide for a mandatory attempt of conciliation before the commencement of arbitration; and on the 'award by consent' in the practice of international arbitration.

Neil Andrews (University of Cambridge), *Procedure, Party Agreement, and Contract* (in English)

In this piece the author considers three points of interaction between agreement and procedure. (1) The parties might consensually choose the applicable procedure, notably the choice between (a) judicial proceedings and (b) arbitration. If they have chosen (a), the parties might stipulate which court and in which jurisdiction the matter will be litigated. Having chosen instead (b) arbitration, the parties will normally make explicit the 'seat' (London, Milan, New York, etc) and the size of the arbitral tribunal (one, three, five, etc). Also falling within (1), there is possibility that the parties will agree to impose on themselves preliminary 'negotiation agreements' and/or mediation agreements. (2) The parties can take a further step and specify or modify the elements of the relevant formal process (whether that process is court proceedings or arbitration). This modification of the default elements of the procedure will involve a 'bespoke' or *ad hoc* agreement, rather than simply adopting national or institutional procedural rules. However, this is less common. Most parties adopt without modification the relevant procedure 'off the peg'. (3) Settlement is the consensual disposal or narrowing of the dispute. In practice, this is the most important way in which agreement and procedure interact. Settlement can occur before or after court or arbitration proceedings have commenced. It is also possible that settlement might occur even after the first-instance judgment has been obtained, for example, when appeal or enforcement proceedings are pending.

Margherita Ramajoli (University of Milan), *Per una giustizia amministrativa alternativa con particolare (anche se non esclusivo) riguardo alle transazioni pubblicistiche* (*For an Alternative Administrative Justice: Focusing on Public Dispute Settlements*; in Italian)

The use of alternative dispute resolution mechanisms in public interest litigation brings both substantial and procedural advantages. They may improve the quality of public decision-making, foster the adoption of shared solutions, re-establish dialogue between parties whose relations are bound to last over time, contribute to moralisation by making clear agreements otherwise not intended to emerge, and finally, make the administrative judicial review more efficient by directing the demand for justice elsewhere. In addition, alternative dispute resolution mechanisms are in tune with the current changes in administrative law; there is a deep link between *droit souple* and *justice douce*, between soft law and ADR, between non-traditional substantive law and alternative administrative judicial review. However, alternative justice is a phenomenon not yet sufficiently developed in public litigation, because of some debated issues in its use. Specifically, it is not easy to harmonise the very purpose of ADR to definitively settle a dispute with the perpetual protection of public interest institutionally entrusted to administrative authorities, as demonstrated by how the latter use the settlement. The introduction of a framework law on ADR in public interest litigation could solve some of the most dramatic issues, naturally maintaining the indispensable flexibility.

Teresa Arruda Alvim (Pontifícia Universidade Católica de São Paulo) and **Márcio Bellocchi** (Universidade de São Paulo), *Mediazione. Il frutto di un buon esercizio del diritto* (*Mediation. The Result of a Mindful Exercise of Rights*; in Italian)

In the last few decades, even civil law jurisdictions have witnessed an increase in the promotion of alternative dispute resolution. Among various reasons for its adoption, ADR affords the parties the possibility to self-tailor a solution to their conflict while significantly diminishing the case overload of the judiciary. Nevertheless, just as varied are the obstacles to the diffusion of ADR, ranging from the lack of preparation of mediators to the traditional adversarial approach of attorneys. The authors examine each of these profiles in the perspective of the Brazilian legal system, analysing the reasons behind the promotion of ADR, its practical implications, and the future outlook on a multi-door justice.

Colin Rule (University of Stanford), *Reinventing Justice with Online Dispute Resolution* (in English)

Online Dispute Resolution (ODR) is the study of how to use technology to help

parties resolve their disputes. Originally created to help e-Commerce companies build trust with their users, ODR is now being integrated into the courts to expand access to justice and reduce costs. With the expansion of artificial intelligence and machine learning, ODR has the potential to play a major role in the justice systems of the future, but there are many questions that still need to be answered. This article outlines the need for ODR, provides a short history of its development, and describes some of the challenges that could accompany its expansion.

Silvana Dalla Bontà (University of Trento), *Una giustizia «co-esistenziale»* online *nello spazio giuridico europeo? Spunti critici sul pacchetto ADR-ODR per i consumatori ('Co-Existential' Online Justice within the EU Judicial Area? Some Constructive Criticism on the Consumer ADR/ODR Package*; in Italian)

Since the 1990s, the European Community, now the European Union, has shown particular regard to the matter of extra-judicial settlement of civil and commercial disputes. The European Union recognized the added value brought by alternative dispute resolution mechanisms in answering the problems posed by cross-border litigation and thus facilitating the creation of the Single Market. The Community's attention first focused on consumer disputes (Recommendations 98/257/EC and 2001/310/EC); it subsequently extended its reach to all civil and commercial disputes (Directive 2008/52/EC); ultimately, it reverted its focus back to consumer disputes with the Directive on consumer Alternative Dispute Resolution (ADR) and the Regulation on consumer Online Dispute Resolution (ODR), both adopted in 2013. This article proposes an in-depth analysis of the objectives, the scope, and the application of the two above-mentioned legal acts composing the so-called ADR/ODR package for consumers, highlighting its strengths and weaknesses. In particular, the discussion focuses on the ODR Platform for the resolution of consumer-to-business disputes launched by the European Union in 2016. In reviewing its functioning through the statistical data collected by the European Union, the author inquires whether the ODR Platform provides for the creation of a 'co-existential justice' in the European legal area or whether other complementary instruments should be implemented to grant a high standard of protection for consumers as the European Treaties impose.