Inside the Italian Courts of Appeals.

Why Reforms Didn’t Work

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ABSTRACT

Italian civil procedure rules on appeals have been thoroughly changed since early Nineties. Using data from the Italian Institution of Statistics, we show that reforms have realized only limited effects: high rates of appeal, lengthy proceedings and high reversal rates were adverse features of the Italian judicial system, and still are. Drawing from the economic literature, we posit that these inefficiencies are not (or not any more) due to inadequate rules of procedure; rather, we suggest that a better performance of judicial auditing (and perhaps of the entire system of adjudication) may depend on improving courts’ organization and on increasing predictability and credibility of the Supreme Court’s decisions.

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INTRODUCTION

Nearly all legal system have an appeals process that allows litigants disappointed with the decision of a first instance court (trial court) to ask reconsideration before a higher court (the appeal court). Different rationales have been offered to explain why the appeals process is such a widely observed feature of adjudication, what its underlying objectives are, and what effects it produces on litigants and judges.

1 Bank of Italy. The views expressed in this paper are those of the author and do not involve the responsibility of the Bank.
From a general standpoint, giving disappointed litigants the possibility of obtaining review of a trial court judgment (either on the merits of the case or for pure issues of law) increases the overall quality of the judicial outcome. This is obvious *ex post*: a second stage review allows to correct errors that might have occurred in the first judgment and, therefore, eventually ensures better and more accurate decisions. But it may also be true *ex ante*: if the threat of bringing an appeal is credible and the risk of being reversed matters for the first-instance judge, she will put more effort on deciding cases and the quality of her judgments will be higher.

Moreover, the analysis of the rules applicable to the appeals process, the rate at which appeals are brought, their time length and outcome are crucial elements for assessing the overall efficiency of adjudication in a given country. If demand for appeal is not driven by strategic behavior of litigants (ie: appeals are brought for really perceived errors made by the lower court’s decision rather than for matters of convenience - such as, for instance, delaying its enforcement), high rates of appeal and high reversal rates may be indirect measures of the quality of lower courts decisions. Furthermore, if appeals are frequent, their time-length will significantly influence the overall time period that litigants face in order to obtain a final judgment (*res iudicata*).

Italian civil procedure rules on appeals (and trials) have been thoroughly changed from early Nineties, when different and subsequent reforms were introduced. This paper analyzes the effects of this intensive change in legislation on three different measures -- rates of appeal, reversal rates and time-lengths -- that may be useful to assess the overall efficiency of judicial auditing in Italy. Data focus on ordinary civil proceedings brought in appeal: dismissal cases (which have a fast-track procedure), and other special proceedings (such as injunctions, summary proceedings or interim orders) are not dealt with.

The paper is organized as follows. Par. 1 provides a survey of the economic literature on the appeals process: what its rationale is, and what effects it produces on litigants’ and judges’ behavior. The major findings of this literature and some preliminary suggestions on the Italian system are briefly sketched in Par. 2. In Par. 3 we describe the basic features of the Italian appeal process. We then provide data on the average rate of appeal, reversal rates and time lengths of the proceedings during the last 15 years. Where possible, a cross-country comparison is given. In par. 4 we offer more detailed information on Italian Appeal Courts, showing great performance diversity among them; some quantitative information is also given on the Italian Supreme Court. Using these data, we try to evaluate the effects of the legislative reforms. Par. 5 concludes.

High rates of appeal, lengthy proceedings and high reversal rates were adverse features of the Italian judicial system, and still are – even if slight improvements may be tracked. The reason for which the overall balance of the legislative reform may not be deemed positive depends upon the fact that these inefficiencies have been predominantly viewed by policy makers as stemming from inadequate civil procedure rules (rather than from other factors too) and that legislative intervention focused on single issues or stages of the Italian proceedings (rather than reviewing the whole framework). Among all, we suggest that better “performance” of judicial auditing (and perhaps of the entire system of adjudication) may depend on policy makers putting
more emphasis on the efficiency of the working methods inside single courts and on increasing predictability and credibility of the Supreme Court’s decisions.

I. THE ECONOMIC LITERATURE

Why is the appeals process such a widely observed feature of adjudication around the world? What elements should it have in order to be optimal? What type of effects does it produce on parties and judges?

Although the economic literature on these issues is relatively few, it provides relevant possible answers to these questions.

a) The appeals process as a means of error correction and the litigants’ role

According to Shavell (2), the appeals process is a mechanism for correcting erroneous decisions of trial courts better than other possible ones, and its widespread existence may be understood in this context.

Each legal system has many different alternatives to avoid or correct mistakes that might occur at trial: it could directly improve the quality of the trial process (for instance, investing in more skilled trial court judges, increasing their number, allowing for more evidence and arguments to be put at trial); it could permit a higher tribunal to review trial decisions at its own initiative or on a random basis; and so on. However, these alternatives would be costlier than the appeal mechanism. Directly investing in trial court accuracy would mean investing in every case brought before the court (and not only in the subset of those that are appealed). Review by a higher tribunal own initiative (or randomly) would again be more costly: it would select incorrect trial decisions for review only by chance, while all of them would be reviewed with an appeals mechanism in place; it might select correct trial decisions for review (wasting resources) and even revert them (introducing error), while none of them would be reviewed under the appeal process.

Shavell’s argument relies essentially on the idea that the appeals process is the most efficient way to correct erroneous decisions because it is left to the losing party own initiative; it “uses” information that litigants have about the quality of the trial court decision and selects for review only decisions were errors are more likely to have been made. This result, so called “separation effect” or “separating equilibrium” (incorrect decisions are appealed, and correct ones are not), is the ultimate superior feature of appeal.

However, the following conditions must be in place in order to reach a separating equilibrium.

First, litigants must have come to know, during trial, whether the trial court decision is correct or not (or at least have probabilistic information about the occurrence of an error); the least this knowledge, the least the appeal is superior vis-à-vis the other possible alternatives sketched above.

2 S. Shavell (1995); Id. (2004).
Second, since the losing party will bring appeal only if the costs she faces are lower than the expected benefits, the separating equilibrium will be reached – either – if the probability of the appeal judge to detect and correct errors occurred at trial is high (the losing party’s expected benefits) – or – if costs of bringing appeals are sufficiently high to discourage groundless second instance suits. From this point of view, the appeals courts’ accuracy, on the one hand, and the legal costs of bringing appeals (as well as their allocation criterion between the parties), on the other, are crucial (3).

Third, for the separation effect to remain stable over time appeal court judges must not assume that the appellant always ought to obtain a reversal. If the separation effect is achieved (ie: incorrectly losing litigants appeal, and correctly losing ones don’t), appeal courts could use inferences from the fact that appeals are brought and reverse all trial court decisions. If this were the case, however, then even correctly losing parties would bring appeal since they would be sure to obtain reversal. As a consequence, the separation effect would be milder and, eventually, completely vanish. The risk that judges use this inferential knowledge may be mitigated by rules of procedure that limit judges’ discretion in their decision making and, therefore, prevent them from assuming that the appellant is always right: rules that, for instance, forbid the appellant to state new claims, raise new motions or produce new evidence in appeal, and thus require the appeal court to render and motivate its decision only on the basis of the trial record, may be understood (also) in this context.

Shavell’s argument – ie: the appeals process in the most efficient way to correct erroneous trial court decisions if the separation effect is achieved – is shared by other authors. Cameron & Kornhauser (4) take the view that the separating equilibrium is better reached when judicial systems are organized on a three-tier hierarchy (trial, appeal and Supreme Court) rather than on only a two-tier one.

As already mentioned, the efficiency of the appeals process relies on two elements: the litigants’ knowledge of the occurrence of errors at trial and the accuracy of the higher court in detecting and correcting such errors. If a party knows it has lost improperly at trial, it has strong incentives to appeal if the probability of the appeal court to correct trial court’s errors is high. However, litigants behave the same way at any level: also the party correctly winning at trial would have strong incentives to challenge an appeal court’s decision incorrectly reversing the trial output. If the “third-level” judge is accurate, she will reverse the decision again, and the party correctly winning at trial will eventually prevail. Knowing this ex ante, litigants correctly loosing at trial will not bring appeals in the first place.

Courts’ accuracy depend – inter alia – on how the judicial system is organized. If the system is pyramidal – ie: the intermediate appeal level reviews a subset of trial decisions, and the higher level reviews a subset of appeal decisions – courts’ accuracy will tend to increase along with their level in the hierarchy.

The argument made by Cameron & Kornhauser then predicts that the efficiency of the appeals process crucially depends on the accuracy of the highest level of the judicial system.\footnote{The level of legal costs and their allocation criterion obviously matter not only in appeal, but influence litigants decisions at any stage of the proceeding. For an in-dept analysis of this point see M. Polinski & D. Rubinfeld (1993).}

\footnote{C. Cameron & L. Kornhauser (2004); Id. (2006).}
judicial hierarchy rather than on the accuracy of the intermediate appeal court, since this is the dominant factor that drives litigants’ decisions whether to bring appeal or not.

b) The appeals process and the judges’ incentives to be more accurate

The appeals process may not only be viewed as the most efficient way to correct ex post erroneous trial court decision, but also serve the function to avoid errors at trial ex ante. \(^{5}\)

If higher courts’ judges are selected among lower courts’ ones, judges may be very interested in signaling their quality, and reputation concerns may arise. Since judge’s quality is difficult to observe directly, the rate at which her decisions are appealed and reversed may serve as an indirect measure of her performance.

Therefore, the possibility for litigants to bring appeal and win constitutes a threat for the trial court judge; under the risk of being reverted, her incentives to be accurate will be stronger than if no appeals mechanisms were in place \(^{6}\). This \textit{ex ante} effect on judges behavior, however, will be achieved only if the appeals process is really able to correct trial court’s erroneous decisions \textit{ex post}: only in this case the threat of being reversed is credible. Put differently, as illustrated in par. 1. a), the appeals process will positively effect judges’ accuracy only when a separating equilibrium is reached – ie: incorrectly losing litigants appeal, and correctly losing ones don’t – and when the probability of the higher courts judges to detect and correct trial courts’ errors is high.

c) The judges’ incentives and the appeals process as a means of reducing agency costs

The arguments analyzed above implicitly assume that judges – independently of their hierarchical position (trial, appeal, or Supreme Court) – have the same preferences. Judges behave as a “team” and share the same goal: deciding cases correctly; judicial auditing is a mean to correct genuine mistakes of lower courts’ judges.

Some authors posit that this “team perspective” might not be the case \(^{7}\). Rather, they suggest that judges have different preferences, and this difference might depend upon their hierarchical position. Mialon, Rubin & Schrag argue that lower and higher courts’ judges face different trade-offs: trial court judges balance litigants’ interest with that of the people within their jurisdiction that will be affected by their precedent; higher court judges weigh litigants’ interest with that of a larger population because their jurisdiction is wider. This physiological difference – trial judges are more “litigants-

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\(^{5}\) S. Shavell (2006).
\(^{6}\) But see also A. Daughety & J. Reinganum (1999) arguing that reversal threat might lead judges to mimicking behavior and incorrect decisions.
\(^{7}\) H. Mialon, P. Rubin & J. Schrag (2005); G. Levy (2005); K. Scott (2006); M. Spitzer & E. Talley (2000. Data on the US Courts of Appeal (where reversal rates are very low) and an explanation based on behavioural economics are provided by C. Guthrie & T. George (2005); on the same issue see K. Clermont e T. Eisenberg (2002).
prone” while appeal judges are more “society-prone” – explain why lower and higher courts judges might rule differently on the same case.

Judges’ behavior may also be affected by career concerns. According to Levy, if higher courts’ judges are selected among lower courts’ ones, their desire to signal their ability might outweigh that of deciding cases correctly. A “careerist” judge will tend to be “creative” (ie. not to follow precedents) more than an efficient judge would do: an innovative decision is a way to signal her talent and increase her reputation.

In this context, the appeals process – and the risk of reversal – may serve an additional function: not only it corrects trial courts’ errors (error costs), but also it mitigates biased behavior of careerist judges and aligns their preferences towards deciding cases correctly (agency costs). Following what we have observed above, a careerist judge will consider the effect of her decision on reputation; if an appeal mechanism is in place, her desire to make innovative decisions will be balanced with that of avoiding reversal (negatively affecting her reputation), which is more likely to occur if innovative decisions are incorrect.

The appeals process may therefore reduce the risk of judges’ inefficient behavior; this holds true, however, only if we assume that appeals judges (differently from trial ones) are interested in taking the correct decision rather than be themselves motivated by reputation concerns. If this is not the case (and that’s likely, since appeals judges may be interested in signaling their ability as well) then judicial auditing is useless in this perspective, and agency costs will replicate even in appeal. Following the example already made above, a careerist appeal judge will tend to reverse trial decisions more frequently than an efficient appeal judge would do, in order to signal her superior ability.

Three factors might mitigate this risk (8):

1) requiring appeals court judges to decide in panels; absent collusion, having more judges deciding each case might offset each others’ individual preferences;

2) having more than one level of appeal and ensuring that the highest-echelon judge has an unbiased behavior (ie: is interested in taking the correct decision). The threat of this additional level of appeal will align preferences of lower courts judges (trial and intermediate appeal) towards efficiency. Put differently, decisonal preferences of the highest level of the judiciary are crucially important, and they will be transmitted down to the lower courts’ judges; if the Supreme Court has an unbiased behavior, agency costs at the lower levels of the judiciary will be reduced;

3) ensuring a good organization of courts. The use of efficient working methods inside single courts – based, for instance, on uniform case management criteria, exchange of information among judges, specialization and coordination of the courts’ staff – may attenuate the impact of judges’ individual preferences on decisions. The less the single judge is left alone in deciding its cases, and the more she is made part of

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8 The first two points are made by S. SHAVELL (2006).
2. SOME PRELIMINARY SUGGESTIONS ON THE ITALIAN SYSTEM

The arguments made by the economic literature analyzed above provide a theoretical framework against which we try to assess the Italian legislative reforms of the appeals process. Before moving to the next paragraph, it’s worth summarizing here the major findings of that literature and offering some preliminary thoughts on the Italian case.

First. The appeals process is the most efficient way to correct (ex post) erroneous trial decisions and to ensure (ex ante) greater accuracy of trial courts. Errors/inaccuracy at trial emerge either from error costs (if we assume that judges have the same preferences, i.e. they are all interested in taking the right decision) or from agency costs (if we assume that judges have different preferences). Well-designed appeal mechanisms may reduce both costs.

Second. For appeals to be efficient a separating equilibrium must be reached – whereby only incorrectly losing litigants appeal, and correctly losing ones don’t. This requires:

i) that parties have come to know during trial whether the trial court’s decision is likely to be correct or incorrect; the availability of precedents on similar cases (together with the probability that the appeal judge will not depart from them unless necessary) is important to this end (9);

ii) that groundless suits be discouraged and effectively sanctioned (for example, by allocating litigation expenses of all parties on the losing one only);

iii) that rules be in place preventing appeal judges (if conditions i and ii are met) to infer sure reversal from the fact that appeal is brought. Forbidding the appellant to state new claims, raise new motions or produce new evidence in appeal (under Italian law this is called “nova prohibition”) may be viewed also in this sense;

iv) that the higher-echelon judge (appeal or Supreme Court) be able to detect and correct errors, and this fact be known to the parties at least.

Third. Judges’ individual preferences and incentives are not irrelevant and influence their decisions. If the threat of being reversed is credible (because erroneous decisions are likely to be appealed by litigants and correctly reviewed by the higher court) each judge will have to balance her decisional preferences with the risk of being reversed.

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9 See K. SCOTT (2006) arguing that when judges have different decisional preferences courts’ organization crucially matters. Greater efficiency of courts: 1) attenuates the impact of individual preferences on judges’ decisions; 2) ensures more accuracy and eventually fewer reversals.

10 The literature reported here moves from the assumption that litigants have diverging expectations on the possible trial outcome (if outcome were predicable, parties would settle before) and that during trial they gain information from the judge’s and the other party’s behavior. The availability of precedents on similar cases and the probability that the appeal judge will not depart from them, however, will influence not only appeal outcome but also parties’ incentives to go to trial in the first place.
reversed. In order to reduce the impact of judges’ individual preferences on decisions, additional factors may be relevant: among these, the court’s composition (single judge vs. panel) and working methods.

Fourth. If the legal system provides for multiple levels of appeals, litigants’ decisions (whether or not to bring appeals) and judges’ behavior (efficient or “strategic”) are not (or not only) driven by the accuracy of the intermediate appeal judge but, rather, crucially depend upon that of the highest level of the judicial hierarchy (ie., of the Supreme Court).

The arguments made by the economic literature are not unknown to Italian legal scholars. Limiting appeals only to wrongly decided cases; restricting evidence in appeal to the trial record (“nova prohibition”); having cases decided by a single judge or a panel; increasing the efficiency of courts’ organization; ensuring accuracy and predictability of the Supreme Court’s decisions: the relevance of all these issues is widely recognized in legal literature. However, only some of them have been dealt with by the legislative reforms. We posit that these omissions might account for the limited results the reforms have obtained.

Few examples may help. One of the major objective of the Italian legislative reform of the appeals process (law 353/1990 and subsequent amendments) was to discourage groundless appeals. Under previous rules, trial decisions could not be enforced when an appeal was brought: therefore, parties had strong incentives to appeal even in rightly decided trial cases in order to delay enforcement. The reform has repealed such provision and, unless otherwise stated by the appeal judge, trial decisions are now immediately enforceable. On the other hand, however, nothing has been done (until very recently) to ensure effective implementation of Italian rules that more directly deter groundless suits. According to the Italian civil procedure code (article 91), litigation expenses of all parties are borne by the losing one. Yet, judges have much discretion on this issue; they frequently disregard this principle, and each party bears its own costs. Only in 2005 a new provision has been introduced requiring courts to give explicit and written motivation in their judgments when deciding not to apply this principle.

The “nova prohibition” is another innovative feature of Italian post-reform rules on appeals. From a general standpoint, the rationale for forbidding new evidence and claims in appeal was found (similarly to the arguments made by the economic literature) in framing the appeals process as a means to review trial court decisions, rather than as a second, full, “trial”. From a more practical point of view, this choice was motivated by the positive effects that the new provision was supposed to produce on the time-lengths of proceedings: with no new evidence and claims permitted, the appeals process should have become quicker. The economic literature suggests that a “nova prohibition” might also efficiently influence reversal rates, as it helps limiting reversal to wrongly decided trial cases only. This point is particularly important for the Italian system, where reversal rates are very high, and suggests the need of maintaining this prohibition strict.

Recent Italian policy makers choices on the courts’ composition (single judge vs. panel) have predominantly been driven by the need to address a lack of resources vis-à-vis an increasing litigation. Until mid-Nineties only minor trial cases were decided
by single judges; having a panel of three judges was the norm for both trial and appeal. After two different reforms (in 1995 and 1999) it’s now the opposite: having a single judge is the norm for trial and appeal; a panel of three judges is only required for those appeal that are brought before the Courts of appeal (\(^1\)). The economic literature highlights that having cases decided by a panel of judges may be useful to align judges’ decisional preferences towards efficiency; if Italian high reversal rates should not result from genuine mistakes of trial courts’ judges but from individual decisional preferences different from efficiency (of both trial and appeals judges), this effect might have been amplified by the extensive use of single judges deciding cases instead of panels. The trend in the Italian reversal rates, which have been increasing during the last years, might confirm this prediction.

The relevance of having a good organization of Courts is unanimously acknowledged in Italy. Analyses on the Italian judicial system all agree on the idea that its inefficiency is largely due to organizational factors. The emphasis is mainly put on the positive effects – in terms of quicker proceedings – that a better Courts’ organization should be able to obtain; in addition to this, the economic literature suggests that an efficient organization also improves the quality of courts’ decisions. However, reforms on this issue – which are inevitably entangled with the principle of judges’ independence stated by the Italian Constitution and may be perceived as aimed at watering this principle - do not easily find their way.

Finally, the Supreme Court’s decisions. The economic literature suggests that the overall efficiency of the appeals process depends on that of the highest level of the judiciary, since this factor affects litigants’ choices and judges’ behavior at lower levels. If the Supreme Court’s accuracy is very high – the argument goes – appeals at an intermediate levels are more likely to be brought only in wrongly decided trial cases and be correctly reviewed by the intermediate appeal judge; therefore, only a few (or even none) appeals courts’ decisions will be brought before the Supreme Court. In turn, the Supreme Court’s high competence, together with its light workload, reinforces the initial assumption and likelihood of her being accurate. Some preliminary remarks may be sketched for Italy. The Supreme Court’s workload for civil cases has been tremendously increasing in the last 10 years; in 2006, it reached the amount of 130,000 civil cases. During the period 1992-2001 on average nearly 50% of the appealed trial courts’ decisions were reversed; at roughly the same rate the Supreme Court reversed again. On the other hand, Italian reforms focused on trial and appeal only and missed to consider, until very recently, rules on the Supreme Court’s proceedings.

\(^{11}\) It’s worth recalling here that, from June 1999, the Italian judicial system is organized as follows:
- Small suits (i.e. whose value is < € 2,500,00) are dealt with by single judges (so called “giudici di pace”); their decision (if suit’s value is > € 1,100,00) may be appealed before the “Tribunale”, and appeals are decided by single judges;
- Other trial cases are dealt with by single judges within the “Tribunale”; they may be appealed before the Court of Appeal, which decides in panels of three judges each.
3. THE APPEALS PROCESS IN ITALY

a) The basic features of the reform

Following the civil procedure reform (law 353/90 and subsequent amendments) Italy has one of the “toughest” set of rules regarding the appeals process compared to other European countries.

Except for countries were appeals require permission (as in UK) or are subject to a preliminary screening process (as in Germany), Italy is one of the few were both of the following rules jointly apply (see Table 1):

i) the appellant may not state new claims, raise new motions or produce new evidence (ie. what we have already mentioned as “nova prohibition”);

ii) even if appealed, trial court’s decisions are immediately enforceable.

<table>
<thead>
<tr>
<th>Country</th>
<th>Permission required, screening process in place or other limitations to right of appeal</th>
<th>Appeals suspend enforcement of trial decision</th>
<th>New claims are admitted</th>
<th>New motions and/or evidence are admitted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>No limitation, except for small suits (&lt;€1.240,00 or 1.860,00)</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Danmark</td>
<td>No limitation, except for small suits (these may be appealed subject to preliminary assessment)</td>
<td>n.a.</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>France</td>
<td>No limitation, except for small suits (&lt;€ 3,800,00)</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Germany</td>
<td>Yes. Since 2002 all appeals are subject to a preliminary screening process. Besides, appeals may not be brought for small suits (&lt; € 600,00) unless they entail particularly relevant legal issues</td>
<td>Yes</td>
<td>No</td>
<td>Yes, but limited</td>
</tr>
<tr>
<td>England and Wales</td>
<td>Yes. There is no right of appeal in civil proceedings; all appeals require permission, which is granted only if they are likely to be successful.</td>
<td>n.a.</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Italy</td>
<td>No limitation, except for decisions based on equity (generally, whose value is less than &lt; € 1.100,00)</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>No</td>
<td>n.a.</td>
<td>No (1)</td>
<td>Yes</td>
</tr>
<tr>
<td>Netherlands</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Spain</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes, but limited</td>
</tr>
<tr>
<td>Sweden</td>
<td>No limitations, except for small suits (these may be appealed subject to preliminary assessment)</td>
<td>n.a.</td>
<td>No</td>
<td>Yes, but limited</td>
</tr>
</tbody>
</table>

(1) New claims are admitted only if both parties agree.

Sources: SHELBY GRUBBS (2003), International Civil Procedure, Kluwer Law International 2003; Banca d’Italia (2005), Civil procedure in Benelux, mimeo ; Banca d’Italia (2005), Civil procedure in France, mimeo; Banca d’Italia (2005), Civil procedure in Germany, mimeo.
These two features, both new, were expected at least to decrease appeals’ time-lengths and rates: the first one, by limiting the evidentiary/instruction stage of proceedings and thus reducing the number of hearings; the second, by discouraging groundless appeals (so reducing the appeals’ judges workload and consequently, again, proceedings’ time-lengths).

The two innovations entered into force at different times. Immediate enforceability of trial courts’ decisions was applied from mid 1995 at the latest. Nova prohibition, instead, presumably came into effect from mid 1998.

Moreover, following Law 353/90 other civil procedure reforms were introduced and have had direct or indirect effect on appeals.

- Since 1997-1998 non-professional judges have been hired with the specific (and temporary) task of deciding cases pending at trial and still regulated by previous civil procedure rules. Anecdotal evidence suggests that the use of non-professional judges has not been positive: although their performance varies greatly among courts, the overall quality of their decision is generally perceived as low. This may account for the increasing rates of appeal and reversal rates observed in recent periods \(^{12}\).

- Since 1999 the two different professional trial courts (“Pretore” and “Tribunale” have been merged into a single one and their jurisdiction reviewed. This has caused

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\(^{12}\) See A. PROTO PISANI (2001); P. VERCHELONE (1999); F. FAVARA (2002) and (2005); M. BELLINAZZO (2006); G. VERDE (2006).
a shift of jurisdiction in favor of the Courts of Appeals, whose workload has significantly increased (Fig. 1). While in 1998 appeals were almost evenly distributed between the “Tribunali” (as a 2° instance judge) and the Courts of Appeal, in 2001 more than 86% of the appeals were brought before the latter (\(^{13}\)).

- As already mentioned, courts’ composition (single judge vs. panel) has been changed since 1998. Appeals are now decided by panels only when brought before the Courts of Appeal.

More generally, legislative changes introduced in the past 15 years have addressed many different issues directly or indirectly influencing the appeals process. While this heterogeneity clearly does not permit to measure the effects they have individually produced, it’s still possible to assess their overall outcome.

b) The data

In order to assess some possible effects of the reforms and, more generally, recent trends in the Italian appeals, data from the National Institution of Statistics (ISTAT) have been analyzed and processed (\(^{14}\)). Three different measures have been calculated:

1) appeal rates – ie: the percentage of trial courts’ decisions (on the merits) subject to appeal – from 1992 to 2005 (latest available data);

2) reversal rates – ie: the percentage of appeals courts’ decisions (on the merits) reverting trial decisions. Calculations refer to the period 1992-2001 (latest available data);

3) effective average time-length of appeals – ie: average number of days passed between the date the clerk has entered the case into the general register of the court and the date in which the judge has delivered her decision. This measure refers to the period 1992-2001. Since then Italian statistics only provide an estimated average time-length (which include all proceedings, whether or not concluded with a decision), and we will therefore refer to this measure.

The findings suggest that the reforms have had limited effects.

1) Appeal Rates

1.1. Some positive effects may be tracked on appeal rates, although their pattern differs among type of suits and time periods (see Fig. 2).

Small suits (\(^{15}\)) have always had low appeal rates, although increasing in the last few years (from 4.3% in 2003 to 8.1% in 2005).

13 ISTAT (2004), at page 27.
14 Two data set are available on an annual basis. The first (Statistiche giudiziarie civili) is on paper; the second (“Giustizia in cifre”) is available on the Internet.
15 As already mentioned, small suits are decided by separate courts (single judges called “giudici di pace”); until mid-1995 they were not subject to appeal.
“Bigger” suits (whose value is more than euro 2,500) show materially higher appeal rates; this is consistent with the cost-benefit approach suggested by Shavell in predicting litigants’ behavior. Moreover, appeal rates have decreased during the whole time-period from 32% (in 1992) to almost 24% (in 2005); in particular, they have been decreasing in the period 1995-2000 (when new provisions on immediate enforceability of trial decisions and nova prohibition entered into force). However, appeal rates remain high in absolute terms, and show a quickly increasing pattern since year 2000. This recent upward trend might confirm anecdotal evidence on the use of non-professional judges we referred to previously (see par. 2A), suggesting low quality of their decisions (in the period 2000-2003, nearly ¼ of total trial decisions were issued by them) (16).

Fig. 2

Sources: Own calculations based on ISTAT data.

1.2. Italian appeal rates remain high even in cross-country comparisons.

Table 2 compares evidence emerging from three recent researches on the evaluation of judicial systems in Europe. Columns 2 and 3 show the appeal rates (referred to all civil suits) for a sample of countries included in two Reports adopted by the Working Group on the Evaluation of Judicial Systems under the authority of the European Commission for the Efficiency of Justice (CEPEJ). The first (column 2) is the result of an experimental exercise and employs figures collected by national correspondents in 40 countries using a pilot questionnarie referred to year 2002; the

16 Low quality of non-professional judges might also account for the increasing reversal rates in appeal we will observe in par. B2.
second (column 3) refers to year 2004 and reports data collected with a revised and improved questionnaire (\(^{17}\)).

Table 2

### Appeal rates, international comparisons
(all civil suits)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(appeals as a % of trial</td>
<td>(appeals as a % of trial</td>
<td>(appeals as a % of all trial</td>
</tr>
<tr>
<td></td>
<td>decisions on the merits)</td>
<td>decisions on the merits)</td>
<td>suits concluded)</td>
</tr>
<tr>
<td>Austria</td>
<td>--</td>
<td>32.2%</td>
<td>4%</td>
</tr>
<tr>
<td>Belgium</td>
<td>4%</td>
<td>5.1%</td>
<td>2.2%</td>
</tr>
<tr>
<td>Danmark</td>
<td>--</td>
<td>2%</td>
<td>5.2%</td>
</tr>
<tr>
<td>Finland</td>
<td>21%</td>
<td>24.6%</td>
<td>2.2%</td>
</tr>
<tr>
<td>France</td>
<td>--</td>
<td>12.8%</td>
<td>9.5%</td>
</tr>
<tr>
<td>Germany</td>
<td>18%</td>
<td>23.4% ((^{1}))</td>
<td>1.9%</td>
</tr>
<tr>
<td>England and Wales</td>
<td>--</td>
<td>--</td>
<td>1.5%</td>
</tr>
<tr>
<td>Italy</td>
<td>17%</td>
<td>21.8% ((^{2}))</td>
<td>13%</td>
</tr>
<tr>
<td>Netherlands</td>
<td>7%</td>
<td>--</td>
<td>1.5%</td>
</tr>
<tr>
<td>Poland</td>
<td>--</td>
<td>17.8%</td>
<td>1%</td>
</tr>
<tr>
<td>Spain</td>
<td>16%</td>
<td>17.5%</td>
<td>--</td>
</tr>
<tr>
<td>Norway</td>
<td>31%</td>
<td>12%</td>
<td></td>
</tr>
<tr>
<td>Sweden</td>
<td>16%</td>
<td>4.8%</td>
<td>2.5%</td>
</tr>
</tbody>
</table>

\(^{1}\) Germany’s Country Report (included in the CEPEJ Survey as annex) shows a 27.9% appeal rate
\(^{2}\) Data for Italy are estimated and include all civil suits (while our data refer only to ordinary civil proceedings)


Column 4 shows appeal rates reported for a smaller sample of countries in a survey performed in 2004 by Ecorys-Ney under the appointment of the Netherlands Council for the Judiciary. Figures refer to year 2001. (\(^{18}\))

In addition to potential data inconsistencies that will be highlighted shortly, it should be noted that the three Reports employ different computation criteria. While in the CEPEJ surveys appeal rates are calculated as a percentage of trial decisions on the merits, the ECORYS-NEY survey takes into account all trial suits, whether or not concluded with a decision on the merits.

These Reports are the first attempt to evaluate and compare the organization and functioning of European judicial systems and might suffer limits and shortcomings. Obtaining comparable and objective quantitative and qualitative figures from different

\(^{18}\) ECORYS-NEI (2004) p. 47, fig. 4.4b.
countries might be hampered by diverse geographical, economic and judicial situations as well as material differences in law and rules of procedure. These difficulties are frequently stressed by the Reports themselves, and particular emphasis is put on the need to interpret cautiously information and figures provided.

Notwithstanding these limits, it’s worth noticing that Italy ranks among those countries having the highest appeal rate in all three Reports.

2) Reversal rates

2.1. Reversal rates are high and have remained so (see fig. 3), with a slight increase from 1998.

This observation holds true considering both the number of reversals over that of all appeals decisions on the merits (affirming or reverting trial outcome) (blue plot) and the number of reversals over all appeals concluded (whether or not with a decision on the merits) (red plot) (19). In 2001, latest figure available, reversals were almost 47% of all appeals decisions on the merits and roughly 35% of all appeals concluded.

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19 The blue plot indicates the rate at which the appeals judge have ruled differently from the trial court (and therefore appellants have obtained reversal) only when appeals ended with a decision on the merits (either reverting or affirming). If we assume that appeals judges correctly reverted, such a reversal rate might be taken as an indirect measure of trial courts’ accuracy. By contrast, the red plot shows the rate at which appeals judges reverted trial courts decisions considering all appeals.
2.2. Cross-country data on reversal rates are not available. The following figures try to assess Italian reversal rates vis-à-vis those of France, whose statistical information is very detailed and easily accessible; this first comparison might be useful also considering the great similarities existing between these two countries’ judicial systems. (20)

Figure 4 and 5 show reversal rates in France and Italy; in order to obtain comparable figures, rates have been computed on all civil suits brought in appeal (differently from figure 3 that refers only to ordinary civil appeal proceedings). As in the preceding paragraph, we distinguish between reversals as a percentage of appeals ended with a decision on the merits (fig. 4) and reversals as a percentage of all appeal concluded (fig. 5). Both show materially higher reversal rates in Italy.

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(20) For the US, see C. GUTHRIE & T. GEORGE (2005) reporting reversal rates in appeal of roughly 10% in the last decade.

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2.3. High and increasing reversal rates in appeals might be due to many different factors.

First, one may posit that high reversal rates are the positive outcome of a separating equilibrium being in place – ie: having the reforms discouraged groundless suits, appeals are now brought only in wrongly decided trial cases and correctly reviewed in appeal. If this were the case, however, we should observe declining rates of recourse and reversal rates in the Supreme Court’s proceedings, and that’s not so. We will address this issue more in details in paragraph 4B. Suffice is to say, here, that high reversal rates in appeal are coupled with even higher reversal rate at the Supreme Court.

Second, appeals reversal rates patterns could be explained by the decreasing accuracy of trial courts. Recall that since 1998 non professional judges have been hired with the task of deciding oldest trial suits, and that the quality of their decisions is generally perceived as low. This might account for the increasing reversal rates observed from 1998 (as well as, as we have already mentioned previously, increasing appeal rates). Similarly, as we suggested in par. 1, changes in the court’s composition – ie: having one judge instead of a panel – might also have negatively affected the accuracy of both trial and appeals courts in the past few years. However, while these two elements might explain recent increasing trends in reversal rates, they clearly do not account for the high level of reversal rates that we observe for the whole period.
One possible explanation for the historically high levels of reversal rates may be drawn from other arguments made by the economic literature, especially those referred to judges’ individual preferences, to the Supreme Court’s role and to courts’ organization. As already mentioned, scholars suggest that the lower-echelon judges’ behavior (as well as parties’) crucially depends on the efficiency of the Supreme Court. If the latter’s decisions are accurate and predictable (i.e. incorrect decisions are likely to be reversed and similar cases are likely to be decided in the same way) error and agency costs affecting lower courts’ decisions will be reduced. The less efficient the Supreme Court is, the less incentives lower-echelon judges will have to be accurate and the more their individual preferences (such as career and reputation goals) will prevail over efficiency. Trial judges will search for higher visibility through innovative and sophisticated law interpretations which might be incorrect (and thus reversed); appeal judges will do the same and reverse more often. In order to reduce the impact of judges’ individual preferences on decisions, additional factors – such as an efficient court organization – may be relevant.

One may object that the literature mentioned above mainly refers to the US institutional setting: quite different from the Italian one, especially as regards the role of precedents and the procedures for judicial appointment and promotion. Both these differences, although material, don’t seem to be relevant for our analysis. First, the ex ante effect produced by the Supreme Court on judges’ behavior does not depend on whether precedents are binding or not (21) but, rather, on the accuracy and predictability of the Supreme Court’s decisions. Second, even if Italian judges have life tenured positions and get economic promotion by seniority, reputation still matters: the perceived quality of judges plays a significant role in obtaining better positions within the judicial system (for instance, in being assigned to more prestigious courts) or extra-judicial appointments.

The importance of reputation and its effect on judges’ behavior is also stressed by the Italian legal literature. Judges decisional preferences are driven “by a strong individualism, that brings them to look for new and different interpretations of law in order to gain visibility, to signal that they do not «copy» what has already been written or said, to feel smart. […] A particular feature of this unconditional search for innovation emerges in the appeals decisions. The appeals judge, normally, wants to show that things could have been done better; that he, the appeals judge, is more accurate and talented than the trial court’s one. So, he frequently reverses decisions, often only in part and on non-material issues.” (22)

The points we have made so far on Italian high reversal rates relate to judges’ behavior. But what about the parties’? The first observation is rather intuitive: being the judicial outcome so variable, parties will appeal more frequently. As we have seen in par. 1, the parties’ decision to bring appeal are driven by the appeal’s costs and expected benefits. If the judicial outcome is predictable (i.e. parties know ex ante who is likely to win), litigants will not bring appeal, since it will be more convenient for them to settle the dispute. The cases that fail to settle are those in which parties have divergent expectations on the judicial outcome; those in which the court could state either ways.

21 Like other civil law countries, Italy does not adopt a stare decisis principle in adjudication, and precedents serve a persuasive role.

This predicts an overall reversal rate of 50% \(^{(23)}\). This prediction brings us to a second comment: reversal rates observed in Italy for both appeals and Supreme Court’s decisions are near that figure. Therefore, one may posit that cases brought before the higher courts are in fact those where parties substantially disagree on the possible judicial outcome: coupled with high appeal rates, this highlights again that the core problem of the Italian appeals process rests on the unpredictability of judges’ decisions and, therefore, on the need to ensure a more uniform and efficient judges’ behavior.

3) Time-length

3.1. No significant effects of the reforms may be tracked on appeals’ time-length.

Italian national statistics offer two different time measures. The first one, available only until 2001, is the effective time-length of appeals: it measures the average number of days passed between the date the clerk has entered the case into the general register of the court and the date in which the judge has delivered her decision. The second, available up to year 2005, measures the average estimated time a case “remains” in appeal \(^{(24)}\).

![Time-length of appeals, n. of days: effective vs. estimated average](image)

Source: ISTAT data


\(^{(24)}\) It employs the following formula:

\[
\text{Time} = \frac{(\text{appeals pending at the beginning of the year} + \text{appeals pending at the end of the year})}{(\text{new appeals brought during the year} + \text{appeal concluded during the year})} \times 365
\]
This second figure might grossly underestimate time: it measures the average number of days of all appeals concluded and, therefore, it includes not only those ended with a decision, but others as well (for instance, appeals concluded with a settlement, or for which the appellant waived is claim, etc., that obviously take a shorter period). Moreover, the formula may be a realistic proxy of time-length only under strict conditions; in particular, it’s necessary that case flows and stocks be relatively stable over the period.

Figure 6 shows the effective and estimated time-length of appeals from 1992. Note that the effective time has reduced only modestly and remains material: the average time to obtain a decision was 998 days in 2001 (1107 in 1992). The estimated time has a more diversified pattern, but remains long too: the figure for 2005 is 1079 days.

In order to have more comprehensive information on ordinary civil proceedings’ time in Italy, fig. 7 shows the average effective time to obtain a decision at trial and appeal from 1992. In 2001, latest year available, 1567 days were needed for a trial decision and 998 day for an appeal one. Other 755 days were necessary at the Supreme Court.

The situation has not improved in more recent years, according to less precise data on estimated average time-lengths (see fig. 8). On the overall, notwithstanding the reforms, no time reduction has been obtained: litigants going through a trial, an appeal and a Supreme Court proceeding needed in 2005 78 days more than in 1994.
Fig. 8

Estimated average time, n. of days
(trial, appeal and Supreme Court)

Source: Own calculations based on data from ISTAT and Italian Supreme Court (Corte di Cassazione).

3.2. Recent cross-country comparisons confirm Italy’s weak position.

Table 3

Average time-lengths of civil suits, CEPEJ Survey 2006 (Data 2004)

<table>
<thead>
<tr>
<th>Country</th>
<th>Trial</th>
<th>Appeal</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Danmark</td>
<td>113</td>
<td>365</td>
<td>478</td>
</tr>
<tr>
<td>Finland</td>
<td>231</td>
<td>370</td>
<td>601</td>
</tr>
<tr>
<td>France</td>
<td>246</td>
<td>459</td>
<td>705</td>
</tr>
<tr>
<td>Germany</td>
<td>207 (local courts)</td>
<td>531 (regional courts)</td>
<td>738</td>
</tr>
<tr>
<td></td>
<td>345 (regional courts)</td>
<td>825 (upper courts)</td>
<td>1170</td>
</tr>
<tr>
<td>Italy</td>
<td>494 (small suits excl.)</td>
<td>875</td>
<td>1369</td>
</tr>
<tr>
<td>Norway</td>
<td>207</td>
<td>300</td>
<td>507</td>
</tr>
<tr>
<td>Poland</td>
<td>156</td>
<td>60</td>
<td>216</td>
</tr>
<tr>
<td>Portugal</td>
<td>696</td>
<td>127</td>
<td>823</td>
</tr>
<tr>
<td>Spain</td>
<td>239</td>
<td>174</td>
<td>413</td>
</tr>
<tr>
<td>Sweden</td>
<td>153</td>
<td>251</td>
<td>404</td>
</tr>
</tbody>
</table>

Table 3 shows the results of the CEPEJ questionnaire and compares time lengths of civil suits for those countries that have provided data on this issue. As also noted in the CEPEJ Report itself, remind that the information might not be homogenous and therefore not fully comparable. However, this adverse feature of the Italian judicial system is widely perceived, and detected by legal scholars, practitioners and judges themselves (25).

3.3. The overall limited effect reforms have obtained in reducing appeals’ time-length might be surprising if one considers that this was the main goal they were supposed to achieve. In particular, the introduction of a strict “nova prohibition” – whereby the appellant is forbidden to state new claims, raise new motions or produce new evidence – has limited (or even abolished) the evidentiary stage of proceedings and therefore significantly reduced the number of hearings necessary to complete an appeal process. Legal scholars and anecdotal evidence suggest that reforms had no significant impact on time-lengths because, even if post-reforms rules of procedure require a maximum of 2 or 3 hearings, the time between one hearing and another (set by the judge) has materially increased (26).

![Fig. 9](image-url)

Source: Own calculations based on ISTAT data.

25 Nearly all Annual Reports on the Italian Judicial System stress excessive time-length of proceedings as one of its major shortcomings. See, for a recent example, N. Marvulli (2006).

26 See, among others, G.F. Ricci (2005) at page 81 and nt. 5.
Many different causes might account for this disappointing result.

The first one is related to the increasing workload of the Courts of Appeal. As already noticed (see par. 2 a) and fig. 1), reforms adopted in mid-1999 triggered a shift of jurisdiction in favor of the Courts of Appeal, and their caseloads (compared to those of the “Tribunali” as a second instance judge) significantly raised since then. Moreover, the boost we observed since 2000 (see fig. 2) in appeal rates has caused a further increase in the Courts of Appeal workload. Not surprisingly, proceedings are increasingly lengthier when appeals are brought before these Courts (see fig. 9).

Second, even though the number of judges serving in the Courts of Appeal has increased, the Courts’ productivity has not improved (27). According to the Italian statistics, the Courts’ productivity rate (measured as the ratio between the number of cases concluded and the Courts’ workload) has been, in fact, decreasing since 1999 (see fig. 10).

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27 See on this point F. FAVARA (2005) at p. 9.
4. Why reforms didn’t work

a) Performance differences among Courts

On the overall, the evidence offered in the preceding paragraphs suggest that the inefficiency of the Italian appeals process are not (or not any more) due to inadequate rules of procedure. While the latter uniformly apply to all appeals proceedings brought before Italian Courts, performance differs greatly among Courts. Time-lengths of appeals ranged in 2005 from 349 days to 2185 days, respectively in Bolzano and in Reggio di Calabria (see fig. 11).

Two factors might account for this wide difference in time-lengths: Courts’ different workload and organization. In figure 12 we show data referred to 16 Italian Courts of Appeals: 7 of them show in 2004 time-lengths below average and 9 above. In order to ensure data consistency, the sample includes only those Appeal Courts in which judges handling ordinary civil proceedings are different from those competent for other issues. The sample comprises 3 “small” Courts of Appeals (ie: having no more than 10 judges: Potenza, Reggio Calabria, Catanzaro), 9 “medium” Courts of Appeals (ie: with a number of judges ranging from 11 to 20: Salerno, Brescia, Messina, Venezia, Catania, Genova, Bari, Firenze, Bologna) and 4 “big” Courts (Torino, Milano, Roma, Napoli).

Using data from the Italian Judicial Council (Consiglio Superiore della Magistratura) we have calculated the number of “civil” judges serving in each Court and, therefore, the number of panels (a panel is made of three judges). For each panel we have then determined workload (green bar), productivity (ie: the number of cases
concluded with a decision, blue plot) and new incoming cases (yellow plot). We then compare these data with each Court’s time-length (purple bar).

The figure suggests three comments.

First: workloads have heavy in all Courts of Appeals. With one exception, in all Courts each panel of judges has more than 500 cases to deal with, and in many of them the figure is quite above 500 (\textsuperscript{28}).

Second: workloads vary greatly. In some Courts judges have a significantly lighter workload than in others. This result calls for the need of distributing judges more adequately among Courts, or – alternatively – of re-organizing the geographical distribution of Courts in order to allocate workloads more evenly.

Third: Courts having similar workload show quite different time-lengths and productivity (ie. number of cases concluded with a decision). This result suggests that different “performances” of Italian Courts of Appeal do not stem only from an inadequate distribution of human resources among Courts but might depend also from a different organization and working methods employed by each Court.

\textsuperscript{28} According to many legal scholars and considering the current courts’ organization and use of ITC, five-hundred cases per judge is the limit above which a decision will not be given within a reasonable time. See, for all, E. IANNELLO (2004) p. 204.
Italian Courts are organized on a non-hierarchical basis: the principle of judges’ independence stated by the Italian Constitution has gradually watered all governance mechanisms. The Courts’ Presidents – who are charged with supervisory and managerial functions over the Courts’ activities – rarely perform this task (also because managerial capacities are scarcely taken into consideration for appointment). *Ex ante* organizational measures aimed at managing time and workloads, determining objectives and priorities, improving the exchange of information among judges and the specialization and coordination of the courts’ staff, adoption of *ex post* assessments etc. are seldom used. When they are, however, results are strikingly positive.

More generally, the lack of governance mechanisms leaves single judges completely autonomous not only in deciding cases, but also in organizing their work. This leads to great behavioral diversity and different performance, which depend upon each judge’s skills, ability, conscientiousness and devotion to duty.

Analyses on the Italian judicial system all agree on the idea that its inefficiency is largely due to organizational factors (29). All recent Annual Reports on the Italian Judicial System stress the need for improving courts’ organization and for linking judges’ (as well as courts’ staff) career to performance measures and managerial capacity. However, reforms on this issue do not easily find their way.

From the economic prospective, the use of efficient working methods inside single courts may serve a paramount function for the Italian judicial system: it may attenuate the impact of judges’ individual preferences on decisions. The less the single judge is left alone in deciding its cases, and the more she is made part of an organization whose end is judicial efficiency, the more reduced her different individual preferences will be.

**b) The Supreme Court**

The economic literature analyzed in par. 1 stresses the importance of the Supreme Court’s efficiency and its relevance in influencing the number of appeals and the quality of their outcome. Accuracy and predictability of Supreme Court’s decisions affect parties’ decisions (whether to bring appeals or not) and behavior of lower-echelon judges (efficient or strategic).

Italian legal scholars unanimously agree on the negative conditions that affect the Italian Supreme Court. Two crucial and intertwined factors are most often stressed: the Court’s workload, more than doubled in the last ten years (30) (see fig. 13), and time-lengths (see fig. 14).

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29 The literature on this issue is quite vast. For some more recent analyses see G. Gilardi (2004); L. Pepino & N. Rossi (2006); S. Zan (2006).

30 Please note that, differently from other jurisdictions, the Italian Supreme Court has no power to select cases to hear.
Supreme Court’s workload (civil cases only)
(new + pending cases)

Source: Own calculations based on data from ISTAT and Italian Supreme Court (Corte di Cassazione).

Civil suits, Supreme Court, effective and estimated time-length
(n. of days)

Source: Italian Supreme Court (Corte di Cassazione) data.
Although Italian Law assigns to the Supreme Court the task of “ensuring correct compliance and uniform interpretation of law”, anecdotal evidence suggests that its impressive caseload prevents the Court from performing this function efficiently; similar cases are often decided differently by the Court itself since no coordination methods among different panels of S.C. judges are in place. The need for a change in the Supreme Court’s rules of procedure addressing these shortcomings has been widely and repeatedly recognized; however, only few and non substantial measures have been adopted until recently. In 2006 a reform has been enacted; whether or not it will be successful, it’s too early to say.

Suffice is to say that an increased efficiency of the Italian Supreme Court appears crucial to ensure a better performance of judicial auditing (and perhaps of the entire system of adjudication). We posit that one of the reasons why Italian legislative reforms missed their goal might lie on the fact that they focused on trial and appeal only and overlooked the importance of the Supreme Court’s proceedings. In the preceding paragraphs we suggested that Italian high reversal rates (which increase parties’ incentives to bring appeal) are not a positive consequence of a separating equilibrium being in place but, rather, a negative result of judges’ decisional preferences not being mitigated by a strong influence of the Supreme Court.

![Fig. 15](image_url)

Reversal rates at the Supreme Court (civil cases only)

Source: Own calculations based on data from ISTAT and Italian Supreme Court (Corte di Cassazione).

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31 See, for all, S. CHIARLONI (2003).
In figure 15 we show the Supreme Court’s reversal rates from 1992 to 2006 (32). The blue plot shows the number of reversals over that of all S.C. decisions on the merits (ie: affirming or voiding appeals’ decisions, either for procedural or for substantial errors (33)); the red plot shows the number of reversals over all S.C. concluded cases (whether or not with a decision on the merits). (34)

Until 2001 (ie: the period considered in our analysis on appeals’ reversal rates) we observe high reversal rates and, on the overall, slightly increasing. From that period on the situation becomes critical: in 2005, nearly 43% of all appeals decisions subject to the S.C. scrutiny are reverted; the percentage raises to 55% considering the subset of those decided on the merits by the S.C. In 2006 (latest data available) reversal rates are, respectively, nearly 37% and 46%.

![Supreme Court: grounds for appeal (as % of total S.C. decisions on the merits)](chart)

Source: Own calculations from ISTAT data.

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32 No statistical information may be found on the “appeal rate” at the Supreme Court. Some preliminary proxies indicate that a reasonable figure might be around 30% (ie: 30% of appeals decisions are brought before the Supreme Court).

33 According to Italian Law, review by the Supreme Court is restricted to errors of law (art. 360 civil procedure code). These errors are traditionally divided into “procedural errors” (ie. the appellant claims lack of jurisdiction of the lower-echelon judge or alleges that the grounds of the appeal’s decision are missing, insufficient or self-contradictory) and “substantive errors” (ie. the appellant claims that one or more provision have been erroneously applied, interpreted or disregarded by the appeals’ judge).

34 We use the term “reversal” is a non-technical way. According to Italian Law, when the Supreme Court finds the claim correct it will quash the appeal decision and “remit” the case to another appeal judge.
The data seem quite disappointing, especially for two reasons. First, they show that when the Supreme Court decides on the merits the appellant obtains reversal in a wide number of cases (more than half in 2005): assuming that the SC has decided correctly, this indirectly proves the low quality of appeal judges’ decisions.

Second, appellants’ claims to the Supreme Court are overwhelmingly referred to erroneous application of law by appeal judges (35) (see fig. 16): this shows, again, that the core problem of the Italian judicial system is to ensure a more uniform interpretation of law.

5. CONCLUSIONS

Following the civil procedure reform (law 353/90 and subsequent amendments) Italy has one of the “toughest” set of rules regarding the appeals process compared to other European countries. Nonetheless, only few positive effects have been obtained: rates of appeal have only slightly decreased; reversal rates have remained high; time-lengths of proceedings are still critical. In cross-country comparisons Italy ranks low in all these three variables.

Having in mind the predictions of the economic literature, in this paper we tried to explain why reforms didn’t work. We suggest that high reversal rates in appeal – which we observe in Italy – might be determined by judges’ decisional preferences (driven by individualism and career concerns rather than efficiency) not being mitigated by the Supreme Court’s action and by an adequate Courts’ organization. Unpredictability of judicial outcome, in turn, induces litigants to bring appeals (and, thus, increases appeal rates); workloads in appeal remain heavy and, consequently, time-lengths remain long.

We posit that these elements have off-set the possible positive outcome of the reforms, and that better “performance” of the Italian judicial auditing (and perhaps of the entire system of adjudication) may depend on policy makers putting more emphasis on increasing predictability and accuracy of the Supreme Court’s decisions and on the efficiency of the working methods inside single courts.

35 See footnote 33.
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RICCI, G.F. (2005) Il processo civile fra ideologie e quotidianità, Riv. trim. dir. e proc. civ., 77
VERCELLONE, P. (1999) La resistibile inefficienza della giustizia civile (Riflessioni su un’esperienza), Questione Giustizia, 1017