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The Traditional Justice System versus Mediation from the Perspective of the Economic Analysis of Law

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In recent decades, several public and private institutions have pointed out the deficiencies in the Judicial Administration in Spain and, consequently, proposals for reform have been put forward, including the establishment of alternative dispute resolutions (ADRs) that will inevitably arise between individuals and companies. Both in fact represent two ways of solving social conflicts, of doing justice, but in which the observance of the legal guarantees of citizens must the reserve of the Judicial System as a common procedure. Therefore, ADRs are not competitive mechanisms in the sense of being exclusive or alternative, but complementary, which open the possibility for companies and consumers to use extrajudicial means to resolve their conflicts. Mediation in consumer activities presents, in relation to the traditional and ordinary justice system, a series of elements that advise its use, since they can contribute to the improvement of efficiency and equity in the Judicial Administration. In addition, these advantages will increase with the incorporation of digital platforms into the administration of these procedures.

Keywords: *judicial administration, conflict resolution, efficiency, equity, legal security*

Introduction

In Spain, at the state level, the transposition of the European regulatory framework regarding the alternative resolution of consumer disputes, in particular Directive 2013/11/EU of the European Parliament and of the Council, of 21 May, 2013, has taken place through Law 7/2017, of 2 November, although some Autonomous Communities have also legislated in this area or, at least, have articulated various regulatory procedures for that purpose.

The Economic Analysis of Law can serve to support and explain the decision-making processes on the construction of alternative dispute resolution systems in different territorial areas.

Consequently, in this paper, after introducing the concept of the Economic Analysis of Law, I look at three fundamental questions:

- The application of this instrument to the study of current legal and judicial systems and alternative procedures for conflict resolution.
- The essential analysis points are efficiency and equity.
- Summary, theoretical precautions and consideration of the restrictions of the institutional framework to the incorporation in our legal system of alternative systems for resolving consumer disputes.

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Economic Analysis of Law versus Formal Legal Dogmatics

Recently, and following the development of the Formal Legal Analysis, which aims to interpret the legal system as a whole or each of its normative elements, in particular (analysis and interpretation, integration and systematisation of legal norms), the Economic Analysis of Law has emerged. This branch of Economics (among others Warburton (2020)) studies the motivations in the origin, the effects of its elements and finally, the economic and social consequences of the existence of the norms, with application and compliance or not, by the obligated parties.

Essentially, therefore, Formal Legal Analysis and Economic Analysis of Law coincide in their objectives but use different methodologies (among others Miceli (2020)).

The organisation of justice as a public administration, with its inputs, internal mechanisms and outputs, occupies a prominent place in the Economic Analysis of Law, without forgetting institutional restrictions and, of course, the rationality and empirical evidence of the behaviour of operators, generically judges, lawyers and users of the legal system.

The concepts of efficiency, equity, transaction costs, externalities, organisation design, sanctions and incentives, etc. are widespread in this type of literature.

The incorporation of Economic Analysis of Law methodology to the review of judicial systems already boasts a young but intense trajectory. The origins of these approaches in Economic Science can be found in the writings of Ronald Coase, recipient of the Nobel Prize in Economics, especially in his article entitled *The Problem of Social Cost* (Coase 1960), though also in other equally relevant works such as *The Nature of the Firm* (Coase 1937)–, in contrast to the work of Pigou: *The economics of welfare* (Pigou 1912), which advocates government intervention in the resolution of social conflicts through the regulation, specifically, of taxes and sanctions.

The translation of the ideas of Coase to judicial conflicts means that, when the Judicial Administration intervenes in their resolution, part of the cost is assumed by the State but in reality it is only a small proportion, since the greater part is made up of the lawyers' fees, expert reports and preparation of evidence, psychosocial and opportunity costs, etc. assumed by the parties.

Therefore, as a general approach, the resolution of a judicial conflict with criteria of efficiency and fairness can be carried out, after the establishment of property rights, through a simple direct negotiation between the affected parties, either with or without the intervention of a third party (arbitrator, mediator, friend, etc.), under the sole condition of economic and social rationality, that is, the cost of accessing the resolution of the conflict through the intervention of these agents is lower than the cost of of ordinary judicial administration transactions.

The deficiencies and subsequent dissatisfaction caused in citizens by congestion in the courts and the delay in obtaining definitive resolutions cannot be solved exclusively and automatically, without further reflection, by measures for

incrementing means addressed to the Judicial Administration, particularly by increases in resources and improvements in organisation.

It is important to bear in mind that the resources used in the Administration have institutional restrictions and, above all, opportunity costs.

On the contrary, today it is possible to identify that the greatest room for manoeuvre is on the demand side, that is, in the reduction of the number of users and cases. In other words, the increase in conflicts and the choice of the judicial route for their resolution is related to the bureaucratic empire that affects above all the operators of the Judicial Administration, who have a monopolistic participation in procedures, as occurs in the case of judges but also and, above all, in that of lawyers and solicitors.

If the judicial process were endowed with greater doses of information and transparency towards users, it would provide them with better knowledge and certification of the results of conflicts. Under these conditions, the number of requests for access to the courts would also decrease substantially, to which the existence of alternative conflict resolution systems, less costly and more equitable with respect to the judicial process, based on various ways of materialising agreements between the parties.

Social Perception and Statistical Evidence of the Judicial Administration

Both Spanish citizens and the various institutions most closely related to the Judicial Administration in Spain, such as the European Commission (2020), the Consejo General del Poder Judicial ("General Council of the Judiciary") (1998), bar associations, but in particular, the opinion of users in the barometers of the Centro de Investigaciones Sociológicas ("Centre for Sociological Research") (CIS) (various years) and the Ministerio de Política Territorial y Función Pública ("Ministry of Territorial Policy and Public Function") (2018) itself presenting the Executive as the penultimate institution, among the nine worst valued by citizens, with the last one being precisely the Administración de Justicia ("Judicial Administration"), as I indicate in Table 1.

Table 1. *Opinion of Spaniards Regarding Various Public Services (Satisfaction %) (2018)*

SERVICES	HIGH	QUITE	LITTLE	NOT	DK	NO	N
Public company	5.9	41.9	35.4	5.9	10.8	0.1	2489
Assistance in public hospitals	9.7	43.2	36.3	8.9	1.8		2489
Assistance in public health centers	10.3	50.5	29.3	7.6	1.5	0	2489
Social services	3.4	27.4	35.0	11.9	22.1	0.3	2489
Unemployment protection procedures	2	23.1	30.3	10.4	33.9	0.2	2489
Public transportation	8.4	45.9	26.8	10.0	8.8	0.2	2489
Public works and infrastructure	3.3	35.6	38.8	14.0	8.2	0.1	2489
Administration of justice	1.1	14.5	37.9	29.1	17.1	0.2	2489
Pension management procedures		25.0	25.6	11.4	35.2	0.4	2489
Citizen security	5.0	48.4	30.2	9.2	6.9	0.3	2489

Source: Ministerio de Politica Territorial y Función Publica (2018).

Regarding the evolution of the opinion of Spanish citizens about Justice in decentralization the last 35 years through the CIS Eurobarometers, the following results were repeatedly obtained on average, collected in Table 2.

Table 2. *Evolution of the Opinion on the Judicial Administration (%)*

	Years						
Assessment	1987	1992	1995	1996	1998	2011	2019
Very good	0	0	0	0	0	0	0
Fairly good	19.1	8.9	14	15.5	9.9	18	21.4
Regular	34.5	38.6	35.5	39.6	24.9	28.7	24.1
Bad	23.5	31.1	29	26.1	38.7	36.7	30.9
Very bad	5.3	13.6	16.6	13.2	18	11.3	17.1
DK/NO	16.7	7.6	4.5	6.4	8.1	5	5.4

Source: Centro de Investigaciones Sociológicas.

The growth of the negative opinions "Bad" and, above all, "Very Bad" is relevant, and they are supported by the increase in interest and information shown by citizens on these issues, which is manifested by a threefold decrease in responses DK/NO.

These results globally coincide with those recently obtained by the General Council of the Judiciary (2021).

Repeatedly over the last three decades, one of the fundamental perceptions and complaints of Spaniards collected in the surveys of the Center for Sociological Research refer to the organisation and functioning of the Judicial System.

Table 3 highlights the low number of responses that show disagreement with judicial decisions (15.26%), compared to that shown in Table 4 as regards deficiencies in attending to citizens (36.56%) and above all, the duration of procedures and delay in obtaining due and definitive resolutions (53.69%) (efficiency: "slow and late justice is not justice") and obscurantism by the administrator; finally, on the part of the lawyers, poor ethical behaviour (35.5%), which ultimately determines that the content of judicial decisions is affected by the economic capacity of litigants (fairness) and more recently by public corruption (efficiency and fairness).

Table 3. *Reasons for Writing Claims, Complaints, Suggestions and Requests for Information (%)*

Reasons	**2008**	**2012**	**2016**	**2020**
Relating to operation of courts and tribunals	78.47	66.35	68.98	68.39
Disagreement with judicial resolution	11.1	18.59	14.16	12.06
Unjustifiable or extraneous matter	6.6	7.8	11.29	12.93
Information requests	2.91	5.85	2.84	5.15
Suggestions	0.66	0.88	1.79	1.09
Thanks	0.26	0.88	0.92	0.38
Total	100	100	100	100

Source: General Council of the Judiciary and own creation (2021).

It is common for users, courts and lawyers to blame themselves for this state of affairs.

The truth is that, along with the problems of the Administration, on the side of the lawyers there is a series of archaic institutions and regulations that substantially worsen access to Justice by citizens including, among others, compulsory professional membership of lawyers, swearing of accounts, consent, and the obligatory intervention of representatives before the courts (*procuradores*) in numerous procedures, etc.

The alternative resolution of consumer disputes, through the different available solution methods, can contribute to the satisfaction of consumers and companies, improve efficiency and, without a doubt, is an important complement to the judicial system for achieving legal protection. Over the last three decades one of the fundamental perceptions and complaints of Spaniards collected in the aforementioned CIS surveys refers to the organisation and functioning of the Judicial System and is related, first of all, to the delay in obtaining definitive judicial decisions (efficiency); secondly, with the concern that decisions are influenced by the economic capacity of the litigating parties (fairness), and more recently by corruption (efficiency and fairness).

Various institutions such as the General Council of the Judiciary itself, the bar associations, but particularly the users in the barometers of the Center for Sociological Research (CIS)[1], present the Executive as the penultimate institution, among the nine worst valued by citizens, withthe Judicial Administration in last place: 46.6% of Spaniards perceive that "it works poorly or very poorly"; 88.4% believe that "it does not provide the same treatment to everyone", and it is the opinion of 50.6% that "it does not inspire confidence."

However, it is most striking that a radically different opinion to that expressed by the rest of the citizens çregarding the functioning of the judicial system is that of the judges: 98% consider themselves as "guardians and guarantors of the rights of citizens"; 99% feel totally independent when making their decisions, despite admitting that 84% of governments and their environment try to influence their decisions; and, in particular, 72% of the judges interviewed feel pressured by the news media.

In short, the deficiencies of the Judicial System in Spain generate inefficiency in the Economic System and social inequity, as there is a large amount of uncertainty in the resolution of social conflicts and, in any case, these are influenced by the economic capacity of the litigants.

As the well-being of Spaniards is powerfully influenced by access to and the functioning of justice, reforms in this area are justified and recommended. The strengthening of this well-being can be obtained by enabling alternative systems to traditional justice imparted by the jurisdictional bodies, and this is precisely one of the purposes of the new European framework for alternative and online resolution

[1]The methodology of the barometers of the Centro de Investigaciones Sociológicas, as well as its database and main studies can be found at: https://www.cis.es/cis/opencms/ES/11_barometros/metodologia.html

of consumer disputes, since all member states are required to ensure that consumers are able to file consumer claims with certified entities.

But, in reality, where does responsibility for this state of affairs lie? With the courts, lawyers or users?

Quite a few of those users who have had some not fully satisfactory experience with the Judicial Administration and the System have most likely heard the mutual blaming of the cause of these deficiencies between lawyers and the courts.

Rightly or wrongly, depending on how you look at it, the legal profession in Spain currently enjoys a series of privileges with respect to other citizens, and is governed by a series of rules that in some aspects would not be out of place in a number of medieval institutions.

Among others, compulsory membership[2], substitution[3], the swearing of accounts[4], the figure and role of the representative before the courts (*procurador*)[5], etc. hinder the formal and real access of citizens to the public service of Justice.

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[2]The Organic Law of the Judiciary (Law 1694/1985) states: "the association of Lawyers, Representatives before the Courts and Social Graduates will be mandatory to act before the Courts and Tribunals in the terms provided in this Law and by the general legislation on professional associations".

[3]The regulation of the substitution of lawyers (*venia*), is included in article 26 of the General Statute of Lawyers (EGAE) and in the correlative article 9 of the Code of Ethics of Spanish Lawyers. The EGAE typifies the infringement of the provisions of article 26 on substitution as a serious offense. For its part, the Code of Ethics considers it as very serious when the substitution of the lawyer is carried out in a procedural communication without prior communication to the senior court.

[4]Article 35. Lawyers' fees.

1. Lawyers may claim from the party whom they defend the payment of the fees they may have accrued in the matter, submitting a detailed invoice and formally stating that these fees are due to them and have not been paid.

2. Once this claim is filed, the Court Clerk orders the debtor to pay said sum, with the costs, or challenge the account within a period of ten days, under penalty of coercion where he/she fails to pay, or file a challenge.

[5]The figure of the *procurador* is regulated in Spain in articles 3 and following of the Law of Civil Procedure, 118, 119, 277 and 652 of the Law of Criminal Procedure, 18 of the Labour Procedure Law and 33 of the Contentious-Administrative Jurisdiction Law and from the corporate point of view, representatives before the courts are subject to their General Statute, approved by Royal Decree 2046/1982, of July 30.

This is one of the figures involved in the most controversial judicial processes, mainly due to the increase in procedural costs for the user and above all due to the questioning of the role at a time when users themselves could assume this function, if not directly the lawyer, but mainly the effective reduction of its functions through the installation of a digital platform in the Judicial Administration that makes it difficult to carry out a large part of the procedures that the prosecutor previously carried out, namely receiving and transmitting notifications, managing the funds, presenting documents) and that they be developed in person in writing in court.

The profession of *procurador*, as we understand it in Spain, is unique, although it is similar to the figure of enforcement agents that exist in other countries, such as the French *le hussies de justice* or the Portuguese *delegado*, although with even less powers.

However, in another 30 European countries there are auxilliary agents involved in the judicial process that are not equivalent to the profession, and in many places they are even civil servants.

In countries such as Germany, France and Italy the figure of *procurador* and lawyer are merged.

The majority of lawyers in Spain consider that morality is something that is basically connected to their private lives rather than with the exercise of their profession, and the matter of compulsory membership is partly responsible for this aberration. In reality, this requirement turns the private legal service practically into a monopolistic company. The moral practice of the lawyer consists of complying with the legal norms, including those of the deontological code that comes from obligatory association, among others, through the figure of professional secrecy that allows detriment to be caused to others by the hiding of information, and even wrongful harm to be directly caused to individuals other than their clients.

The catalogue of undesirable practices of a large number of lawyers inundate individual testimonies, meetings, social networks and other media outlets, at least in Spain, and includes: the abusive collection of fees by not returning the provision of funds when their client wins the lawsuit with the right to costs; little interest and means displayed by the lawyer in the first instance with respect to the second instance, which he considers as inexorable, thus increasing the cost of the proceedings for the client and a rise in lawyer's fees; the frequent situation wherein a few hours before the deadline for submitting documents they do not yet exist, are ill-prepared by the lawyer or are in an incipient situation, indeed, after several months and even years of conversations and contributions of documents by the client, various charges for provision of funds in the event that the lawyer does not require any other document "essential" to the proceedings such as a medical certificate or similar; the difficulties in finding an experienced and solvent lawyer for the most humble citizens, when the opposing party is a powerful local individual or institution; bragging to the client of friendship or intimate relationship with the judge or declaring a political opinion very different from that of the client to justify an undesired judgment, etc.

As regards judges and prosecutors there is lack a code of ethics, and economic rationality predicts and, the non-methodical empirical evidence available at least shows that these groups will as a priority carry out those actions that will benefit them personally, above all, in reducing their workload, and increasing their chances of personal development and professional promotion.

Their behaviour is far removed from that of carrying out tasks of universal morality, supported above all by the absence of a thaumaturgical nature of the norms and that judicial actions brought by citizens against the resolutions of judges, at least, require, in addition to essential institutional support (other judges and lawyers), a huge amount of financial resources that are not within the reach of most litigants.

The practical performance of judges, prosecutors and lawyers in Spain, in particular the latter, entails a high moral risk or perhaps an "intrinsic immorality". The problem behind this reality is that "We need lawyers as much as we need refuse collectors, and in both cases we should expect them to smell bad."

The intellectual and cultural levels of numerous judges in Spain are extremely deficient. The origins of this lie in the mechanisms that operate in the decision of

students opting for this degree path[6], study plans and ordinary teaching practices of most of the current Faculties of Law, in which, despite recent slight improvements, rote and descriptive contents far exceed those of an analytic nature.

The system of public competitive examinations (*oposiciones*) to for would-be judges consists in applicants being able to "sing" around 328 topics from various branches of Law, of course, for a large number of years (at least 10 for some and even 15 or more for those few who can afford such a luxury), isolated from society and its concerns and problems. [7]In these conditions, people become "odd"; after a good number of years they see that their colleagues are raising families and prospering professionally, and when they themselves reach the end of this period if they do not take the exams in short they have nothing, not to mention that few people can bear the expense involved, so the social origin of the judge must be that of the economically privileged.

A considerable number of current lawyers in Spain have previously studied to be judges but, after 5, 10 or even 15 years preparing for the professional exams, have decided or have had no other choice but to abandon this career path and dedicate themselves to the professional practice of being a lawyer, for which of course they lack the theoretical knowledge and convenient experience.

Of those who successfully complete the *oposición* process and reach the position of judge, on very few occasions can it be related to social, artistic, humanitarian, intellectual or cultural concerns, among others, and it is a frequent complaint of lawyers, users of the judicial system and even of some judges of note that there is often an attempt to hide these deficiencies with the "arrogance of the ignorant" (Romero 2018).[8]

However, it is most striking that a radically different opinion to that expressed by the rest of the public regarding the functioning of the judicial system is that held by judges. Among others, 98% consider themselves as "guardians and guarantors of the rights of citizens", 99% feel totally independent when making their decisions, despite admitting that 84% of governments and those close to these attempts to influence their decisions and, in particular, 72% of the judges interviewed felt pressured by the media.

There was a consensus in Spanish society, including among the members of the Judicial Administration, the rest of the legal operators and other experts, about the deficiencies of our legal system, with agreement not only on the main aspects or problems presented by Justice in Spain but even in their solutions.

This was included in the State Pact for Justice Reform signed in 2001 by the PP and PSOE (2011).

[6]Most universities do not require a grade point cutoff for accessing a degree in law and most students lack the vocation to be a lawyer, at least when they begin studies.

[7]https://elpais.com/politica/2017/04/07/actualidad/1491596451_160160.html.

[8]Pascual Sala, president of the General Council of the Judiciary, yesterday called for prudence, discretion and strength in the Judicial Administration and attacked the spectacular nature and arrogance of judges and magistrates, although he did not refer to any specific example…. . "Spectacularity can be a symptom of arrogance, but arrogance is a generally ephemeral brilliance; as soon as you scratch the personality of an arrogant individual, very high doses of clumsiness and lack of intelligence are discovered," added Sala.

The Spanish people, beginning with those who dedicate their professional activity and even some who dedicate their lives to the service of Justice, unequivocally demand a substantial effort to improve and modernise the organisation of our judicial system.

Traditional shortcomings, added to the new demands of an increasingly dynamic and complex society and the rise in litigation and complexities thereof, force us to undertake the necessary reforms.

From the point of view of social welfare, it is necessary for Justice to act with greater speed, fairness, efficiency, effectiveness and quality, with the most modern methods available and procedures that are simpler and more accessible to citizens. It must satisfactorily fulfill its constitutional function of guaranteeing the rights of citizens in a reasonable time and of providing legal certainty, by acting with predictable patterns of behavior and decision. It must act as an independent, unitary and integrated power, with a backbone governed by an institutional coherence that, ultimately, allows it to carry out its constitutional functions more effectively.

Nevertheless, the result of this Pact, analysed fifteen years after its signing, is not comfortable at all.

Indeed, CIS pointed out in 2021 regarding the functioning of the Judicial Administratino, only 10.2% of those surveyed felt "fairly satisfied or very satisfied", while 78% said they were "not very satisfied" and 38.3% "not satisfied at all", with these opinions being substantially different to that which occurs with other public services such as, for example, healthcare or education.

As the well-being of Spaniards is powerfully influenced by access to and functioning of the public service of justice, reforms are needed in this area. The improvement of this well-being can collaborate with the authorisation of complementary systems to the traditional justice imparted by the jurisdictional organs.

The Situation in the EU

The indicator of confidence in the judicial system is one of the nine variables that make up the quality of life indices prepared by the European Statistical System, broader than the traditional indicator based exclusively on GDP growth and, furthermore, its homogenisation of the methodologies used facilitates a harmonised comparison of the different countries that make up the European Union.

Table 4. *Trust in the Judicial System in the European Union*

European Union (28 countries)	4.6
Belgium	5.0
Bulgaria	3.0
Czech Republic	3.8
Denmark	7.5
Germany	5.3
Estonia	5.2

Ireland	5.1
Greece	4.1
SPAIN	**3.1**
France	4.5
Croatia	3.3
Italy	3.6
Cyprus	3.6
Latvia	4.5
Lithuania	4.9
Luxembourg	5.3
Hungary	5.1
Malta	4.9
Holland	6.2
Austria	6.0
Poland	4.2
Portugal	2.9
Romania	5.8
Slovenia	2.7
Slovakia	3.6
Finland	7.2
Sweden	6.7
United Kingdom	5.5
Island	5.7
Norway	7.2
Switzerland	7.0
Serbia	3.4

Source: European Social Survey (2021a, b).

Of the 28 countries of the European Union only three, Slovenia (2.7), Portugal (2.9) and Bulgaria (3.0) have a lower index than Spain (3.1) which are, therefore, in a defined position behind the average (4.6) and at the antipodes of the best performing countries, Denmark (7.5), Finland (7.2) and Norway (7.2).

Public Spending on Justice in Spain

The determination of Public Expenditure on justice in Spain is a difficult task to carry out, among other reasons mainly because of the decentralisation and distribution of the powers of justice in Spain between the Ministry of Justice, the Autonomous Communities and the General Council of the Judiciary.

However, in recent decades an increase in the means and public spending allocated to the management of the administrative organisation of Justice is clearly revealed, with litigation and the consequent average pending rate for the duration of proceedings and enforcement thereof also having increased.

The conclusion is that the cost of justice in Spain is quite inefficient, to which a significant dose of inequity must be added because the budget allocation for the higher courts is not related to the rate of litigation in the spatial sphere of each one of them, consequently revealing large territorial imbalances, unjustified from any point of view whether it be legal, social or economic.

Peace Courts

The increase in litigation in Spain bears a great responsibility for the virtual disappearance of justices of the peace.

In reality, a significant part of this increase in litigation is due to the economic, corporate and professional interests of legal operators, especially lawyers, who irresponsibly induce potential litigants to immerse themselves in conventional or traditional legal proceedings riddled with uncertainties.

"Bring me the papers, we're going to bankrupt..." is an all too frequent expression made by some lawyers to their clients, when it is most likely that the only party "bankrupted" is the client himself who, to begin with, the lawyer asks for a succulent supply of funds and who too often is not warned of the expected technical and legal difficulties of the proceedings, among which include above all the probable non-enforcement of the judgment, the prolonged temporary duration and its corresponding monetary and psychological cost, plus the social stigmatisation in the event of losing the case.

A rigourous supply of information by the lawyer to the client about the real expectations as regards the proceedings, prior to their initiation, would substantially reduce the number of lawsuits that reach the courts.

The outlook of this situation is related to the aggravation that is a direct result of the fact that Peace Courts have practically disappeared.

Justices of the peace are not legal professionals belonging to the judicial career who have accessed the job through public exams, but are individuals selected by the city council of the municipality in which there is no Court of First Instance, and appointed by the administration chamber of the corresponding Higher Court of Justice for a period of 4 years.

Generally, it has involved older people who enjoyed great prestige in the community, and their powers are regulated in Organic Law 6/1985 and, therefore, together with assissting the other the courts, their influence in the resolution of conflicts was considerable, among which included informing, mediating, advising and even dissuading litigants by informing them of the likely outcome of the proceedings.

According to the General Council of the Judiciary, in 2020 there were 7,700 justices of the peace in Spain who resolved 646,835 cases, but in reality they are already lower in number and have also been losing powers in recent years.

Finally, the Draft Organic Law on Organisational Efficiency of the Public Service of Justice, which modifies Organic Law 6/1985, of July 1, on the Judiciary, for the constitution of the Courts of Instance and the Justice Offices in the municipalities, indicates:

> This law undertakes the organisational reform of the Judicial Administration in all its areas, through the creation and constitution of the Instance Courts and the evolution of the Peace Courts into modern Offices of Justice in the municipalities.

In effect, this draft regulation recommends the effective disappearance of the Peace Courts in Spain.

Politicisation of Higher Courts of Justice

In essence, the regulations that govern appointments to positions in the Judiciary in Spain are Organic Law 6/1985, of 1 July, of the Judiciary, Organic Law 2/1979, of 3 October, of the Constitutional Court, and the Spanish Constitution, and as a result thereof all the important positions in our judicial system are filled not as a result of professional criteria, but instead chosen discretionally by the political executive, that is, Parliament (Congress) and the Senate, autonomous community chambers and the General Council of the Judiciary, sometimes in part by Congress. The main function of the General Council is to govern the judges.

On the side of the members of the Public Prosecutor's Office, the appointment of the State Attorney General is the direct responsibility of the Government.

The level of political corruption in Spain is very high compared to the European average, and this is perhaps the most immediate reason why political parties try to control the appointment of members of the higher courts.

The Council of Europe, in a report by GRECO (The Group of Experts against Corruption of the Council of Europe), has in recent years repeatedly urged the Spanish authorities to reform the election system for members of the General Council of the Judiciary (CGPJ).

The 20 members of the Council rely for their election on a reinforced majority of three fifths of the Congress and Senate, and to date there has been no precise agreement between the majority parties, the PSOE and the PP.

The current CGPJ, appointed in 2013, and in office for more than three years (2018), has not been renewed due to the lack of consensus between the PSOE and the PP for its renewal, and this is also transferred to the existence of more than 40 senior positions with discretionary appointment.

Examples of political interference with the judges of the higher courts in Spain are repeated and numerous, with the resultant public scandals being demoralising for citizens and sustaining the negative perception held by Spaniards about Justice, particularly the more enlightened ones.

The best-known cases include those related to mortgage taxes, the case of Catalonia, the *Noos* case, actions by the former King, Juan Carlos de Borbón, the illegal financing of political parties, substitutions of Supreme and Constitutional court judges expressly to address certain cases, among other examples, put on display before Europe some of the most significant weaknesses of Spanish democracy.

A serious error on the part of judges, lawyers and even some legal experts is that they refer to the fact that, despite the poor perception and image held by citizens of the judicial system, every time they have a conflict they go to court as the first way of solving it.

This conception, which is removed from reality and probably the result of corporatist myopia, reduces social conflicts with legal significance to those of public administrations or those of individuals with high economic disposal, with direct relationships with institutions, socially integrated and totally dependent on the legal system. On the contrary, there are a large number of people who, due to their culture and economic conditions, cannot or do not ordinarily resort to the

judicial system for the resolution of their social conflicts, which is expensive and uncertain for them, and instead try to resolve them and indeed do so in most cases through other means, be they legal or not. Of course, there are others who, because they carry out their activity in part in breach of the legislation applicable to them or directly outside the law, do not usually turn to the ordinary courts to resolve conflicts that arise in their economic activity or daily lives.

At least, it appears judges are unaware that for a considerable part of the judicial conflicts that reach the courts the real reason is not the one that is formally presented (theft, prevarication, attacks against free competition, etc.) but others (infidelities, betrayals between members of a political party, discrepancies among company executives, etc.).

More Resources for the Judicial Administration or Implementation of Alternative Systems? (Supply or Demand?)

The problems exhibited and the consequent dissatisfaction in citizens caused by congestion in the courts and the corresponding delay in obtaining definitive resolutions cannot be dealt with exclusively through supply methods directed at the Judicial Administration, particularly through the increase of resources and improvement of its organisation. Without disregarding the possibilities offered by this aspect, the area where today it is possible to identify the greatest room for manoeuvre is on the demand side, that is, in the reduction of the number of users.

Thus, the number of requests for access to the ordinary courts would decrease substantially with the development and establishment of alternative conflict resolution systems, less costly compared to the judicial process, based on different ways of materialising agreements between parties.

Now, the institutional basis from which we start and which is compatible, at least, with the partial results of our research is that ordinary justice has failures that must inexorably be corrected; however, from a global and technical-scientific point of view, despite the name, alternative dispute resolution (ADR) systems, cannot be considered as competitors in the sense of alternatives to the ordinary judicial system. Both, in fact, represent two ways of resolving social conflicts, of doing justice, but in which the observance of the legal guarantees of citizens must ultimately be reserved for the ordinary Judicial System.

In other words, alternative dispute resolution systems can contribute to optimising efficiency in the Judicial Administration by including the mechanism of voluntary agreements between the parties, which is less expensive and quicker than ordinary jurisdiction (Kaplow 1986). However, this must all occur without endangering the equality of all citizens in access to Justice and with the inescapable safeguard of legal certainty, based on the possibility that the voluntary agreement between the parties does not occur, access to ordinary justice is guaranteed.

The increase in conflicts and the choice of the judicial route for their resolution is related to the bureaucratic empire that affects above all the operators of the Judicial Administration, who have a monopolistic involvement in

proceedings, as occurs with judges but also and, above all, with lawyers and *procuradores*.

If the judicial process were endowed with a greater dose of information and transparency towards users, this characteristic would provide them with better knowledge and certainty about the foreseeable result of their conflicts. Under these conditions, the number of requests for access to the courts would decrease substantially. The achievement of this goal could also contribute to the existence of alternative conflict resolution systems, less costly with respect to the judicial process, based on different ways of materialising agreements between parties.

When the Judicial Administration intervenes in the resolution of conflicts, significant costs are incurred, both public and private. As a consequence, from the point of view of the Economic Analysis of Law, it is possible that an improvement in social efficiency may be obtained if there is an alternative dispute resolution system in which the cost of accessing a solution accepted by the parties in dispute is lower than the transaction cost of ordinary justice, including psychosocial and opportunity costs. Logically, this efficiency can only be assumed if the system in question does not fail to attend to a certain consensus based around criteria of equity and legal certainty considered as institutional restrictions.

Comparison of the Degree of Efficiency and Fairness Provided by the Ordinary Judicial Procedure and Consumer Mediation

The full array of dispute resolution methods that can be used for alternative resolution of consumer disputes is quite extensive. It is worth distinguishing between autocompositive (negotiation, mediation and intermediation) and heterocompositive (arbitration and others) solution methods.

Regarding the mediation system, in summary, an impartial third party who is not involved or has no interest in a certain way of resolving the conflict accompanies and helps the parties to reach an agreement. This, however, is not mandatory and, therefore, binding, if the parties do not wish it.

It is usually presided over by transparency and the contribution by the parties of a large number of arguments via what can translate into easy and affordable access to justice, and provide effective help in decongesting ordinary justice.

The economic analysis of the conduct of agents and legal proceedings has been extensively studied by the Economic Analysis of Law and today has reached a high level of development (Kaplow 1986). As the so-called alternative conflict resolution systems have appeared and been put into operation, research has been carried out with the aim of comparing their fundamental elements with the equivalents of the traditional justice system.

My examination focuses particularly on the comparison between the ordinary judicial system and mediation in consumer affairs as main exponents of the different methods of solving social conflicts. As the elements to be compared are very numerous, I focus on some elements that allow me to measure the degree of efficiency and equity achieved in each case. With improvement of efficiency I mean the reduction of costs of all kinds that must be incurred to obtain a resolution

or judgment, including opportunity costs, psychological and social costs and those related to public image.

For its part, in the concept of fairness we include both the meaning of the resolution or judgment, that is, who does it benefit or harm, as well as the distribution of the costs of the procedure used.

In Table 5 we compare various components of the efficiency and equity of the traditional justice system and mediation.

Table 5. *Comparison of the Traditional Justice System and Mediation*

Efficiency	**Courts**	**Mediation**
General	Voluntary/compulsory	Volunteer for both
Bonding	Binding	Binding/ Non-binding
Third party choice	Choice by Law	Volunteer
Flexibility and speed	Standardised Procedure	Greater flexibility and less Speed
Duration	Indeterminate	Shorter duration
Enforcement of the resolution	Last instance (provisional)	Executable
Equity		
Confidentiality/Publicity	Advertising	Confidentiality
Direction of the procedure	Judge	The parties and the mediator
Transaction costs	Elevated	Minor
Transparency	Stairway	Highest
Corruption	High	Minor
Influence of economic power	High	Higher but smaller
Interest of lawyers and others	High	Minor
Degree of compliance with Resolutions	Medium	High degree of compliance
Control of the parts	Medium	High

Source: Own elaboration based on the bibliography and available experiences (2019).

Efficiency

The public costs for a trial involving a small amount of 600 euros are on average 3,000 euros, and 75% of those cases derived by the Judicial Administration to mediation end with an agreement.

The costs or private expenses for the parties to the proceedings of a small claim amount to approximately 2,000 euros, both for plaintiff and defendant.

A civil claim of 300,000 euros supposes, on average, a lawyer's fee up to judgment of 30,000 euros plus costs related to enforcement, those claimed by *procuradores* and those of the experts and other professionals who have been consulted. In the event that the plaintiff wins the lawsuit and gets a judgment on costs, all expenses should be paid by the convicted party, but **what normally occurs is thatlawyers fail to return the required provision of funds, with their fees in reality being the costs assessed by the judge plus the provision of funds.**

If the client loses the lawsuit, his or her expenses will amount to payment of his *procurador* fees plus those of the opposing party's *procurador.*

However, if the litigants have resources that do not exceed twice the minimum interprofessional salary in Spain, they can request **free legal aid**. In this

case, except for the requirement of clandestine payments, the proceedings will be cost-free, but if they win they will have to pay the lawyer's bill and those of their collaborators, including procurador and experts.

On the other hand, **the monetary costs of involved in mediation** for both parties of a litigation such as the one indicated are close to 1,200 euros[9]. Opportunity and psychological costs of the proceedings, which mainly depend on their duration, are not included here.

For its part, **the real cost for the administration of each mediation claim** is estimated at around 1,600 euros.

In the White Paper on Mediation in Catalonia, a study carried out for this Autonomous Community concludes that if cases of legal proceedings were reduced by 20% within it, its Judicial Administration would save 4 million euros per year its Judicial Administration.

For the purposes of the efficiency of the mediation system, the question of the convenience or not of the costs for both parties is controversial. It seems reasonable that in the case of basic services, the complaining consumer does not pay anything, simply to make the system viable. Faced with an uncertain resolution and probably of little economic importance individually, few consumers would risk initiating the mediation process, if this entails any cost.

On the other hand, for the respondent company, in turn, the added cost of the mediation would be very low (little else apart from fees), because they have already financed these expenses (lawyers, administration, etc.), among other reasons. It would therefore be efficient and fair for them to pay some amount.

The only thing left is to legally solve the possibility of abuse on the part of consumers in mediation claims ("I'm going to discredit you, I'm going to ruin you with lawsuits", etc.).

On the one hand, it must be borne in mind that "equality of arms" does not occur in conflicts in consumer affairs between users considered on an individual basis and those large companies that are responsible for a number of basic services under a monopololistic regime and, on the other hand, it is likely that the company interrupts the supply of a basic service for citizens, meaning thattheir bargaining power is, in reality, insignificant.

The mediation process is substantially quicker than legal proceedings. This period could be improved even more substantially if online resolution procedures are promoted, developed and implemented using information and communications technology.

Judicial independence is a concept that in all likelihood contributes to the reduction of corruption and, consequently, to high levels of efficiency in the legal and economic systems and, ultimately, to achieving a system of competition and distribution of benefits based on the merits of economic agents and not, on the other hand, on influences.

[9]The cost for the businessperson and consumer of mediation is not zero. The initial fees may be zero but this does not extend to the cost of lawyers, tests, expert reports, investigations, etc. contributed or used as arguments in the mediation process. This matter is, in any event, controversial from the economic point of view. It seems reasonable that in the case of supplying basic services, the complaining consumer not be required to pay anything, simply to make the system viable.

Systems such as the Spanish one have excluded alternative consumer dispute resolution entities from accreditation where the staff in charge are paid in full by the respondent company. On the other hand, the level of transparency of the accredited entities has also been regulated by the Directive 2013/11/EU and by Spanish law, in such a way that it is contemplated that the consumer may have the possibility of knowing what problems are the most frequent and what would be the probable solution for the demand this raises. In short, the degree of transparency that an alternative resolution entity for consumer disputes can guarantee compared to the judicial system is much greater.

Justice in Spain is very expensive and consequently unequal depending on the level of income of the litigants. In reality, as in other areas of life, there are two kinds of justice, that of the rich and that of the poor.

Large companies, banks, institutions, white-collar criminals, drug traffickers, etc. all hire the best lawyers and as a result, in part, they achieve a high percentage of success in legal proceedings. The going rates for these lawyers are prohibitive for the majority of the population and for this reason people who lack funds, in the event they decide to initiate legal proceedings, are obliged to entrust their affairs to duty lawyers appointed by the state who, with few and obvious exceptions, are not among the most prestigious and experienced.

A Catalan lawyer of great renown in Spain and, especially among social groups, Loperena (2003), with first-hand knowledge of this situation, has masterfully expressed it:

> One piece of advice: never go to hospital or court on your own initiative. If you have no other choice - when they take you on a stretcher, handcuffed or the law forces you to go, do so, but never cross their thresholds without having thought it through a thousand times. Because, although it is known where the entrance leads, the exit can lead you to the cemetery or jail. When you read this, many of you will wonder if lawyers who are competent, honest, decent fair and staunch defenders of the weakest still exist. Without wanting to sound corporatist, I can assure you that they do. Of course there are! During the 40 years that I practiced law, I met hundreds.

In reality, the rules do not have thaumaturgical power and it is possible that this suitability of mediation in consumer affairs fails or, at least, its foreseeable positive effects are reduced if the basic rule is not reinforced by adequate and sufficient technical elements and human resources.

There is consensus on the consideration that for the new mediation model to achieve its aims in terms of equity and efficiency of social welfare, it must be supported at least by the following characteristics: transparency, speed, cost-free, flexible, memory, etc. and for this, it is obviously essential that the process be carried out through a computer platform that permits the online resolution of consumer conflicts. The following must be included in the design of this platform:

1. Technologies to support mediation: communication and management tools in order to speed up the procedure.

2. Mediation improvement technologies: combined use of web pages, blogs, wikis and other tools that support the arguments and proposals of the parties.
3. Enabled mediation technologies: that allow the mediation process itself to be structured: forms, information flows, algorithms for crossing standard mediation proposals, etc.

Finally, the great advantage of mediation as a method of conflict resolution, prior to ordinary judicial proceedings, consists both in the willingness of the parties as regards its development and in reaching an agreement, which makes it highly attractive for the parties, who control the development of the procedure at all times.

For this reason, the effectiveness of mediation demands the participation of both parties, but not culmination in agreement.

The convenience of this obligation on the part of the company is exacerbated in basic services monopolies such as water, electricity, communications, etc., and even in the articulation of collective mediations that have an impact on a certain number of consumers.

As mediation is or may be more efficient than the ordinary justice system, from the point of view of collective or social interest, participation in it should be mandatory, but as it presents or may present equity problems, in order to save it, the possibility of judicial proceedings must always remain open.

If the agreement does not arise, any steps carried out by the mediator must be transferred to the ordinary courts both to seek savings in public judicial costs and to know the attitude and arguments of the parties.

Equity

The equity of ordinary judicial proceedings is one of the deficiencies pointed out by both experts and users. In this case, both the management of the proceedings, "equality of arms", and the result of the enforceable resolution depend largely on the economic capacity of the parties.[10]

One of the main causes of inequity in the ordinary judicial system is public corruption. In this sense, judicial independence is an essential requirement for reducing this element and, consequently, for maintaining a high level of efficiency in both the judicial and economic systems, which would contribute to achieving a structure of competition and distribution of benefits based on the merits of economic agents and not, on the other hand, on their economic or political influences (equity).

[10]On the other hand, for the respondent company, in its case, the added cost of the mediation would be very low (fees and little else), among other reasons, because it has already financed these expenses (lawyers, administration, etc.). Therefore, it is efficient and fair that they pay something. The only thing left to do is legally solve the possibility of abuse by consumers in mediation claims ("I'm going to discredit you, I'm going to ruin you with lawsuits", etc.).

Although independence and transparency of the judicial system are not homonymous, it is true that an essential requirement for the former is a transparent system. In fact, a good part of the indicators on corruption in the different countries were not obtained by evaluating the sentences and other judicial resolutions, since it is obvious that "not all of what they are and not all of those who are are", but through transparency in the activities of administrations, among the most important the Index of International Transparency.

However, the mediation procedure, in all the hypotheses of assumption of charges, is the most equitable, insofar as although "the inequality of arms" persists, neither party is obliged to finalise the proceedings nor, therefore, to accept the resolution proposed by the mediator, if it considers it unfair[11]. On the other hand, "unequal arms" can also be mitigated by the intervention of an equitable mediator, who does not have an interest in the stamp of the resolution of the conflict.

Summary and Conclusions

Those entities, organisations and companies that have carried out mediation tasks in Spain in conflicts in relations between companies and consumers in recent decades, both on their own initiative and due to legal requirements, are very numerous and the proceedings are diverse. The simple task of their systematisation constitutes a pending assignment for research, and an enormous quantity of resources is required to carry it out.

The new European Union framework for the alternative online resolution of consumer disputes is in accordance with Directive 2013/11/EU of May 21, 2013, regarding the alternative resolution of consumer disputes and Regulation 524/ 2013/EU, of May 21, on online resolution of consumer disputes. This regulatory framework is that which has been transposed into the Spanish system through Law 7/2017, of 2 November and as a whole, of course, it supposes a new institutional base upon which mediation activities in disputes that arise in consumer activities are going to be developed from this moment onwards.

Various public and private institutions have been pointing out in recent decades the deficiencies of the Judicial Administration in Spain and have likewise made proposals for reform, although alternative dispute resolution systems (ADR) cannot from a global and technical-scientific perspective emerge as substitutes in the sense of alternatives to the ordinary judicial system.

Access to Justice for all citizens is a fundamental right enshrined in article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms that has been transferred to Community Law by article 47 of the Charter of Fundamental Rights of the European Union and, on the other hand, the Spanish

[11]If we start from the basis that mediation is or can be more efficient than the ordinary justice system, from the point of view of collective or social interest, participation therein and acceptance of the mediator's resolution should be mandatory, but as it presents or can present problems of fairness, with the purpose of saving it, the possibility of judicial proceedings must always remain open. In an attempt to also reduce costs (efficiency), there should be an effort to incorporate what was carried out and demonstrated in the failed mediation into the judicial proceedings.

Constitution in article 117.3 attributes exclusively to the Judiciary the power to "judge and enforce what is judged", that is, citizens have the right to resort to the courts in the exercise of their legitimate rights and interests.

Nevertheless, the concept of legal guardianship is broader than the strict legal guardianship that corresponds to the courts. There may be other ways of resolving conflicts that are more appropriate in certain contexts or for particular cases than judicial proceedings.

Both, in reality, represent two ways of resolving social conflicts, of doing justice, but in which the observance of the legal guarantees of citizens must be reserved for the Judicial System. Therefore, ADRs are not substitute mechanisms in the sense of excluding, or alternative in the strict sense; rather, they are complementary, opening up the possibility for companies and consumers to use extrajudicial means that are more agile and less costly than the ordinary judicial process for putting an end to their litigation and claims.

The pioneering interpretations of Coase collected today by the Economic Analysis of Law and applied to the Judicial System postulate, as a general approach, that the resolution of a conflict based on criteria of efficiency and equity can be carried out, after establishing the rights of property, through a simple direct negotiation between the affected parties,

This intervention of a third party (arbitrator, mediator, friend, etc.), has to be developed under the condition of economic rationality, that is, that the cost of accessing the resolution of the conflict through the intervention of these agents be lower than the transaction cost of ordinary justice and, from here:

Mediation in consumer activities presents, in relation to the traditional justice system, a series of elements that recommend its use, since they can collaborate in the improvement and efficiency of the management of Justice in Spain and, therefore, in increasing the well-being of the majority of the population. We are referring, above all, to lower public and private costs, shorter duration, greater transparency and, therefore, improved predictability in conflict resolution and, furthermore, these advantages will increase with the incorporation of digital platforms to the management of these procedures.

We believe that the advantages in terms of efficiency and fairness that consumer mediation presents as a way of resolving consumer conflicts have been successfully demonstrated.

However, the rules do not have thaumaturgical power and it is possible that this suitability of mediation in consumer affiars fails or, at least, its foreseeable positive effects are reduced if the basic rule is not followed by both technical elements and human resources, adequate and sufficient for its development, management, control and, where appropriate, sanction.

There is consensus on the consideration that for the new mediation model to achieve its aims in terms of equity and efficiency of social welfare, it must be supported, at least, by the following characteristics: transparent, fast, free, flexible, with memory, etc. and for this, it is obviously essential that the process be carried out through a computer platform that allows online resolution of consumer conflicts.

References

Centro de Investigaciones Sociologicas (various years) *Barómetro*. (Barometer).

Coase H (1937) The nature of the firm. *Economic* 4(Nov): 386–405.

Coase H (1960) The problem of social cost. *Journal of Law and Economics* 3(Oct): 1–44.

Consejo General del Poder Judicial – General Council of the Judiciary (1998) *El libro blanco de la justicia*. (The white book of justice). Consejo General del Poder Judicial.

Consejo General del Poder Judicial – General Council of the Judiciary (2021) Los españoles y la Justicia. (The Spanish and justice). Metroscopia.

European Commission (2020) *SWD 308 final working document of the services of the Commission. Report on the rule of law in 2020.* Chapter on the Situation of the Rule of Law in Spain. European Commission.

European Social Survey (2021a) *Trust in justice: topline results from round 5 of the European social survey.* European Social Survey.

European Social Survey (2021b): Confidence in justice. Results of round 5 of the European Social Survey. European Social Survey.

Kaplow L (1986) An economic analysis of legal transitions. *Harvard Law Review* 99(3): 509–617.

Loperena JM (2003, April 26) *La justicia tiene un precio*. (Justice has a price). El mundo.

Miceli TJ (2020) *The economic approach to law*. Third Edition. Stanford University Press.

Ministerio de Politica Territorial y Función Pública (2018) *Informe sobre la percepción ciudadana de los servicios públicos. La confianza en las instituciones (2017).* Report on the citizen's perception of public services. The trust in the institutions (2017). Madrid.

Pigou A (1912) *The economics of welfare*. Macmillan Publishers Limited.

PP and PSOE (2011) *Pacto de Estado para la Reforma de la Justicia. Congreso de los Diputados*. (State pact for justice reform. Congress of deputies). Ciclostilado.

Romero L (2018) *La soberbia de algunos jueces*. (The pride of some judges). Law&Trends. Available at: https://www.lawandtrends.com/noticias/justicia/la-soberbia-de-algunos-jueces-1.html.

Warburton C (2020) *Economics analysis and Law*. London: Taylor & Francis Group.