ACCESS TO JUSTICE

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Focus on Facts

Access to law and justice is the most advanced expression (Cappelletti, 1994b) of the social dimension of justice – a concept arising as the attempt to tackle the crisis experienced by justice when considered as a merely formal type of equality before the law, and developing from the transformation of industrial societies and the new role played by the State in fostering rights. This dimension is closely related to the affirmation of social rights – which were enshrined in the 1948 Constitutional Charter – and has to do with the shift from a theoretical, abstract vision of law and justice to a dimension where what matters is the substantive, actual access to both. Access to law and justice is grounded in the principle of substantive equality that is set forth in Article 3, paragraph 2, of the Constitution as the latter provides that equality must be effective and it is the State's responsibility to remove all obstacles that prevent, at least, opportunities from being equal. Access to law and justice is grounded additionally in Article 24 of the Constitution, which enshrines the right to take legal action (paragraph 1) and the inviolability of the right of defense, so much so that ad-hoc tools are made available to those destitute of means in order to ensure implementation of this right (paragraphs 2 and 3) . Article 111 of the Constitution was added recently to the above historical foundations, after the in-depth reformation brought about by the Constitutional law No. 2/1999. The latter introduced several principles in the Constitutional charter to ensure an effective right to sue and defend an action in court, which are usually referred to as the "due process" principles. As well as providing that this subject matter must be regulated by law (paragraph 1), the said Article sets forth the principle of equality of arms, that is to say, the requirement that every individual should be in a position to appear before the judge, along with the impartiality of judges and the reasonable duration of judicial proceedings (paragraph 2). The final three paragraphs

address the procedural safeguards of defendants in criminal proceedings starting from pre-trial investigations; application of the equality of arms principle to the taking of evidence; and finally, the obligation to provide reasons for judicial decisions as well as the obligation for the Court of Cassation to step in if a case is related to personal freedom.

Several regulatory instruments at European level set forth the access to justice principle as well. In the European Convention of Human Rights the right to a fair trial is laid down in Article 6 along with the right to an effective remedy (Article 13). The Treaty on the Functioning of the EU provides that "The Union facilitates access to justice, in particular through the principle of mutual recognition of judicial and extra-judicial decisions in civil matters" (Article 67.4), whilst measures aimed to ensure "effective access to justice" must be adopted in the civil law sector (Article 81.2, letter e)). Finally, Article 47 of the Charter of Fundamental Rights of the EU provides for the right to an effective remedy before an impartial judge.

Access to law and justice was aptly considered to be a remedy to the obstacles placed between citizens and justice. This remedy applies, in particular, to the following (Cappelletti, 1994, p. 81):

1) **Economic obstacles**, preventing access to justice for all those who are unable to bear the relevant costs because of their financial conditions and are accordingly in danger of being the holders of "unreal rights";
2) **Organizational obstacles**, making it hard to establish and defend certain collective rights and/or interests;
3) **Procedural obstacles**, consisting in the inappropriateness of some procedures to afford remedies, so that alternative methods prove necessary to solve conflicts and disputes and to enforce citizens' rights and claims.

These three obstacles were highlighted by Mauro Cappelletti over

20 years ago and remain fully applicable today, although they have taken on different features because of the evolution undergone by individuals, institutions and procedures "through which the law takes life, evolves and is enforced" (Cappelletti, 1994, p. 77). Thus, the economic obstacles pinpointed by Cappelletti retain their full force, but the organizational hindrances do not result currently only from the framework of the interests to be protected as they include the territorial distribution of judicial offices – this being a key component to assess the adequacy of access to justice. Finally, procedural obstacles are mirrored not only by the importance attained by alternative dispute resolution methods, but also by the amendments made to procedural rules in order to make justice more efficient without impinging on the rights of the parties concerned.

Legal Aid

The removal of economic obstacles preventing access to justice became increasingly topical in 2012 and 2013 because of the persistent economic crisis and the policies aimed at the containment of public expenditure (the notorious "spending review").

Unfortunately, this issue does not rank among the top ones in the public debate. Despite its constitutional importance, legal aid for those unable to afford it is not receiving the attention that is paid conversely to other issues related to the rise of poverty.

It is an issue that only surfaces on account of cases covered by the media and is prone to turn into discussions on whether legal aid is to be bestowed or not. This happened, for instance, with the **legal aid applications lodged by Mafia bosses**.

In 2012, the granting of legal aid to Vincenzo Virga, a Mafia boss under trial on charges of murdering Mario Rostagno, led Senator Lumia, a member of the Anti-Mafia Committee, to issue a harsh statement to the effect that he emphasized the need for devising legislative solutions whereby account could be taken of the fact that

"Mafia bosses, seemingly destitute of means after their assets have been seized or forfeited, can actually count on moneys and assets of their own by way of straw-men and thanks to the Mafia family they belong to." In line with this approach, a decision by the Court of Cassation denied legal aid to Salvino Madonia, a Mafia boss. Another boss called Giuseppe Graviano fell under the spotlight because he was acquitted in April 2013 of the charges of submitting untrue income reports in order to be afforded legal aid during a criminal proceeding held in 2004.

The decision by the Court of Cassation No. 44121 of 13 November 2012 was also taken up in the media because it ruled that **the income of cohabiting family members** must be computed in assessing the applicant's financial status, so that legal aid may no longer be afforded if the total income is in excess of the relevant threshold.

Except for a few specialized websites, the media have paid little or no attention to the difficult issue of **granting legal aid to aliens**, in particular asylum applicants.

Worthiness is the focus of the arguments concerning the extension of legal aid to **victims of crime.**

Some interest was aroused by the meeting between an MP, Stefano from the SEL (Left and Freedom) Party, and a delegation of the Associazione Italiana Vittime di Malagiustizia (AIVM) (Italian Association of the Victims of Judicial Malpractice) in July 2013, where possible legislative amendments to legal aid rules were discussed in order to enable victims to access it. Access to legal aid was also granted by the recent decree on femicide, derogating from income bracket rules.

In 2013, legal aid was the subject of media interest because of the proposals put forward by the Bar regarding the reduction of the fees due to defense counsel, technical experts or investigators as a result of the amendments made by the Stability Law (Budget Act). An

example is provided by the harsh statement issued by Unione Camere Penali (Criminal Bar Association) (http://www.cittadinanzattiva.it/newsletter/2013_11_21-304/files/delibera-47-patrocinio-spese-stato.pdf) immediately the relevant bill was adopted by the Chamber of Deputies, and by the declaration of Giuristi democratici (Democratic Juridical Scholars) (http://www.giuristidemocratici.it/post/20131218180221/post_html) after the bill was finally passed.

Protecting Collective Interests and the Reformation of the Judicial System

Compared to the 1980's and 1990's, when the issue of **protecting collective interests** first surfaced, a lot has happened. Only in some cases has this issue come under media focus, in spite of its unquestionable importance for safeguarding citizens. In 2012 the media reported about the complaint lodged by Codacons against the order issued by the Court of Grosseto to set the costs for the copies of the records on file in the proceeding for the Costa Concordia shipwreck. Still in 2013, the judges allowed the municipality of Busto Arsizio and Lega Pro to file a claim for damages in the fast-track trial celebrated against the football fans that had staged racist songs especially directed at Boateng during the Pro Patria-Milan FC match. Though not a novelty in terms of case-law, it is of interest that the judge granted Lega Pro locus standi because of the collective interests vested in it – since its Code of Ethics included principles such as the fight against racism and discrimination in all its forms (Ansa, February 2013).

Finally, still in 2013, the Minister of the Environment Orlando proposed introducing the *debat public* tool in Italy, that is to say "procedures for consulting the local population and stakeholders to be supervised by an independent public body and carried out according to pre-defined time schedules, which are part of the decision-making process to implement major public works for which the EIA (Environmental Impact Assessment) or the IEA (Integrated

Environmental Assessment) are required" (Ansa, 9 June 2013). As regards citizens' participation in public decision-making, reference should also be made to the innovations introduced by the so-called simplification decree in terms of civic access rights.

Along with this long-standing issue there is the emerging one related to **the organization of justice**. This is actually considered in many quarters to be exclusively a spending review measure, however we believe it is one of the organizational obstacles to the protection of citizens' rights. Indeed, the right to justice becomes real to the extent access to a knowledgeable and effective judicial system is available. One can hardly tell nowadays whether the restructuring effort made by the Ministry is going in the direction of enhancing the efficiency of justice or is rather based on a one-size-fits-all approach to cutting expenditure that fails to take account of local needs.

Unquestionably this is an issue that has hit the headlines. Before the approval of the legislative decrees on the reorganization of judicial districts, the debate – sometimes quite harsh – involved the Unified Bar Association, the National Bar Council and some national and local politicians. The bodies representing the Bar have criticized, first and foremost, the working method followed by the Ministry and emphasized that expenditure was being cut indiscriminately based on past performance rather than on a spending review approach – which means "starting true management controls, determining standard costs and demand, and calculating also the costs due to the elimination of certain offices in terms of additional investments that may prove necessary and of reduced efficiency." (Ansa, May 2012). Criticisms were also levelled at the overestimation of savings, which allegedly failed to consider the additional costs due to travelling by citizens and staff. The National Bar Council supported their views with the help of a survey carried out on the four peripheral sections of the Court in Trento; compared to the current costs, amounting to Euro 90,000, the travelling expenses borne by citizens and judicial staff rose allegedly to Euro 2,446,920 on top of the environmental impact – which was calculated to total 700,000 Kg of Co2 emissions due to the travelling required in order to reach the provincial

headquarters.
The members of the Bar resorted also to mobilization initiatives by calling a strike (5 July 2013) and supporting the demonstrations waged by local authorities (24 July 2013).
Local authorities and Regions complained on the one hand that no consideration had been given to the important role played by judicial offices in areas where crime is rife (such as Calabria) and emphasized, on the other hand, how inappropriate it was to eliminate judicial offices for which substantial costs had been borne recently both by the Ministry and by local authorities in renovation and restructuration activities – as is the case with the courts of Chiavari, Pinerolo, and Bassano del Grappa.
The Criminal Bar Association has pointed out since July 2012 that the new territorial organization of judicial offices must take account of "citizens' right to the so-called proximity justice, i.e. to encounter no obstacles in their demand for justice because of the inconvenient location of judicial offices."
For her part, the then Minister of Justice, Ms. Severino, reiterated firmly that the judicial offices to be eliminated were selected on the basis of "the criteria mentioned in the delegated legislation: population; area; number of judges and prosecutors per individual office; number of administrative staff; annual workload and productivity; costs; status of the facilities; impact rate of organized crime." (Ansa, July 2012).
As the decree was moving through the parliamentary process, the opinions from the CSM [Italian Judicial Council] and the Justice Committees from both Houses of Parliament were obtained.
The CSM welcomed the reformation and emphasized that keeping the territorial distribution of judicial districts developed in the 19th century was no longer tenable; though pointing out that the decree was fraught with criticalities and limitations, it considered that "this should not be an obstacle or a reason for delaying" a reformation that "was absolutely a priority to make judicial activities at least somewhat more effective."
The Justice Committees of Parliament emphasized the requirements

due to the fight against organized crime; in particular, the Senate Committee reiterated that it was inappropriate to eliminate some courts on account of their geographical location and/or the recent costs incurred to revamp some offices.
On 7 September the two legislative decrees were promulgated that set forth the elimination of all the peripheral branches of courts (220), the merge of 667 justice of the peace offices, and the suppression of 31 courts including the respective prosecuting offices. The initial plan was to suppress 37 courts but it was reconsidered by endorsing the request to keep some courts in areas where organized crime is especially rampant (Caltagirone and Sciacca in Sicily; Castrovillari, Lamezia Terme and Paola in Calabria; Cassino in Latium).
After the decrees were issued, the discussion changed its focus along with its general import. Following some calls made upon the new Minister of Justice, Ms. Cancellieri, to steer away from this new approach, there was on the one hand the recourse to courts and, on the other hand, the reliance on high-impact protestations: roads were blocked (Pinerolo); judicial offices were symbolically occupied (Chiavari); hunger strikes were called (Rossano); electoral certificates were returned (Melfi); finally, some lawyers had themselves symbolically crucified (Salerno). In spite of the unrelenting protestations, the reformation came into force on 13 September 2013.

Procedural Reformations and Alternative Dispute Resolution
As already pointed out, one of the main obstacles to ensuring full-fledged access to law and justice consists in the inadequate procedures as for timeline and mechanisms. The long-standing difficulties experienced by justice in Italy, with particular regard to civil justice, are well-known. This was confirmed also in the 2012-2013 period, when Italy was found to have, for the fifth time in a row, the slowest judicial system in Europe - according to the European Court of Human Rights (ECHR). Italy is the country with the highest number of convictions (over 2,000) and there are over 8,000 claims pending before the ECHR on account of excessive

duration of trials. The Court focused both on the excessive length of civil proceedings and on the delays in paying the indemnification provided for by Law No. 89/2001 – the so-called Pinto Law. Many are the legislative measures issued to cope with this problem and they will be addressed in paragraph 3. The point to be made here is that the statistical figures show some slight improvements, however it is unquestionable that the reforms discussed and approved in 2012-2013 or shortly before will take some additional time to be assessed thoroughly as for their effects. The Table below shows that pending judicial proceedings decreased in number, albeit slightly, which means that the cases handled by courts outnumbered supervening cases.

Table – Pending Civil Proceedings

		Pending as of 31 December 2010	Pending as of 31 December 2011	Pending as of 31 December 2012	Pending as of 30 June 2013
Court of Appeal	% over previous year	5,15	1,19	-2,00	-6,17
	& over 2009	**5,15**	**6,40**	**4,27**	**-2,16**
Courts of Law	% over previous year	-1,52	-0,98	-2,33	-1,29
	% over 2009	**-1,52**	**-2,48**	**-4,75**	**-5,98**
Justices of the Peace	% over previous year	0,20	-11,06	-12,02	-3,51
	% over 2009	**0,20**	**-10,89**	**-21,60**	**-24,35**
Juvenile Courts	% over previous year	-2,60	-5,11	-3,95	-7,16
	% over 2009	**-2,60**	**-7,58**	**-11,23**	**-17,58**
Court of Cassation	% over previous year	1,48	-2,11	4,39	-1,72
	% over 2009	**1,48**	**-0,67**	**3,70**	**1,92**
Total	% over previous years	-0,51	-3,91	-4,88	-2,38
	% over 2009	**-0,51**	**-4,40**	**-9,07**	**-11,23**

Source: Data from the Minister's Report on the Administration of Justice, 2013, reprocessed.

The mean duration of judicial proceedings also decreased slightly, in particular it fell by 2.5% for the proceedings pending before Courts of Appeal (1,025 days in the 1 July 2012 to 30 June 2013 period, compared to 1,051 days in the corresponding 2011 to 2012 period); by 6.4% for the proceedings pending before first-instance courts (437 days in the 30 June 2012 to 30 June 2013 period, compared to 466 days in the corresponding 2011 to 2012 period); and by 2.6% for the proceedings pending before justices of the peace (358 days in the 1 July 2012 to 30 June 2013 period, compared to 367 days in the corresponding 2011 to 2012 period). These figures are clearly far from being reassuring, however they point at least to a trend reversal.

One should not fail to consider, however, that the above figures result from the effects produced jointly by the decreased number of supervening proceedings and the increase of finalized proceedings. Whilst increased productivity is unquestionably to be welcomed, it is actually more difficult to tell whether the decrease in supervening proceedings resulted from a lower litigation rate or from the failure to take legal action exactly because of the mean duration of judicial proceedings.

Along with the above data, the statistics concerning Alternative Dispute Resolution (ADR) highlight an upward trend. The analysis by ISDACI (http://www.isdaci.it/index.php?option=com_content&view=article&id=29) shows that 243,281 ADR applications were filed with Italian Resolution Centres in 2012 (up by 72% compared to 2011); this increase was due mainly to civil and commercial mediation, where the number of applications rose to 154,879, up by 154.7% compared to 2011.

It is actually a medley picture, in particular regarding civil and commercial mediation. The survey carried out by the Ministry of Justice in the period from 2012 to the first half of 2013, involving

60% of accredited mediation bodies, shows that the settlement rate is satisfactory after mediation was initiated (41% in 2012, 49% in the first half of 2013, when only optional mediation was allowed following the judgment rendered by the Constitutional Court). However, along with these non-negative figures, one should also consider the substantial percentage of proceedings that led to no settlements because one of the parties had failed to appear. In particular, in the second half of 2012 insurance companies failed to enter an appearance in 70% of cases – which clearly points to their poor endorsement for this procedure.

The above figures were given by the Ministry of Justice to support the ongoing reformation process. It is clearly too early to draw any conclusion; one can only note, as did the President of the Court of Cassation on the occasion of his opening address for the 2014 judicial year, the perseverance shown by the Ministry of Justice in carrying on highly controversial reformations in the 2012 to 2013 period. This applies to the reorganization of judicial districts as well as to procedural reformations, which were harshly criticized especially by the Bar. The Unified Bar Association reiterated on several occasions that adding filtering mechanisms to appellate proceedings in civil matters is not only useless, but downright harmful because it increases the judges' discretion and is in danger of affecting the rights of weaker parties – whilst making the whole procedure even more chaotic. Similar criticisms had been levelled since 2011 against civil mediation.

Discriminations and Violence

One can hardly pinpoint cases of violence or discrimination in connection with access to law and justice. Since this is a right that is encountering considerable difficulties in being recognized as such – or rather, since it is a plan for the reformation of justice what is being aimed at – the very need for such a plan to be implemented points to the shortcomings of the judicial system. This is why a list is given

below of some recurring issues affecting the Italian judicial system as for the years 2012 and 2013:

1) The length of judicial proceedings, in particular civil proceedings, which results into Italy's being convicted repeatedly because of the unreasonable duration of trials;
2) The ineffective organization of justice as a whole;
3) The failure to grant legal aid to asylum applicants and aliens on account of procedural flaws;
4) The failure to assess the quality of defense for weaker parties.

Legislation and Policies

In spite of the difficulties in recognizing access to law and justice as a right on a par with other fundamental rights, there were several legislative and policy innovations in 2012 and 2013 if one follows the tripartite structure proposed by Cappelletti.

Legal Aid

Legal aid was the subject of judicial decisions, including by the Court of Cassation; although there is a wealth of case-law on this topic, it is hardly debated publicly. Even though this issue is important, one can argue unquestionably that it is an issue reserved for scholars.

No specific innovations were brought about in the case-law of the Court of Cassation. The interpretation was endorsed whereby the income of individuals cohabiting permanently should also be computed in assessing whether the **eligibility threshold** was overstepped or not (Cassation, IV division, 13 November 2012).

Taking up a decision of 2006 where it had considered the income of a person cohabiting *more uxorio* to be relevant, the Court expanded the concept of "family" and "household" to include cohabiting family members – here, the mother of the lady who was cohabiting *more uxorio* – as they contribute economically

to the household irrespective of kinship.

In taking account of the economic and financial status of all the individuals making up the household income based on factual as well as legal relationships, the Court emphasized the economic and social importance attained nowadays by *de facto* families. One cannot but agree on this view, which once again calls upon the lawmaker to take up the issue of *de facto* families as they would appear currently to come into play whenever specific obligations have to be fulfilled (or else in order to limit welfare rights, or anyhow rights entailing costs), whilst they are overlooked whenever one is expected to afford them specific rights.

Illicit proceeds were also considered to be relevant in determining whether legal aid should be granted or not. Via its decision No. 43843 of 12 November 2012, concerning the proceeding against the Mafia boss Madonia, the Court of Cassation ruled that the fact of receiving costly gifts by family members when in prison along with sums of money is proof of an income level such as to allow affording legal costs. This decision concerning the relevance of illicit proceeds is in line with a stance the Court had taken repeatedly (Cass. Div. VI, 17 April 1998, No. 1390; Cass. Div. IV, 4 October 2005, No. 45159; Cass. Div. IV 15 March 2012, No. 10125), to the effect that "illicit proceeds are also relevant in assessing eligibility for legal aid, which proceeds can be established on the basis of evidence including the circumstantial evidence referred to in Section 2729 of the Criminal Code." In a decision rendered in 2013 (No. 18591 of 24 April 2013), the Court (IV Criminal Division) reiterated that illicit proceeds are also to be computed in assessing eligibility; however, the Court found that no mechanical approach should be implemented in assessing income as the factual circumstances of the case must be considered and ruled out that non-final judgments may in any case be taken into account as this would be in breach of the presumption of innocence principle. In the case at issue, legal aid had been applied for by a person convicted of robbery in the first-instance proceeding, and

such robbery had yielded allegedly illicit profits amounting to Euro 27,500. However, the relevant sentence had not become final yet and the Court ruled accordingly that it was illegitimate to deny legal aid on the basis of a non-final sentence allowing the existence of illicit profits to be assumed.

Regarding **legal aid**, one should point out that Section 74(2) of Presidential Decree No. 115/2002 affords legal aid to Italian nationals who are destitute of means. **Aliens** may be afforded legal aid pursuant to specific legislation; in particular, legal aid may be granted to "an alien staying regularly in the national territory at the time the fact or issue that is the subject of the judicial proceeding arises" as well as to stateless persons (Section 119 of Presidential Decree No. 115/2002); to aliens challenging deportation orders before justices of the peace (Section 142 of Presidential Decree No. 115/2002 and Section 13(3) of Legislative Decree No. 286/1998); to aliens when brought before the judge to validate and extend detention at a CIE [Identification and Deportation Centres] (Section 14(4) of Legislative Decree No. 286/1998); to aliens applying for recognition of refugee status before a civil court.

The decision rendered by the Council of State (III division, No. 3917 of 19 July 2013), following the opinion given by the Studies Department of the Council of State, extended legal aid to aliens challenging the rejection of a stay permit application or the rejection of the application for legalization of undeclared work. The rationale for this decision was that if the lawmaker afforded legal aid to aliens challenging deportation orders, legal aid was to be also granted in connection with any disputes concerning the preconditions for deportation – such as the rejection of the legalization application. The Council of State emphasized that "the ban on deporting an alien pending a legalization proceeding is tantamount to conferring a provisionally legal status on such alien, albeit via a *fictio iuris*, which may ultimately become a permanently legal or a permanently illegal status, as the case may be."

As for affording legal aid to illegally staying aliens, there is no consistent application by courts of the legislation that allows income to be certified via a self-executing affidavit (Section 94(2) of Presidential Decree No. 115/2002) if the certification of income produced abroad cannot be obtained from diplomatic or consular authorities (Section 79(2) of Presidential Decree No. 115/2002). Not all courts accept such an affidavit and given the difficulties in obtaining certifications from some diplomatic or consular representations, one is ultimately prevented from obtaining legal aid.
A final consideration to be made on access to legal aid has to do with the certification of income for international protection applicants, whenever the latter challenge, before a civil court, the rejection of their application by the territorial committee competent for deciding on such protection. Under Legislative Decree No. 25/2008, Section 94(2) of Presidential Decree No. 115/2002 (enabling income to be certified via an affidavit) is to be applied "in all cases", as it is clearly impossible for an international protection applicant to turn to the consular authorities of the country he or she is fleeing from. Nevertheless, the approach followed by the Council of the Bar in Rome – which is competent for deciding on the granting of legal aid in such cases – is not in line, as the certification by consular representations is requested in all cases.
This practice was the subject of an opinion rendered by the UNHCR to the Council of the Bar in Rome, and was also reported by Associations working to safeguard aliens' rights (see http://www.asgi.it/home_asgi.php?n=2713&l=it).

This is compounded by the difficulties in enclosing an ID with the application, as asylum applicants often hold no IDs. At end 2013, the Council of the Bar in Milan granted a legal aid application by an international protection applicant holding no IDs as it considered the identification report issued by the police headquarters to be enough. These inconsistencies show the piecemeal approach followed in safeguarding the right to legal aid.

Regarding the **regulatory innovations at European level**, reference should be made to the proposal for a directive "on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings" submitted on 27 November 2013 along with the Recommendations addressed to Member States on "right to legal aid for suspects or accused persons in criminal proceedings."

This instrument that is about to start its legislative process in Europe is considerably important not only because it might lead to changing legal aid systems in Europe, but also because it is part of a larger set of measures aimed to strengthen procedural rights of European citizens. The latter are based, in turn, on the roadmap adopted by the EU Council in November 2009 – the so-called Stockholm Roadmap. The importance of this roadmap consists in the underlying objective to reconcile the measures adopted over the past few years to enhance the fight against crime and transnational terrorism with the enhancement – which is necessary, as should be emphasized – of citizens' rights which were unquestionably affected by the measures enacted following 9/11.

The set of measures in question includes Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings – which Italy is about to transpose even though the relevant deadline was 27 October 2013, see below; Directive 2012/13/EU on the right to information in criminal proceedings, which is due to be transposed by June 2014; and Directive 2013/48/EU "on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty", to be transposed by November 2016.

Apart from the instruments that have yet to be transposed by Italy or are still being debated in Europe, consideration should be given here to Directive 2010/64/EU on the **right to interpretation and translation in criminal proceedings**. There is little doubt that a person unable to understand the language spoken in the country

where he or she is being tried (either because he or she is a national of another EU Member State or because he or she is an alien) must be enabled to understand what is happening in the criminal proceeding concerning him or her; indeed, this is the first precondition for him or her to be afforded access to justice – it is no chance that this is one of the elements mentioned in Article 111 of the Constitution. In this case, procedural and economic obstacles are simultaneously at play. If no interpretation or translation is provided, a person may in no way participate actively in the judicial proceeding – which also applies if that person is unable to afford the relevant costs, so that the right in question is merely fictitious. Focusing on the costs of such services, Article 4 of the directive provides that costs shall be borne by the State regardless of the outcome of the proceedings (therefore also if the person is convicted) and the economic status of the person concerned (therefore irrespective of eligibility for legal aid). Under the legislation in force in Italy, the costs incurred for interpretation must be borne by the defendant in case the latter is convicted, as they are part of the costs relating to "staff supporting judicial authorities". The draft decree adopted by the Government in the early days of December 2013 rules out that such costs may be borne by defendants, which brings the Italian legislation into line with the directive.

In addition to the directives that are part of the European roadmap for the rights of the accused in criminal proceedings, one should also refer to the adoption of Directive 2012/29/EU "establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Directive 2001/220/JHA." Under Article 7 of the latter directive, the right to interpretation and translation is recognized to victims of crime along with the right to legal aid (Article 13); Member States are required to set out the relevant terms and conditions. The Italian legislation is somewhat vague on victims' procedural rights, so that Government will have to take special care in the transposition of the above instrument – which will hopefully be finalized by the set deadline, i.e. by 17 November 2015. Still, one cannot help wondering why the lawmaker

failed to take up the provisions of this directive, at least regarding the right to interpretation, already when discussing the instruments mentioned above.

At national level, a major innovation concerning legal aid and victims of crime came in 2013. This is Law No. 119/2013, the so-called femicide law, which affords legal aid also by derogating from income brackets limitations (as was already the case for female genital mutilation offences) in connection with maltreatment of family members or cohabiting persons and stalking. In this manner, Parliament implemented the Istanbul Convention that commits the signatory countries to affording legal aid to victims of domestic violence.

Two additional **instruments** should be mentioned **at national level**.

In 2012, the Decree of the Minister of Justice of 2 July updated the provisions of Section 76(1) of Presidential Decree No. 115/2002 by raising the income threshold for legal aid eligibility to Euro 10,766.33, i.e. by adjusting the latter to the inflation rate as established by ISTAT for the previous two years.

The 2014 Stability Law (Budget Act) as approved in December 2013 amended the computation mechanisms for legal aid costs. Firstly, the fees due to defence counsel, party-appointed technical experts and private investigators – which are calculated on the basis of mean values and then halved – were reduced by one-third. Secondly, the costs for service of records were trebled, rising from 8 to 27 Euro (Section 1(606) of Law No. 147 of 27 December 2013).

Protecting Collective Interests and the Reformation of the Judicial System

No major regulatory innovations came to light in 2012 and 2013 as for the **protection of collective interests**. Reference should be made to the order issued by the TAR [Regional Administrative Court] of Latium on 25 October 2012, which granted the claim lodged by Codacons against the order issued by the Court of Grosseto whereby photocopying fees were due to obtain, on IT media, the records

of the proceeding pending before the Court following the Costa Concordia shipwreck. The order had been challenged by Codacons, which claimed that the costs - amounting to Euro 30,000 per capita – would undermine the right of defense of the shipwreck victims. The TAR granted the complaint because "unsustainability of the costs due for photocopying fees is liable to negatively affect the full availability of evidence and, accordingly, the full realization of the right of defence". In an age where the costs of defence are increasingly regarded by the State as non-sustainable, the decision by the TAR deserves being emphasized. Furthermore, one should mention that in April 2013 legislative decree No. 33/2013 came into force; the decree regulates disclosure, transparency and dissemination of information by public administrative bodies and is better known as the Transparency Decree. Under Section 5, a "civic access right" entitles every citizen to request documents, information or data the public administration is obliged to disclose – if they failed to be disclosed. The request need not be substantiated, is free of charge and must be filed with the transparency manager of each administrative body.

The **reorganization of the judicial system** was implemented by way of Law No. 148/2011 which empowered Government to reorganize the territorial distribution of first-instance judicial authorities.

Government accordingly enacted two legislative decrees (No. 155 and 156 of September 2012) setting forth the elimination of 31 courts and the attached prosecuting offices, of all peripheral offices of first-instance courts (220) plus 667 justice of the peace offices.

In the period between approval of the legislative decrees and their coming into force on 13 September 2013, many were the debates and protestations, at times quite lively, and they were described in paragraph 1. From a legal and regulatory standpoint, one should perhaps recall that several complaints were lodged with TAR in order to stay the relevant measures; labour courts were also seised in order to prevent staff from being transferred. A petition was also filed with the Constitutional Court by some judges from the courts of Alba,

Montepulciano, Pinerolo, Sala Consilina, Sulmona, Urbino and the Friuli-Venezia Giulia Region. By way of its judgment No. 237/2013 of 3 July 2013, the Court only granted the petition lodged by the judge from Urbino, because Section 1(2), letter a), of the enabling law No. 148/2011 left untouched the courts sitting in municipalities that were provincial capitals. Since Urbino is one of the two provincial capitals in the Pesaro-Urbino province, its elimination was not in line with the provisions of the said enabling statute. Thus, the number of courts and attached prosecuting offices to be eliminated was downsized to 30. All the other complaints were found to be inadmissible (as is the case with the one by Friuli-Venezia Giulia) or unsubstantiated. Regarding the issues addressed here, the Court found that "as for the alleged violation of Article 24 of the Constitution because of the failure to provide remedies and the difficulties in accessing justice, it is unquestionable that there is no unavailability and/or limitation imposed on remedies and that the solutions devised by Government can reconcile several values that are protected by the Constitution according to a reasonable approach so as to ultimately enhance the effectiveness of the judicial system as a whole." Thus, the reformation passed muster with the Constitutional Court. This reformation required a major organizational effort by the Ministry of Justice in order to outline the allocation of staff, both judicial and administrative; decide on the use of buildings and offices; amend the IT systems in the offices to be merged; etc. .

Finally, the reformation passed the final hurdle between end 2013 and the early months of 2014. By its decision of 15 January 2014, the Constitutional Court declared the petition for a referendum filed by several Italian Regions in 2013 as inadmissible; the relevant reasons have yet to be disclosed.

Procedural Reformations and Alternative Dispute Resolution

Major procedural reformations were brought about in 2012 and 2013 in order to enhance the efficiency of Italy's civil judicial proceedings. The process started – and is actually far from being finalized – when Law No. 69/2009 was enacted; the latter enabled Government

to adopt legislation in two key areas : a) **reducing and simplifying civil judicial proceedings**; b) regulating mediation and conciliation in civil and commercial disputes. As to the former, legislative decree No. 150/2011 amended civil procedure mechanisms by limiting them to three procedures: standard procedures; summary inquiry procedures; labour law procedures.

The same rationale underlies the more recent measures to **reform appeal proceedings in civil matters** (Law No. 134/2012, converting decree-law No. 83 of 22 June 2012, known as Development Decree, as adopted by the Monti Government).

This reformation was modelled after the English and German systems and introduced filtering mechanisms based on the reasonable likelihood for the appeal to be granted.

The provisions on **mediation** had to go over many more hurdles. They were introduced pursuant to Directive 2008/52/EC via legislative decree No. 28/2010, but their implementation required major organizational efforts – due to the need to register mediation and training bodies after verifying the respective eligibility qualifications – along with regulatory finetuning. Civil and commercial mediation is aimed at enabling the settlement of disputes that concern negotiable rights vested in the parties by way of a third party either acting as a facilitator of the amicable settlement or else putting forward a proposal for resolving the dispute. This is meant ultimately to expedite a satisfactory solution, though based on a compromise, and to reduce the number of supervening proceedings in civil matters.

There are three types of mediation: on an optional basis, if the parties are free to resort to it; on a recommended basis, if the judge calls for the parties to rely on it; on a mandatory basis, with regard to specific subject-matters such as "condominiums (joint tenancy), rights in rem, sharing of assets, succession, family agreements, renting, loan for use, lease of companies, payment of damages following the circulation of vehicles or craft, medical malpractice and defamation via press or any other media, and insurance, banking and financial contracts" (Section 5 of legislative decree No. 28/2010).

The mandatory nature of mediation in the above cases was ruled

to be unconstitutional by the Constitutional Court (judgment No. 271/2012) because it was found to be *ultra vires* – since the European directive did not envisage such mandatory provisions.
Government remedied this situation by a decree No. 69/2013 (so-called "Action Decree"), converted into Law No. 98/2013, which re-introduced the mandatory recourse to mediation in the areas where such an obligation had been envisaged. Additional amendments were also made to enhance the enforcement of mediation agreements and prevent further costs for citizens. In particular, only the initial preliminary meeting held for planning purposes is a precondition for the case to be actionable if the subject-matter is one of those for which mediation is mandatory (except for the payment of damages due to the circulation of vehicles or craft); such meeting is to take place by 30 days from the filing of the relevant application. If no agreement is reached between the parties, no charge will be levied. This is meant to prevent creating obstacles to the whole mediation procedure if the conflict between the parties is past remedy; at the same time, it can work as a stimulus for mediation bodies to achieve an agreement. Finally, the 2013 reformation provided that lawyers are mediators of their own right; this sounds rather unimportant, but it might actually prove fundamental to ensure the full implementation of mediation mechanisms given the harsh opposition shown by the Bar.
The aforementioned "Action Decree" also includes several organizational measures, the most important among them being the appointment of deputy judges for Appellate Courts in order to facilitate the finalization of proceedings and thereby reduce the backlog.
The reformation of civil proceedings led most recently to the **bill enabling the Government to regulate civil proceedings**, which was approved by the Council of Ministers on 17 December 2013.
The bill includes several measures that are aimed to re-determine the cases where it is mandatory to provide reasons, empower judges to order a shift to the summary proceedings of inquiry, expand the

competence of single-judge courts as compared to panel courts, and so on. The delegated powers have to be exercised within 9 months, which means that these new measures will have to be issued in 2014 so as to streamline and enhance the effectiveness of civil proceedings.

The other major issue addressed by Parliament had to do with the **slow pace of judicial decisions**, in particular as for the payment of the indemnification due following conviction for excessive duration of a judicial proceeding.

Law No. 134/2012 also amended the Pinto law in order to contain costs and afford easier, more effective access to fair compensation proceedings so as to expedite the payment of damages. In the first place, it was provided that the decision would be up to a single judge, not to the Court of Appeal, via a proceeding modelled after the one applying to injunction orders. Secondly, a specific threshold was set beyond which the duration of a proceeding would be considered to become "unreasonable" and entitle a party accordingly to fair compensation (three years for first-instance proceedings, two years for second-instance proceedings, and one year as for the proceedings before the Court of Cassation). The amount of the indemnification was also set forth, i.e. Euro 1,500 per year or fraction thereof – including at least six months - in excess of the reasonable duration threshold. Finally, the relevant petition may be filed, under penalty of forfeiture, within six months from the final judgment rendered in the proceeding whose duration exceeded the "reasonable" threshold. In addition to these procedural amendments, budgetary changes were also made to increase apportionments and proceed accordingly with the payment of damages.

Our Recommendations

1. Fully reconsidering legal aid mechanisms in order to ensure better remedies and prevent miscarriages of justice, also by

testing a public legal aid system.

2. Implementing the reorganization of judicial districts by increasing staff and facilities in the offices with higher workloads.

3. Implementing the reformation of civil and commercial mediation without increased costs for citizens and by pursuing effective mediation practices.

4. Monitoring the results achieved via the reformations in civil proceedings (appeals and mediation) with the help of independent bodies.

5. Overcoming the long-standing practice of delayed and/or partial transposition of the EU directives concerning justice.

6. Implementing administrative transparency principles so as to make administrative practice truly transparent rather than merely an exercise in bureaucracy.

7. Expediting the payment of indemnification for the excessive duration of judicial proceedings and monitoring the results achieved via the reformation of the Pinto law.

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