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ACCESS TO JUSTICE IN ITALY

by

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ACCESS TO JUSTICE IN ITALY

Livia Giuliani[1], Federico Alessandro Goria[2] & Elisabetta Silvestri[3]

1. GENERAL INFORMATION

Italy is a parliamentary republic; although over the years its Constitution has been the subject of some reforms, which have changed its original centralized system, introducing a form of regional decentralization, the jurisdiction is still exclusively attributed to the competence of the State (Article 117 of the Italian Constitution).

According to the Italian National Institute of Statistics (*Istituto italiano di statistica* data http://dati.istat.it) at 1st January 2019 the resident population was 60,359,546 inhabitants, of which 5,255,503 foreigners; among the latter the most substantial ethnic groups are represented by Romanians (1,207,000), Albanians (441,000), Moroccans (423,000), Chinese (300,000) and Ukrainians (239,000), who alone constitute 50% of the foreign resident population in Italy (National demographic balance 2018, p. 6; https://www.istat.it/it/files//2019/07/Statistica-report-Bilancio-demografico-2018.pdf). The predominant religion is the Christian one, in its three components, Roman Catholic (by far the majority), Protestant and Orthodox, but there are numerous minorities, especially Muslims and Jews (Center for Studies on New Religions – *Centro studi sulle nuove religioni* https://cesnur.com/il-pluralismo-religioso-italiano-nel-contesto-postmoderno-2/).

The GDP of 2018 is around two thousand billion dollars, while the ten-years trend is illustrated by the graph below, also calculated in

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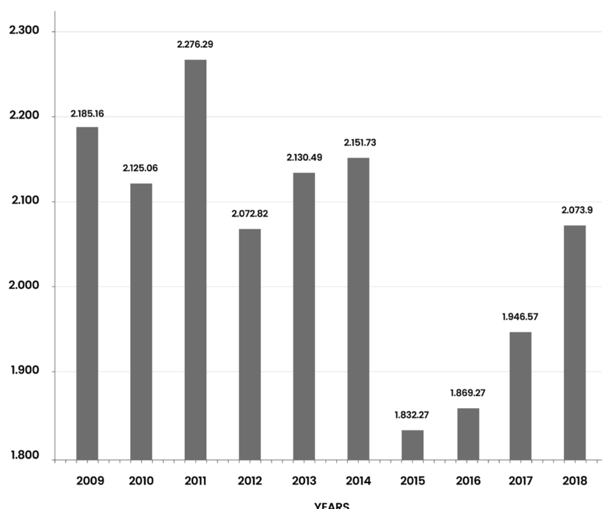
billions of US dollars (data https://it.tradingeconomics.com/italy/gdp).

The GDP of 2018 is around two thousand billion dollars, while the ten-years trend is illustrated by the graph below, also calculated in billions of US dollars (data https://it.tradingeconomics.com/italy/gdp).

Chart 01. Italy GDP for the last ten years (2009-2018)



The 2018 Gross National Income at purchasing power parity per capita (PPP) is 42,49 $ (World Bank data https://data.worldbank.org/indicator/NY.GNP.PCAP.PP.CD?year_high_desc=true).

The 2017 Inequality Index value is 0.771 (data http://hdr.undp.org/sites/default/files/2018_human_development_statistical_update.pdf), while the 2016 poverty rate was 0.137 (data https://data.oecd.org/inequality/poverty-rate.htm).

The life expectancy at birth are 83,2 years, the expected years of schooling are 16,3, while the mean years of schooling are 10,2 (http://hdr.undp.org/en/2018-update).

The 2018 Human Developement Index (HDI) is 0,880 (http://hdr.undp.org/en/2018-update).

2. LEGAL SYSTEM

The Italian Republic was established as a result of a popular referendum that on June 2, 1946 sanctioned the end of monarchy. On the same date, the members of the Constituent Assembly were elected;

the Constitution of the Italian Republic went into force on January 1, 1948.[4] The Constitution reflects the principle of separation of powers, even though the separation cannot be seen as a harsh divide, since there is a constant interplay among the legislative, the executive and the judicial power. The Italian Constitution is what is conventionally called a 'rigid' constitution, since it cannot be changed or repealed like any other ordinary statutes: its amendments require a specific supermajority in both houses of the Parliament.

The Constitutional Court is in charge of deciding cases in which the consistency with the Constitution of the statutes applicable to cases pending before the judiciary is challenged: according to a renowned Italian scholar, 'More than 50 years of constitutional review in Italy have brought about a consolidation of the position of the Constitutional Court',[5] even though the occasions when the Court has become the target of harsh criticism coming at times by politicians, other times by the public opinion have multiplied in recent years.

The head of state is the President of the Republic, elected for a seven years term by the two houses of the Parliament at a joint session: he has variety of powers and prerogatives that make his role very important, since he 'represents national unity' (Article 87, sec. 1 of the Constitution)[6] and is the ultimate guarantor of the Constitution.

The legislative power is vested with the Parliament that is comprised of two chambers, the Chamber of Deputies (*Camera dei Deputati*, in Italian) and the Senate (*Senato*, in Italian): Article 70 of the Constitution provides that 'The law-making function shall be exercised collectively by both Houses.' The two chambers have virtually the same powers, so that one may say that Italy had adopted a system of perfect bicameralism, a system that has been repeatedly criticized as a source of inefficiency in the process by which bills become law in force.

The executive power is entrusted with the Government, which includes the Council of Ministers and the President of the Council. According to Article 95 of the Constitution, 'The President of the

[4] C. Pinelli, 'The 1948 Italian Constitution and the 2006 referendum', available at https://www.scienzegiuridiche.uniroma1.it/sites/default/files/docenti/pinelli/italian-constitution-2006-referendum.pdf.

[5] T. Groppi, 'The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review?' (2008) 3 J Comp L 100, at 115.

[6] All the citations from the Italian Constitution come from its official translation into English, which is available on the Senate's website: https://www.senato.it/application/xmanager/projects/leg18/file/repository/relazioni/libreria/novita/XVII/COST_INGLESE.pdf.

Council shall conduct and be accountable for the general policy of the Government. The President of the Council shall ensure the consistency of political and administrative policies, by promoting and coordinating the activities of Ministers.'

As far as the judiciary is concerned, the Constitutions provides that 'Judicial proceedings shall be exercised by ordinary magistrates empowered and regulated by the provisions concerning the Judiciary' (Article 102, sec. 1). A few other constitutional rules are worth mentioning in order to give a better view of Italian judiciary. Therefore, the judiciary 'shall be autonomous and independent of all other powers' (Article 104, sec. 1); the recruiting, posting and transferring, as well as any decision concerning promotions and the infliction of disciplinary measures fall within the jurisdiction of the High Council for the Judiciary that is the self-governing body of the judiciary, in operation since 1958 (Articles 104 – 107). Ordinary judges are recruited through competitive examinations (Article 105); once in office they are considered public servants, even though their status is surrounded by special guarantees aimed at securing that they stay neutral, independent, and impartial.

Ordinary courts have civil jurisdiction and criminal jurisdiction. The former comes into play mainly when disputes between private parties must be resolved; the latter is established with the purpose of deciding whether or not a person charged with a criminal offence is guilty, keeping in mind that in Italy criminal proceedings are instituted by a public prosecutor, who is an ordinary judge who performs a few specific functions in the framework of criminal trial and, most of all, 'shall have the obligation to institute criminal proceedings' (Article 112 of the Constitution).[7]

As far as ordinary courts exercising civil jurisdiction are concerned, the courts of first instance are the justices of the peace (who are honorary judges) and the *Tribunali*: the respective jurisdiction is determined according to the amount of money at stake or according to the subject matter. Intermediate appeals are brought to the appellate courts (*Corti d'appello*) and a final appeal (on points of law only) can be lodged with the Italian Supreme Court, the *Suprema Corte di cassazione*.

Justices of the peace and *Tribunali* have criminal jurisdiction as

[7] See M. Caianiello, 'The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?' (December 23, 2011), in E. Luna, M. Wade (eds), *Transnational Perspectives on Prosecutorial Power* (Oxford University Press, 2011), available at SSRN: https://ssrn.com/abstract=1976204.

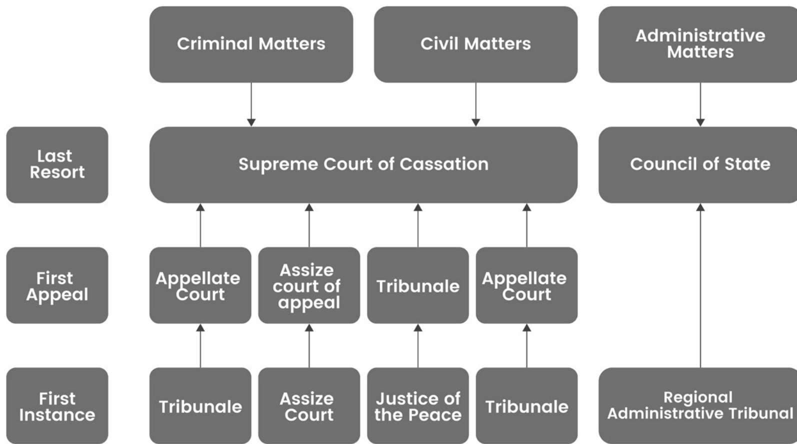
well, but other criminal courts must be listed. First of all, the **juvenile courts** and the **juvenile divisions of the courts of appeal** are the courts of first and second instance in charge of criminal offences perpetrated by minors. **Assize courts** *(Corti di assise)* are the courts of first instance that try the most serious crimes and are composed of six lay judges led by two professional judges. Beside the courts of appeal as courts in charge of intermediate appeals, there are the **Assize courts of appeal** *(Corti di assise di appello)* that hear appeals against judgments issued at the first instance level by assize courts. The **supervisory courts** *(Tribunali di sorveglianza)* and the **supervisory offices** *(Uffici di sorveglianza)* supervise the enforcement of **prison sentences** and the application of the law governing sentences. The Court of cassation acts as final appellate court in criminal matters, too.

According to Article 102, sec. 2 of the Constitution, 'Extraordinary or special judges may not be established. Only specialized sections for specific matters within the ordinary judicial bodies may be established, and these sections may include the participation of qualified citizens who are not members of the Judiciary.' The Constitution, though, makes an exception for some special courts that were already in operation when the Constitution was enacted: these courts are the administrative courts, meaning the Council of State as a single appellate court and the Regional administrative courts (*Tribunali amministrativi regionali*), as courts of first instance, as well as the Court of Auditors and the military courts (Article 103).

According to the evaluation of judicial systems prepared by the European Commission for the Efficiency of Justice (CEPEJ) with reference to the data of 2016, in Italy the number of professional judges per 100,000.00 inhabitants is 10.6 while in the countries that are members of the Council of Europe the median is 18 and the average 21. The number of prosecutors per 100,000.00 inhabitants is 4, while in the countries that are members of the Council of Europe the median is 11 and the average 2.[8]

[8] The whole CEPEJ report is available at https://www.coe.int/en/web/cepej/cepej-work/evaluation-of-judicial-systems.

Chart 02. Judicial Organization in Italy



If one is inclined to follow the traditional approach taken by scholars in comparative law, one can certainly say that the Italian legal system belongs to the Civil Law family, because of his historical heritage:[9] it is a legal system in which the Roman law legacy is still detectable, even though throughout the centuries the influence of German and French laws cannot was significant, also due to the historical vicissitudes of the country that was unified only in 1861 under the Kingdom of Italy ruled by the House of Savoy. The fact that Italy is a Member State of the European Union has compelled the domestic legal system to transpose into the legislation in force institutes that are not necessarily in line with the Civil Law roots of the Italian legal culture. Furthermore, some traditional feature have declined, while new features have acquired remarkable relevance: for instance, the importance of what Italians calls 'the doctrine' (*la dottrina*, in Italian),[10] that is the work of legal scholars, is declining, while for centuries it has been considered fundamental for the proper interpretation of the law. Precedents are still not listed among the official sources of law, but court rulings (most of all, if they are issued by the Court of cassation) do have a *de facto* precedential value; furthermore, expressions strictly connected with the doctrine of stare decisis, such as overruling, or anticipatory and perspective overruling have been included as they are (meaning, in English) in the

[9] See extensively L. Moccia, 'Italian Legal System in the Comparative Law Perspective: An Overview' (1999) 27 Int'l J Leg Info 230.

[10] On the role of legal scholarship in Italy, it is still very informative what John Merryman wrote in the 1960s: J. H. Merryman, 'The Italian Style I: Doctrine' (1965) 18 Stan L Rev 39.

Italian legal lingo.

In a comparative study on the legal profession in the European Union, the situation in Italy is pictured in negative terms: fighting a rearguard battle, the Italian legal profession 'has not undergone a fundamental transformation despite the evolution of the international market'[11] and it is stuck in 'archaic forms of practice'[12] that, for instance, do not allow the establishment of professionals corporations. Although one may say that there is some truth in this critical assessment of Italian attorneys as a whole, it seems that the real problem with the legal profession in Italy is at present (and has been at least in the last decade) the number of lawyers. According to an official report published in June 2019,[13] the number of attorneys who are members of the Bar was 243,488 in 2018, more or less 4 attorneys for every 1,000 inhabitants. The general opinion is that Italy has too many lawyers, and evidence of that can be found in the low average income of lawyers: again in 2018, the average income was approximately €38,000.00, with sharp differences between geographical areas, so that the highest income was registered in the North of the country (specifically, in the region called Lombardy) while the lowest one in the Southern regions. According to the evaluation of judicial systems prepared by the European Commission for the Efficiency of Justice (CEPEJ) with reference to the data of 2016, in Italy the number of attorneys per 100,000.00 inhabitants is 378.4 while in the countries that are members of the Council of Europe the median is 119 and the average 162.[14]

According to Article 24 of the Italian Constitution, 'Defense is an inviolable right at every stage and instance of legal proceedings. The poor are entitled by law to proper means for action or defense in all courts'. One may argue that this principle grants the legal profession a constitutional dimension that makes it stand out from the other liberal professions and requires specific rules. As of today, the legal profession is governed by a statute passed in 2012, which replaced the regulation dating back to 1933.

The legal profession is decentralized and includes 164 local bar councils. The local bar councils are coordinated by the National

[11] K. Gromek-Broc, 'The Legal Profession in the European Union – A Comparative Analysis of Four Member States' (2002) 24 Liverpool L Rev 109-130, at 126.

[12] *Ibid.*, at 128.

[13] See Centro Studi Investimenti Sociali – CENSIS, L'avvocato nel quadro di innovazione della professione forense – Rapporto 2019 – Roma, giugno 2019, available at http://www.censis.it/sites/default/files/downloads/Rapporto%202019_0.pdf

[14] See above, footnote no. 5.

Bar Council (*Consiglio Nazionale Forense*, in Italian), which is the highest institution of the Italian legal profession. The National Bar Council comprises 33 members, all lawyers elected within the members of the local bar councils: they stay in office for four years.

As far as the functions of the National Bar Council are concerned, they are both regulatory and disciplinary. An example of the regulatory function is the drafting and updating of the Code of Conduct for lawyers; the disciplinary function is performed acting as appellate court against the judgments issued by the district disciplinary boards at the local level for violations of the code of ethics. Judgments given by the national Bar Council are subject to a further appeal that can be lodge with the Supreme Court of cassation.

The statute governing the legal profession states that attorneys (*avvocati*, in Italian) shall perform their role with independence, loyalty, integrity, dignity, diligence and competence, taking into account the social importance of defense and abiding by the principles of fair and loyal competition.[15] Furthermore, attorneys shall comply with the rules laid down by the Code of Conduct, rules concerning the relationship between the attorney and his client, the opposing party and his attorney, and the court. The Code of Conduct provides for a variety of regulations having to do with the different functions attorneys can perform. It comprises 73 articles and is available in English, too.[16]

In order to become an attorney, one must earn first a full law degree (*laurea magistrale a ciclo unico*, this being the official denomination of the Juris Doctor degree), followed by a considerably long period of traineeship (eighteen months) under the supervision of a fully licensed attorney: during the traineeship, the prospective attorney is supposed to attend a certain number of court hearings with his mentor, and to learn how to draft legal briefs, contracts and the like.

After completion of the mandatory internship, the trainee attorney must sit for the State Bar exam, which takes place only once a year. The Bar exam includes three written tests: the candidate is expected to draft a legal opinion on a civil case, a legal opinion on

[15] Article 3, sec. 2 of Statute no. 247 of 2012. The Italian text reads ‘La professione forense deve essere esercitata con indipendenza, lealtà, probità, dignità, decoro, diligenza e competenza, tenendo conto del rilievo sociale della difesa e rispettando i principi della corretta e leale concorrenza’.

[16] The Code is available at https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/DEON_National_CoC/EN_Italy_Code_of_Conduct_for_Italian_Lawyers.pdf.

a criminal case and a pleading or brief having to do with a civil, criminal or administrative case, according to the Candidate's choice. The written tests are administered in three days in a row; candidates have eight hours to complete each test. Those who pass the written part of the Bar exam (approximately 30%) must take an oral exam on six legal subjects at the candidate's choice. The chosen subjects, though, must include either civil or criminal law and either civil or criminal procedure: legal ethics is a mandatory subject, too.

The Italian legal profession is governed not only by domestic rules and regulations, but also by European Union normative instruments. Especially important are a few Directives that Italy has duly implemented: Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services; Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained; Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications; Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (the so-called Bolkestein Directive).[17]

To the question whether the general population can afford the fees charged by practicing attorneys it is hard to give an educated answer. This author was not able to find any recent studies, reports or data able to shed light on the affordability of legal fees. Taking into account the very low annual income threshold that allows individuals to apply for legal aid (or, better yet, legal assistance paid by the public purse) one can infer that a good number of persons are expected to bear personally the expenses of turning to an attorney and, as the case may be, starting a judicial proceeding (the annual income threshold in question is just below €11,500, meaning corresponds approximately USD 12,760.00). In light of the huge number of Italian practicing attorneys, one may assume that there is competition among legal professionals, so that individuals (or, at least, those who have limited financial possibilities) may shop around in order to find a lawyer who is inclined to charge law fees in order to stay afloat: unfortunately, though, low fees are rarely met with high quality services.

[17] On the influence of European Union regulations on the status of the Italian legal profession, see E. Silvestri, 'The Legal Profession in Italy: Regulation v. Competition?', in A. Uzelac and C. H. van Rhee (eds), The Landscape of the Legal Profession in Europe and the USA: Continuity and Change (Intersentia, 2011), 145-159.

Legal representation is mandatory both in civil and criminal cases. In civil cases pro se legal representation is allowed before justices of the peace, if the value at stake is below €1,100.00: it is obvious that at present nobody would go to court advancing such a small claim. In any other civil cases, the assistance of a licensed attorney is mandatory, including in the preliminary attempts at mediation (that in Italy are compulsory for quite a number of cases concerning different matters), as well as in the procedures known as assisted negotiation (another form of ADR similar to American collaborative practice, but made mandatory for claims up to €50,000.00 and when damages caused by traffic accidents are asserted). In criminal proceedings individuals must always be assisted by counsels of their choice.

Paralegals do not exist in Italy as members of a specific profession. Law offices, most of all if they consist of a large number of attorneys, have one or more legal assistants or legal secretaries who perform clerical tasks. Some legal assistants may even hold law degrees, but they do not have any particular status, neither can they represent a person in court.

3. PROCESS AND PROCEEDINGS: OVERVIEW

3.1. Criminal procedure

Italian criminal proceedings are governed by a code of criminal procedure approved in 1988 (the "Code"). The Code is based on an adversarial system and was finalized after a lengthy reform process that started after the fall of the fascist regime. The reform had the objective, *inter alia,* to conform Italian criminal procedure to the principles of the Italian Constitution and of international human rights legislation. Initially, the Code was received cold-heartedly: the then prevailing legal sentiment was still influenced by the inquisitive system previously in use and was unfavorable to any changes also due to the recrudescence of terrorist attacks and mafia-related crimes. For this reason, the Code was amended several times, with changes which were not always coherent, resulting in a Code that is now substantially different from its initial version. In brief: the first ten years from the introduction of the Code have been characterized by a clear reluctance in accepting the new adversarial system, culminated with the constitutional "due process" reform, following a few decisions issued by the Constitutional Court that essentially demolished the very principles of the new codification. The second decade witnessed the introduction of amendments to the Code, which some commentators interpreted as deriving from personal interests of political figures

representing the majority party then in office (the so-called laws "*ad personam*"). In the last decade the discussion surrounding the Code - while also having the objective of refining the protection of fundamental rights, following repeated indications coming from European authorities - has been and still is oriented at gaining efficiency in the administration of justice, clearly slowed down by an unbearable workload. A clear sign of such inefficiency is the circumstance that a large number of proceedings terminates with the extinction of the offence due to the applicable statute of limitation, which results in a triple defeat for the justice system: while the accused person is kept under the threat of a criminal conviction for an excessive time, eventually the aim of the criminal prosecution is not satisfied, nor is the interests of the victims of the offence, while public resources are wasted in a way the is not cost-effective. Finally, it should be mentioned that the evolution of the Code during the last thirty years, as briefly summarized above, resulted in a complex system of criminal procedure that is increasingly inconsistent and follows different rules depending on the type of the criminal offence at hand. For instance, stricter rules apply for applicable measures, investigation deadlines, rules of evidence and concerning personal freedom, for terrorism and mafia-related crimes. Also, an increasing request of protection for so-called weaker subjects, in line with European directives and international conventions, resulted in the creation of specific procedural rules which apply to a large number of crimes related to personal violence.

3.1.1. Criminal investigation process

Italian criminal procedure provides for three levels of judgement. The first instance proceeding has a two-step structure contemplating first a period of investigation, which precedes the trial. The main actor in the preliminary phase is the public prosecutor ("PP"), who directs the investigations. The PP takes care personally the investigations, or, as it is more often the case for the number and quantity of the investigative acts, avails herself of the criminal police, which operates upon her delegation or within the instructions given by the PP. The principle of objectivity, which applies to the PP as a public officer, mandates that the PP must collect all the elements necessary for the exercise of the criminal prosecution, including "assessments on facts and circumstances which are favorable to the person under investigation".

However, in order to grant equality of arms to the parties also during the investigations, the defense lawyers have been granted

investigative powers that were not included in the original version of the Code, powers which are to a certain extent similar to those granted to the PP and the results of which acquire the same value recognized to the acts carried out by the PP during the investigation phase and the subsequent trial. Following the enactment of law 7 December 2000 no. 397, defense attorneys were given ample powers as regards the investigative phase: they can carry out investigations in order to search for and find elements of evidence in favor of their client ‘starting from the time when they have been granted the professional mandate’ (art 327 bis par. 1 CPP). Defense lawyers may proceed with the investigations personally or availing themselves of representatives or private investigators (provided that they are duly licensed), or experts, should a specific knowledge be required (art. 327 bis, par. 3 CPP).

The investigations start with the notice of crime, which must be recorded in an *ad hoc* register provided for in art. 335; investigations may last up to 18 months or two years in case of particularly serious crimes (art. 407 CPP). The person under investigation (hereinafter, also referred to as the ‘suspect’) is informed about the existence of a proceeding against her only insofar as an act must be carried out for which the presence of the defense attorney is necessary (art. 369 CPP). Therefore, it is possible that the entire investigation stage is carried out without the suspect being informed about the proceeding. However, the PP cannot exercise the criminal prosecution without first informing the suspect of the investigation in progress, so as to grant the suspect the possibility to obtain information regarding the acts carried out during the investigation, with a view to taking any actions that is useful for her defense (art. 415 bis CPP).

If during the investigation it is necessary to adopt acts which may impact on the rights of the suspect or if the suspect raises a complaint, the parties are entitled to approach a judge - the so-called preliminary investigations judge (“PIJ”) – who, being an impartial authority, is called to offer protection to the fundamental rights of the suspect and to ensure that the proceeding is carried out correctly (art 328 CPP). Among the main duties of the PIJ, in the first place there is the power to issue decisions concerning personal rights, property rights or the use of assets. For instance, the PIJ can 1) issue interim orders affecting personal freedom (art 392 CPP) or similar orders concerning assets; 2) confirm the interim measures adopted by the PP or the judicial police (art. 391 CPP); 3) authorize acts that have an impact on personal correspondence and personal domicile, like wiretapping of communications and conversations (art. 267 CPP);

4) issue orders concerning the seizure of biological samples (art. 359-bis, in connection with art. 224 bis CPP); and finally, 5) decide on the restitution of seized assets (art 263 CPP).

The PIJ also intervenes to protect the defense rights when there are assessments made on the legal capacity of the suspect to take part in a proceeding, or to decide whether to suspend the right of the suspect under arrest to consult with his attorney (art. 104 par. 3 and 4 CPP), or in situations when there is an imbalance between the position of the PP and that of the defense lawyer. In the latter case, the PIJ may for instance: i) authorize the defense lawyer during the defensive investigations to consult, receive declarations and assume information from a person who is under detention (art 391 bis, par. 7 CPP); ii) decide on the request of a defense lawyer to obtain documents from a public office (art. 391 quarter CPP); and iii) authorize the defense lawyer to enter private places or places which are not open to the public (art. 391 septies CPP). Finally, when it is necessary to anticipate the acquisition of evidence, the PIJ authorizes it and ensures that the evidence is collected in the presence of both parties, issuing instructions during the evidence collection (art. 392-402 CPP).

The PIJ has also certain duties relating to the exercise of the criminal prosecution by the PP, exercise which is mandatory. For instance, some relevant examples are the control powers granted to the PIJ as regards i) the duration of the investigations (art.406-407 CPP), ii) the conditions for the extension of the investigations (art. 414, 415, 434 CPP), and iii) the decisions made by the PP at the end of the investigations. In this regard, the PIJ decides upon both the PP's dismissal order (art. 409) and the PP's request for trial (art. 416 CPP). Finally, the PIJ (or the judge of the preliminary hearing, as the case might be) acts as the deciding judge in the event that the parties choose one of the so-called alternative procedures, for instance when a) the PP requests the issuance of a criminal decree (art. 461 CPP); b) the parties have agreed upon the application of a sanction (art. 444); or c) the accused person has requested an abbreviated decision, at the preliminary hearing (art. 438 and following) or after the conversion of the immediate proceeding pursuant to art. 458 or the accused person has requested the suspension of the prison sentence with probation (art. 464 bis and ff CPP.).

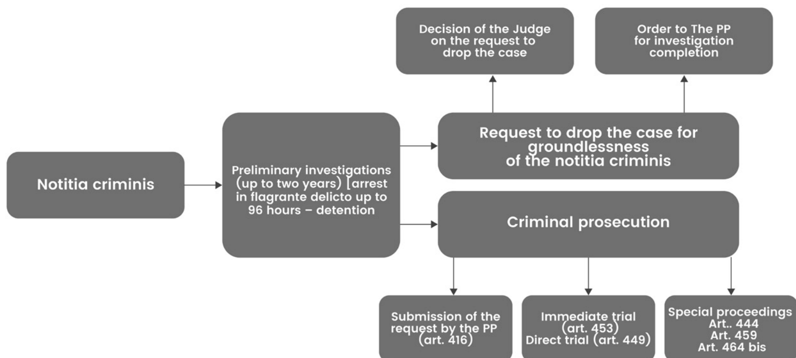
The suspect may be arrested by the criminal police, normally only *in flagrante delicto*. The PP must be informed of the arrest within 24 hours and within the following 24 hours he must request the PIJ to confirm the arrest. The PIJ has 48 hours to decide. Failure to comply with the above deadlines results in the invalidation of the

arrest and the obligation to release immediately the person under investigation. The arrest may be ordered by the PP, also in the absence of an *in flagrante delicto*, when (1) 'there are specific elements making it probable that the suspect may flee, also in relation to the impossibility to determine the identity of the suspect', and (2) there are serious elements indicating that a crime has been committed. The crime must be (a) one for which the law provides for life prison or for a prison term of at least two years as minimum sentence and in excess of six years as maximum sentence, or (b) a crime concerning weapons of war, explosives, terrorism, or eversion of the democratic order (art. 384 CPP).

Restriction of personal freedom can be ordered by the PIJ upon request by the PP, pursuant to art. 274, in the following cases: 1) when there is the need to protect the acquisition of evidence; 2) in case of a probable flight of the suspect; and 3) when serious crimes are otherwise likely to be committed in light of particular factual circumstances. The suspect may challenge the arrest order (art. 309-311 CPP) and request that the arrest is re-evaluated because the underlying conditions have changed (art. 299 CPP). The terms of the arrest vary depending on the gravity of the offence and may range between 6 months and one year of imprisonment (art. 303 CPP).

Following the investigations, the PP must choose between a dismissal and the exercise of the criminal prosecution. If the PP has collected sufficient evidence in order to proceed with a request for trial, the PP must exercise the criminal prosecution. Only in the absence of sufficient evidence, that is, when the notice of the crime is found to be groundless, the PP must request the dismissal. The PP must decide based on technical requirements, since her decision cannot be based on considerations of opportunity.

Chart 03. The preliminary investigation



3.1.2. *Criminal prosecution proceedings*

As indicated before, the criminal prosecution is mandatory: pursuant to art. 112 Cost., upon receipt of a notice of crime, the PP must start the criminal prosecution. The PP is also the only party which is responsible for the action. The person offended by the crime has no role in such respect, except in the case of certain minor offences that cannot be prosecuted without a formal request filed by the offended party.

The criminal prosecution is eventually exercised with the formulation of the accusation in the forms provided for by law, in particular pursuant to art. 405, which lists the request for trial and certain alternative simplified procedures.

The request for trial (art. 416 CPP) leads to the preliminary hearing, during which the judge must evaluate whether or not the conditions for starting the trial exist. The preliminary hearing may be unnecessary when there is sufficient evidence of the crime already in the first phase of the investigations. In such case, when the relevant conditions apply, the PP may exercise the criminal prosecution, asking the PIJ to proceed with a so-called immediate trial, or taking the accused person directly before the trial judge (the so-called direct trial).

At trial, which is public and carried out according to the principles of orality and unity, the evidence is normally taken in the presence of the parties, but some exceptions exist, coherently with the provisions of art. 111 fifth par. Cost., (consent expressed by the accused person, unequivocal evidence, impossibility of collecting the evidence for objective reasons). The trial should also be carried out in compliance with the principle of concentration, thus ideally completed within one day or, if this is not possible, it should continue on the following business day: however, the current workload of courts makes this rule one of the least observed by judges.

The problem of proceedings *in absentia* has been resolved since 2014. After an evolution started by European case-law, which lasted for a decade, with law no. 67 of 28 April 2014, the Parliament has repealed from the Code the possibility of proceedings *in absentia*, except in specific cases. The judge will now proceed without the presence of the suspect when the latter, whether free or under arrest, has expressly renounced (art. 420-bis par. 1 CPP), or when there is evidence that the suspect has knowledge of the proceeding or there is a legal presumption of such knowledge (art. 420-bis par. 2 CPP). Such presumption exists when the suspect has declared or elected do-

micile or has been arrested, detained or under precautionary measures or has appointed a defense attorney, as well as when the suspect who is absent has received personally the notice of the hearing or there is certain evidence that the offender is aware of the proceeding or has voluntarily avoided the official notification of the proceeding or of acts thereof. When the proceeding is *in absentia,* the suspect is represented by her defense attorney. Depending on the gravity and the type of the crime, the competent judge will be the Court of Assize, the Tribunal (composed by either one or three judges) or the Justice of the Peace, the latter being an honorary judge who can decide only upon minor crimes.

The PIJ (or the judge for the preliminary hearing, depending on the circumstances) is the trial judge for alternative procedures such as the simplified trial (art. 438-443 CPP), the 'settlement procedure' (art. 444-448 CPP), the criminal decree (art. 459-464 CPP), and the suspension with probation (art. 464 bis-464 *novies* CPP). These are procedures which imply the granting of certain benefits against concessions by the accused person. Generally, a material reduction of the sentence and additional benefits are granted: for instance, the judge cannot apply ancillary sanctions and precautionary measures, the accused person will not pay the costs of the proceeding and will be entitled to the extinction of the crime if certain terms are met; the decision will not be mentioned in the judicial records. All that, if the accused person waives certain defense rights of hears.

Following the first instance decision, the offender and the PP (and, under the circumstances, also the damaged parties exercising an action for damages, as well as the party responsible for damages if different from the accused person), have the right to file an appeal against any types of decision. The decision issued on appeal can be challenged through a motion to the Court of cassation, which can be filed solely for issues of law, for the reasons listed in art 606 CPP.

The right to appeal is granted in very ample terms and the decision becomes binding and final only when no further challenges other than the so-called revision are available to the convicted person. The rules concerning the right to appeal criminal decisions are the principal aspect that the government will have to take into account in the near future. It should be noted that the practical experience shows an abuse of appeals by convicted persons, who aim at delaying the enforcement of the conviction and often, with the passing of time, the extinction of the crime due to the rules on the statutes of limitation, and therefore impunity. The fact that up to 70 per cent of the appeals brought to the Court of cassation are declared inadmissible

confirms that many challenges are abusive.

One should also note that even after decisions become final and binding, the convicted person can start a revision proceeding, meaning an extraordinary action that can be resorted to when new facts contrary to the findings of the proceeding emerge or when the decision must be made in agreement with a final judgment issued by the European Court of Human Rights, pursuant to art. 46 par. 1 ECHR.

There are no duration limitations applicable to the criminal proceeding but, as already observed, it happens often that the proceedings ends with a dismissal due to the extinction of the crime: the Code provides that the accused person cannot be convicted when a certain number of years have elapsed from the time when the crime was perpetrated (it is irrelevant when the commission of the crime becomes known to the authorities).

During the proceeding, the offender can be subject to precautionary arrest for the same reasons described above with respect to the investigations phase (art. 273 and art. 274 CPP). Limitations to the duration of the arrest are provided for, depending on the gravity of the crime, for each phase of the proceeding (art. 803 par. 1). Furthermore, an overall maximum term is contemplated, also depending on the gravity of the crime: the accused person will have the right to be released if the proceeding is not completed within 2, 4 or 6 years, depending on the crime (art. 303 par. 4 CPP).

Chart 04. Trial and special proceedings

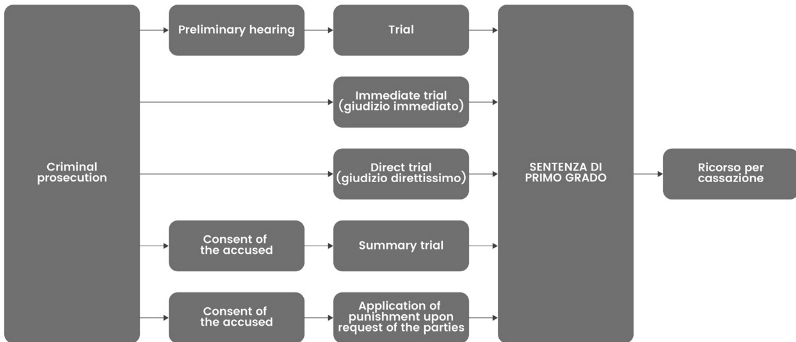
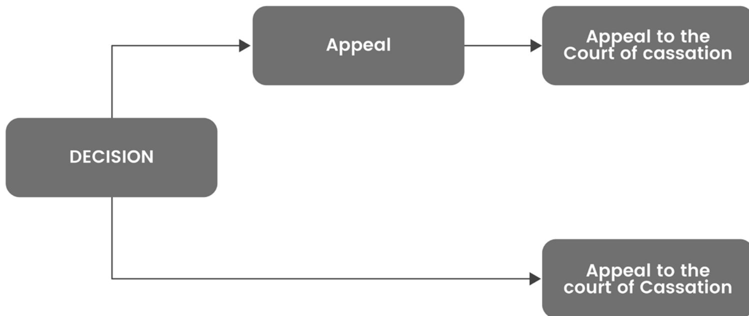


Chart 05. Appellate Remedies



3.1.3. Italian criminal procedure and due process

The Italian criminal procedure is based on the principle of 'due process of law': mandatory exercise of the criminal prosecution, independent and impartial judges, presumption of innocence and an inviolable right of defense at any stage of the proceeding are some of the principles adopted by the Code, and also embedded in our Constitution.

Guarantees of context (right to defend oneself through legal assistance, equal rights between the PP and the defense lawyer, impartiality of the judge and reasonable duration of proceedings) and rights essentially corresponding to the basket of rights provided for by art. 6 par. 3 ECHR are specifically granted to the accused person. The Code provides that the person who is accused of a crime in the shortest possible time shall be informed, on a confidential basis, of the nature and the reasons of the accusations raised and be granted the time and the conditions which are necessary for preparing her defenses, and have the right before the judge to question or have questions raised to the persons making declarations against her and to obtain the calling and the interrogation of the persons to her defense with the same rights and conditions as the PP, and the acquisition of any other evidence in her favor; to be assisted by an interpreter if she does not speak or understand the language spoken within the proceeding. Besides, the Italian Constitution and the Code must be read in conjunction with the provisions of international conventions, which are an integral part of the Italia legal system.

In any case, it is true that, notwithstanding the ample guarantees that characterize our system, in practice the Italian criminal proceeding is still too slow. For this reason, proposals for the reform of criminal procedure insist on measures of decriminalization, as

well as on measures for procedural simplification and for the search of alternatives to criminal prosecution. The reform of appeal rights is another area to be taken into consideration for the future, for the reasons mentioned above.

3.2. Civil Procedure

Civil procedure is mainly regulated by the Code of civil procedure, which dates back to 1940 and entered into force in 1942.[18] One may wonder whether the fact that the Code was adopted during the Fascist era had a strong bearing on its content and, as a matter of facts, some scholars believe that the Code upheld an authoritarian model of civil justice, centered on a strong and powerful judge, the real 'master of the game', while the parties played a secondary role. Whatever the drafters of the original text of the Code had in mind, it is necessary to emphasize that the Code has gone through countless amendments and additions that only its appearance (that is to say, for instance, its division into four books) has remained the same. A variety of judicial procedures that can be loosely qualified as belonging to what is conventionally called 'civil justice' are located outside the code, being provided for by special statutes, many of which carry their label of origin in European law, either directly applicable in the Member States or to be implemented via domestic statutes. Last but not least, the advent of the Constitution (in 1948) and the active involvement of the Constitutional Court in repealing quite a number of procedural rules deemed at odds with fundamental principles have established the unwritten rule according to which procedural rules (as well as substantive ones) must be given a constitutionally oriented interpretation by the courts that are supposed to apply them.

As explained above, at the first instance level civil and commercial jurisdiction pertains to either the justices of the peace or to the *Tribunali*. Justices of the peace have jurisdiction when the value at stake is below €5,000.00, but the threshold is higher (€20,000.00) when damages caused by traffic accidents are sought. Justices of the peace have also a limited subject matter jurisdiction. *Tribunali* have

[18] On Italian civil procedure, see in general M. A. Lupoi, *Civil Procedure in Italy* 3 (Wolters Kluwer 2018); E. Silvestri, 'Italy: Civil Procedure in Crisis', in C. H. van Rhee, F. Yulin (eds), *Civil Litigation in China and Europe. Essays on the Role of the Judge and the Parties* (Springer 2014) 235-255; E. Silvestri, 'Goals of Civil Justice When Nothing Works: The Case of Italy', in A. Uzelac (ed.), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer 2014) 79-103; M. A. Lupoi, 'Recent Developments in Italian Civil Procedure' (2012) 3 Civil Procedure Rev., 25-51.

jurisdiction over cases exciding the threshold mentioned above and exclusive jurisdiction over specific matters (e.g., personal status and family matters, as well as enforcement procedures). Complex rules have to be applied in order to determine the proper venue so as to choose the court where to initiate litigation. Under Italian law, jurisdiction (*giurisdizione*) and venue (*competenza territoriale*) are important issues on which the court can rule at the outset of litigation, causing – as the case may be – the dismissal of the action.

Within each *Tribunale* cases are heard either by a single judge or by a three-judge panel. Nowadays, the majority of cases are dealt with by a single judge; in the small number of cases entrusted to a three-judge panel (e.g., cases arising out of bankruptcy law or the law of decedent's estate), one judge is in charge of the whole development of the proceeding and reports to the other two members of the panel with a view of issuing the final judgment.

Before the *Tribunali*, the ordinary procedure can be divided into three stage: the introductory stage; the evidence taking stage; and the decision stage.

As far as the introductory stage is concerned, a civil action begins when the plaintiff serves a statement of claim on the defendant. The statement of claim (in Italia, *atto di citazione*) must include a list of mandatory elements, such as the cause of action and the material facts supporting the cause of action, as well as the relief sought, and the evidence and the documents that the plaintiff intends to use to prove his allegations. In his answer, the defendant must 'put forward all his defenses and take a stand on the material facts advanced by the plaintiff in support of his cause of action' (Article 167, sec. 1 of the Code of civil procedure, my translation). The answer must list the evidence and the documents that the defendant intends to use in order to oppose the plaintiff's contentions.

Concepts such as pre-trial phase, pre-trial discovery and trial are alien to the language of Italian civil procedure, since adjudication develops along a variable number of hearings that are self-contained 'episodes', and have no continuity at all, if only because hearings, as a rule, are far too spaced out. The first hearing is particularly important, since at this hearing the parties are entitled to 'line up the shot' by clarifying and modifying their allegations. At the same hearing the court rules on the admissibility of the evidence offered by the parties.

As far as the evidence taking is concerned, it is worth emphasizing that in principle the court must rely only on the evidence

offered by the parties in support of the factual allegations they have made in their pleadings. This general rule (laid down by Article 115, sec. 1 of the Code) has some exceptions that apply only insofar as there is a legal rule granting the court the power to take evidence *ex officio*. This happens for instance in the procedure followed in labor cases, as well as in certain non-contentious proceedings. [19]

Evidence must be not only admissible, but also relevant for the case at hand. Evidence is relevant when it has a logical connection with the facts in dispute, so that it allows to establish whether or not these very facts are true.

One may say that the probative weight of each piece of admissible evidence can be placed in a theoretical hierarchy: at the top there is documentary evidence and, in particular, the so-called public deeds (*atti pubblici*, in Italian), which are documents drafted and signed by notaries public or other public authorities entrusted with the power to grant 'public faith' to the documents they draw up. The probative value of public deeds, private writings and other documents are governed by complex rules that are common to the majority of continental European legal systems having roots in the Civil Law tradition. Out of curiosity, one must mention the fact that among admissible evidence the Italian laws in force still list the oath and the confession.[20] The new forms of evidence connected with the development of modern IT are subject to regulations laid down by special statutes.

Testimony refers solely to statements made in court by third parties (witnesses): this means that neither the statements made by the parties nor expert opinions are considered testimony. As far as experts are concerned, they are considered auxiliary officers of the court.

According to Article 116, sec. 1 of the Code, 'The court must evaluate the evidence in accordance with its prudent judgment, except as otherwise provided by the law' (my translation). Scholars emphasize the adjective 'prudent' evaluation, in order to signify that a free evaluation of evidence must not cross into an arbitrary or capricious assessment, in light of the fact that courts are bound to

[19] See E. Silvestri, 'Evidence in Civil Procedure in Italy, available at https://pf.um.si/site/assets/files/3223/evidence_in_civil_law_-_italy.pdf.

[20] See E. Silvestri, 'The Antique Shop of Italian Civil Procedure: Oath and Confession as Evidence', in C. H. van Rhee and A. Uzelac (eds), Truth and Efficiency in Civil Litigation. Fundamental Aspects of Fact-Finding and Evidence-Taking in a Comparative Context (Intersentia 2012) 47-58.

expound on the reasons that led them to accept or reject the evidence in the judgments they issue. Exceptions to the rule just mentioned concern what Italians call 'legal evidence' (*prova legale* in Italian): legal evidence is evidence whose probative value is pre-determined by the law. 'Legal evidence' includes in general certain types of documentary evidence, party admissions, and conclusive presumptions.

When the evidence taking stage is over, the parties are expected to lodge with the court their final briefs (in Italian, *comparse conclusionali* and *memorie di replica*), in which they summarize all the factual and legal arguments that the parties want the court to take into account. Oral argument takes place rarely and only if a party so requests.

The judgment is immediately enforceable (which means, in case of a money judgment, that the creditor can begin the appropriate enforcement procedure). Italian decisions must always lay down the facts in dispute and the legal principles applied by the court in order to arrive at the judgment, since one of the canons of due process is, according to the Italian Constitutions, the rule according to which 'All judicial decisions shall include a statement of reasons' (Article 111, sec. 6).

Even when the case is decided by a three-judge panel, the only opinion that counts and has legal value is the majority opinion. Neither concurring nor dissenting opinions are contemplated by Italian law.

As far as the procedure before the justices of peace is concerned, the pattern followed is more or less the same as the procedure before the *Tribunali* with a few simplifications that do not seem worth mentioning.

With reference to case management, one must emphasize that the concept of case management is alien to Italian civil procedure. Italian litigation still advances through an endless series of hearings scattered over an unpredictable time period, so that it is fair to say that the concept of a real preparatory stage is wishful thinking, devoid of any practical application. That being the situation, it should not come as a surprise that judicial case management is *terra incognita*. On the contrary, what is surprising is the fact that, according to the Code of Civil Procedure, the court 'is entrusted with all the powers necessary for the swift and fair development of the proceeding', including the power 'to set deadlines for the completion of procedural steps' (Article 175, sections 1 and 2; my translation). Furthermore, the court also has the power to impose sanctions on the parties and their lawyers when they have breached the duty to conduct litigation

with fairness and integrity (Article 88). Therefore, it is clear that, according to the procedural rules in force, Italian courts could resort to at least minimal case management. In reality, though, that does not occur. essentially because caseloads are very heavy and courts are understaffed. The combination of these two curses that the Italian justice system is unable to dispel makes it impossible for the judges to properly study each case, as would be necessary for a sound exercise of case management powers. There have been recent attempts at improving the situation, for instance through the establishment of the so-called '*ufficio per il processo*' (which can be roughly translated as 'office for the proceeding'), which increases the judicial staff by the addition of law clerks (typically, young law graduates) or lay judges and other persons who are supposed to help judges navigate the sea of documents, briefs and other kinds of papers that make up the courts' dockets and to decipher the mysteries of online justice (a recent feature of Italian civil justice).

Beyond the practical realities there are essentially ideological barriers preventing any attempt at reforming the Code of Civil Procedure in the direction of envisioning a structured and non-episodic case management, as well as the possibility for the court to adjust the procedure according to a standard of proportionality. According to a widespread school of thought, to grant judges broad case management powers would mean to inject an authoritarian note into civil procedure. In order to understand this curious idea, one should revisit the history of the Code of Civil Procedure in force. The Code was adopted in 1940, and the fact that courts were entrusted powers allowing them to play an active role in the development of proceedings was later seen as the sign of a 'fascist', authoritarian approach to litigation. That is why any idea of granting more powers to courts is often met with a good measure of skepticism, if not open hostility. As often is the case, misconceptions stem from ignorance, and even in the case of the Code and the powers granted to courts an accurate reading of the Report accompanying the original text of the Code would be illuminating. The Report shows how the drafters of the Code anticipated ideas that would become popular much later. In their concept of the dynamics of civil justice, the divide between an inquisitorial model of adjudication and a proceeding molded by the judge according to the specific needs of the case at hand was clear. To dictate a single, rigid procedure applicable to each and any case – the Report reads – neither satisfies the need for an accurate finding of the facts (which is necessary most of all in complex cases) nor does it grant an expedited disposition of cases (which is a need

particularly felt when a case is simple or requires an urgent resolution). Therefore, it is necessary to organize the development of adjudication according to the principles of adaptability and flexibility: the court, assisted by the parties, should adapt the procedure to the specific features of the case, so as to obtain the highest possible level of procedural economy.

Even though the advent of case management in Italian civil procedure cannot be foreseen at least in the near future, mention has to be made of a relatively new type of first instance proceeding that was introduced in 2009 and advances, modestly, the cause of a managerial treatment of cases. Reference here is to the so-called 'summary proceeding' (in Italian, *procedimento sommario di cognizione*) that can be chosen by the claimant if certain requirements are met. From the point of view of judicial case management, the summary procedure is very interesting, since the court, 'taking into account the introductory pleading and having heard the parties, can decide how the case will develop, dispensing with any formalities that are not essential to safeguarding the due process rights of the parties' (Article 702 *ter*, sec. 5 of the Code; my translation). Therefore, the court can adapt the procedure to the needs of the case with a flexible approach that is the exact opposite of the rigid approach typical of the structure of the ordinary first instance proceeding. Unfortunately, the summary proceeding has not been very successful in practice, for a variety of reasons that cannot be explained here and now. In spite of that, a variety of bills pending before the Parliament for the (umpteenth) reform of the Code of Civil Procedure provides for a generalization of the summary proceeding, which would become the basic model of proceedings before first instance courts.

As regards provisional or interim remedies (in Italian, *provvedimenti cautelari*), the Code of civil procedure, as well as a number of special statutes, provide for different types of provisional remedies. According to a traditional, but still sound explanation, three possible situations justify the request for a provisional measure: when it is highly foreseeable that a judgment will remain unsatisfied; when it is necessary to protects the rights of the parties while an ordinary proceeding is pending; and when there is the need to preserve evidence, which could go missing or be destroyed or, in general, could become unavailable[21]

Interim measures can be requested before the commencement of

[21] See M. Cappelletti & J. M. Perillo, *Civil Procedure in Italy* (Martinus Nijhof 1965), 130-143.

a civil law suit (in Italian, we talk about *provvedimenti cautelari ante causam*) or when litigation is pending. The procedure is governed by a set of rules laid down by the Code of civil procedure: these rules are known as 'the uniform procedure for interim measures' (my free translation of the Italian '*procedimento cautelare uniforme*': Articles 669-*bis* – 669-*quaterdecies* of the Code). On their turn, these rules are supplemented by other rules that govern individual provisional measures.

It is conventional to distinguish between protective measures and anticipatory measures. The formers are aimed at preserving the *status quo* during the development of judicial proceedings or at preserving property in order to guarantee the satisfaction of a future money judgment. The latter anticipate the effects of a final judgment. Protective measures always require an action on the merits to be instituted within a specific deadline: should this condition not be satisfied; the measure automatically loses its effects. Differently, anticipatory measures do not need the support of a judgment on the merits; their effects survive whether or not an adjudication on the merits ensues, even though they cannot be relied upon as a final judgment that settles the issues in dispute with res judicata authority.

Interim measures are specific, meaning that each one is available only if certain requirements are met. In spite of that, when there is a danger of imminent and irreparable injury and no specific interim measures are available, the court may grant an 'urgent measure' (*provvedimento d'urgenza*, in Italian: Article 700 of the Code) whose content can be shaped so as to ensure in advance the future effects of a decision on the merits. That said, for the granting of all provisional measures two requirements must be met: the *fumus boni juris*, meaning that the applicant must show a credible cause of action, and the *periculum in mora*, which exists when it is reasonable to believe that, while the applicant is waiting for a judgment on the merits, the right for whose protection the provisional measure is sought will be subject to irreparable damage.

Italy has a chronic problem with the excessive length of judicial proceedings, whether civil, criminal or administrative. At July 1, 2019, a total of 3,425 Italian applications were pending before the European Court of Human Rights:[22] a high percentage of applications concerns the violation of Article 6, sec. 1 of the ECHR insofar as it provides for a reasonable duration of judicial proceedings. The extent

[22] For this piece of information, see https://www.echr.coe.int/Documents/CP_Italy_ENG.pdf.

of the problem is such that it is not possible to mention the countless Interim Resolutions issued by the Committee of Ministers at the Council of Europe, neither does it make any sense to elaborate, on the one hand, on the causes of the problem and, on the other hand, on the various attempts made through law reform with a view to expediting the pace of justice. A few excerpts from selected judgments can elucidate the situation better than a scholarly recount.

In *Scordino v. Italy* (2006),[23] the Court said:

> 'It feels it important to point out that the reason it has been led to rule on so many length-of-proceedings cases is because certain Contracting Parties have for years failed to comply with the "reasonable time" requirement under Article 6 § 1 and have not provided a domestic remedy for this type of complaint.
> The situation has worsened on account of the large number of cases coming from certain countries, of which Italy is one. The Court has already had occasion to stress the serious difficulties it has had as a result of Italy's inability to resolve the situation. It has expressed itself on the subject in the following terms:
> "The Court next draws attention to the fact that since 25 June 1987, the date of the *Capuano v. Italy* judgment (Series A no. 119), it has already delivered 65 judgments in which it has found violations of Article 6 § 1 in proceedings exceeding a "reasonable time" in the civil courts of the various regions of Italy. Similarly, under former Articles 31 and 32 of the Convention, more than 1,400 reports of the Commission resulted in resolutions by the Committee of Ministers finding Italy in breach of Article 6 for the same reason. The frequency with which violations are found shows that there is an accumulation of identical breaches which are sufficiently numerous to amount not merely to isolated incidents. Such breaches reflect a continuing situation that has not yet been remedied and in respect of which litigants have no domestic remedy. This accumulation of breaches accordingly constitutes a practice that is incompatible with the Convention." (see *Bottazzi v. Italy* [GC], no. 34884/97, § 22, ECHR 1999V; *Ferrari v. Italy* [GC], no. 33440/96, § 21, 28 July 1999; *A.P. v. Italy* [GC], no. 35265/97, § 18, 28 July 1999; and *Di Mauro v. Italy* [GC], no. 34256/96, § 23, ECHR 1999-V)'.

[23] *Scordino v. Italy,* https://hudoc.echr.coe.int/eng#{"itemid":["001-72925"]}, §§ 174-175.

More recently, in *Zullo v. Italy* (2006), the Court emphasized again that

> '[…] A domestic remedy has been introduced [*in the Italian law in force*]. However, that has not changed the substantive problem, namely, the fact that the length of proceedings in Italy continues to be excessive. The annual reports of the Committee of Ministers on the excessive length of judicial proceedings in Italy (see, *inter alia*, CM/Inf/DH(2004)23 revised, and Interim Resolution ResDH(2005)114) scarcely seem to reflect substantial changes in this area. Like the applicant, the Court does not see how the introduction of the Pinto remedy at domestic level has solved the problem of excessively lengthy proceedings. [*Omissis*]. The Court emphasises once again that Article 6 § 1 of the Convention obliges the Contracting States to organise their legal systems so as to enable the courts to comply with its various requirements. It wishes to reaffirm the importance of administering justice without delays which might jeopardise its effectiveness and credibility. Italy's position in this regard has not changed sufficiently to call into question the conclusion that this accumulation of breaches constitutes a practice that is incompatible with the Convention.'[24]

The domestic remedy mentioned in *Zullo v. Italy* is a special procedure provided for by statute no. 89 of 24 March 2001 with a view to granting litigants the right to claim damages (before appellate courts) in case of excessively lengthy court proceedings. A reform of the procedure in 2012 set the maximum length of proceedings at six years. Unfortunately, the so-called 'Pinto remedy' has not been successful: to the contrary, the cure has turned out to be worse than the disease, so to say, since throughout the years the statute has brought about additional litigation and huge costs for the national budget.

3.3. Alternative Dispute Resolution

Italy has unconditionally embraced the gospel of ADR. The reasons are not ideological, but only practical: ADR schemes carried

[24] *Zullo v. Italy*, https://hudoc.echr.coe.int/eng#{"fulltext":["zullo"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-72934"]}, §§ 120-121.

with them the promise of a reduction in the heavy courts' caseload. The belief that ADR could save Italian civil justice from collapsing under an over-growing number of judicial proceedings was so strong that a few ADR methods were made mandatory, that is to say that they are compulsory steps that parties must take prior to being allowed to appear before the court. This is the case of mediation and assisted negotiation. As far as mediation is concerned, the Italian legislators provided for it in 2010 via implementation of EU Directive 2008/52/EC on certain aspects of mediation in civil and commercial cases. From the outset, mediation was made mandatory in a variety of cases; due to a strong opposition from lawyers' associations, the rules on the duty to attempt mediation before regaining the right to access the court ended up before the Constitutional Court. Mandatory mediation was declared at odds with the Constitution, but only for a formal quibble, which allowed the Parliament to reinstate mandatory mediation soon afterward.[25] Therefore, at present, the Italian legal system provides for three types of mediation: voluntary mediation, devoid of any practical relevance; mandatory mediation, in a long list of disputes concerning matters such as property rights, trust and real estate, landlord and tenant disputes, banking and financial contracts, just to mention a few examples; and mediation ordered by the court at any stage of the proceeding, not only before a court of first instance, but while the appellate procedure is pending as well. A peculiar feature of Italian mandatory mediation is that parties must appear in front of the mediator with their own attorneys. In other words, legal representation is conceived as always necessary and not optional, in spite of the conventional wisdom according to which in mediation parties should work together so as to try themselves to put an end to their dispute, working out an agreement that is suitable for both.

Assisted negotiation vaguely resembles the American collaborative law, but a fundamental difference must be emphasized. The attorneys assisting the parties during the negotiation do not face any ethical impediments preventing them from representing the same parties in court, if the negotiation fails. This means that they have no incentives to work so as to help the parties reach a settlement. Assisted negotiation is mandatory when damages caused by traffic accidents are claimed and for any case in which the amount at stake is above €50,000.00.

[25] On the vicissitudes of mandatory mediation, see E. Silvestri and R. Jagtenberg), 'Tweeluik-Dyptych: Juggling a Red Hot Potato: Italy, the EU, and Mandatory Mediation' (2013) 17 *Netherlands-Vlaams Tijschrift voor Mediation en Conflictmanagement* 29-38.

Other ADR schemes have been introduced though the implementation of another European Directive, meaning Directive 2013/11/EU on alternative dispute resolution for consumer disputes. These schemes are specifically designated to simplify access to justice for consumers and users; along the same lines, one must mention the availability of a special online platform for the disputes arising out of transactions that took place in the so-called 'marketplaces': the platform has been established by EU Regulation no. 524 of 2013. Finally, a number of special statutes addressing specific subject matters (telecommunications, tourist services, just to offer the reader a couple of examples) provide for either voluntary or mandatory attempts at conciliation or mediation, not to mention the special ADR bodies established for the amicable resolution of disputes in the domain of banking law, insurance, derivatives, commercial banking, capital markets and investment management. One may say that probably even in the field of ADR methods a serious simplification would be necessary: as they say, 'less is more', even in the field of access to justice, when 'more' only means a variety of ADR methods that overlap and make it difficult for ordinary people to figure out which one is the best suited for their needs. [26]

3.4. Simplification of law and by-passing legal process

No special, simplified procedures exist for the resolution of small claims. In 2014 new rules for the separation of spouses and the divorce were introduced, allowing the parties to resort to a semi-administrative procedure that does not contemplate, in principle, any judicial involvement.

In exceptional circumstances as provided for by specific rules, courts can issue decisions that are not based on the law in force, but on principles and criteria that take into account the peculiar aspects of the case at stake. The Italian expression by which this hypothesis is identified is known as '*giudizio di equità*'. The term '*equità*' is difficult to translate, since the English 'equity' is only an acoustic similarity. Often, in order to explain what '*equità*' means Latin expressions are used, such as (judgment) '*secundum conscientiam*' or (judgment) '*ex aequo et bono*'. In any event, the only significant cases decided dispensing with the applicable legal rules are those decided by justices of the peace when the amount at stake does not exceed €2,500.00 (Article 113 of the Code of civil procedure).

[26] See E. Silvestri, 'Too Much of a Good Thing: Alternative Dispute Resolution in Italy' (2017) 21 Netherlands-Vlaams Tijschrift voor Mediation en Conflictmanagement 29-38.

4. ACCESS TO JUSTICE, EQUAL ACCESS TO COURT AND FAIR TRIAL

The right for everyone to access to court, to receive legal assistance and a fair trial is granted in Italy by virtue of both international and national law.

The Universal Declaration of Human Rights (1948), in his Article 8 grants the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to everyone by the Constitution or by law and, in Article 10, it grants a fair and public hearing by an independent and impartial tribunal for everyone, in full equality, in the determination of his right and obligations and of any criminal charge against him.

The European Convention on Human Rights (1950) is more precise, recognizing not only an equal right in accessing the courts and the right to an effective remedy in case of violation of the Convention (article 13), but also the right to "legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required" (article 6 c): this principle was originally limited only to criminal cases, but later on it was extended to non-criminal cases as well by the case law of the European Court of Human Rights, inferring it from the right to a fair trial. More or less the same is established also in the International Covenant on Civil and Political Rights (1966, Article 14, particularly para. 3 d).

The Charter of Fundamental Rights on Freedoms of the European Union (2000, revised in 2007, and binding from 2009) grants a fair trial and the right to legal aid, which "shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice", without making any distinction between criminal and non-criminal cases (Article 47).

The implementation and enforcement of all these international treaties takes place primarily at the national level. In particular, Article 4 of the Treaty on European Union (TEU) requires EU Member States to take appropriate measures in order to ensure the fulfillment of obligations arising out of EU law. This is the so-called principle of sincere cooperation. Additionally, Article 19 of the TEU requires Member States to provide sufficient remedies that guarantee effective legal protection in the fields covered by EU law.

From this point of view, the Italian Constitution (1948; art. 111 was changed in 1999) has implemented all these principles in two

fundamental articles, one in part I (Rights and duties of citizens) and the other in Title IV (The judicial branch): the first one, that is, Article 24, grants the right to take action in court for everyone who needs to protect his right sunder civil and administrative law; it ensures the right of defense in every stage and instance of legal proceedings and provided that those who are 'not wealthy enough' could have proper means for action or defense before all courts[27]. The second one, Article 111, establishes the right to a fair trial and explains in details what this right means: 'Jurisdiction shall be implemented through due process regulated by law. All court trials shall be conducted with adversary proceedings and parties shall be entitled to equal conditions before a third-party and impartial judge. The law shall provide for a reasonable duration of trials. In criminal law trials, the law shall establish that the accused be promptly and confidentially informed of the nature and reasons of the charges and be given adequate time and conditions to prepare a defense. A defendant shall have the right to cross-examine witnesses for the prosecution, or to have them cross-examined before a judge; examine witnesses for the defense in the same conditions as the prosecutor; and the right to produce any evidence for the defense. The defendant shall be entitled to the assistance of an interpreter in the case such defendant cannot speak or understand the language in which court proceedings are conducted. The formation of evidence in criminal law trials shall be based on an adversarial process. The guilt of the defendant may not be established on the basis of statements by persons who have willingly refused cross-examination by the defendant or the defendant's counsel. The law shall regulate the cases in which the formation of evidence may not occur in an adversarial process, with the consent of the defendant or owing to verified objective impossibility or proven illicit conduct. All judicial decisions shall include a statement of reasons. Appeals to the Court of Cassation in cases of violations of the law shall always be allowed against sentences and against measures affecting personal freedom pronounced by ordinary and special courts. This rule can only be waived in cases of sentences

[27] "Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law. Defense is an inviolable right at every stage and instance of legal proceedings. The poor are entitled by law to proper means for action or defense in all courts. The law shall determine the conditions and forms regulating damages in case of judicial errors".
"Tutti possono agire in giudizio per la tutela dei propri diritti e interessi legittimi. La difesa è diritto inviolabile in ogni stato e grado del procedimento. Sono assicurati ai non abbienti, con appositi istituti, i mezzi per agire e difendersi davanti ad ogni giurisdizione. La legge determina le condizioni e i modi per la riparazione degli errori giudiziari".

by military tribunals in time of war. Appeals to the Court of Cassation against decisions of the Council of State and the Court of Accounts are permitted only for reasons of jurisdiction'[28].

Nevertheless, as observed recently, 'Italy is a country where the conflict between law in books (particularly in the Fundamental Charter) and law in action is extremely acute[29].

First of all, there was and there is not a real political debate around the subject of access to justice: no mentions of it in parliamentary debates or in political party manifestos, with the only exception of the Five Star Movement (*Movimento 5 Stelle*)[30], whose political agenda includes some minor reform proposals in the fields of legal costs, ADR systems, legal aid and class actions[31].

The lack of political debate results in the fact that in the last twenty years the majority of legislative provisions related to access to justice were merely the implementation of European directives: for example, this is the case with the statute no. 89 of 2001 (the so-

[28] "La giurisdizione si attua mediante il giusto processo regolato dalla legge. Ogni processo si svolge nel contraddittorio tra le parti, in condizioni di parità, davanti a giudice terzo e imparziale. La legge ne assicura la ragionevole durata.
Nel processo penale, la legge assicura che la persona accusata di un reato sia, nel più breve tempo possibile, informata riservatamente della natura e dei motivi dell'accusa elevata a suo carico; disponga del tempo e delle condizioni necessari per preparare la sua difesa; abbia la facoltà, davanti al giudice, di interrogare o di far interrogare le persone che rendono dichiarazioni a suo carico, di ottenere la convocazione e l'interrogatorio di persone a sua difesa nelle stesse condizioni dell'accusa e l'acquisizione di ogni altro mezzo di prova a suo favore; sia assistita da un interprete se non comprende o non parla la lingua impiegata nel processo.
Il processo penale è regolato dal principio del contraddittorio nella formazione della prova. La colpevolezza dell'imputato non può essere provata sulla base di dichiarazioni rese da chi, per libera scelta, si è sempre volontariamente sottratto all'interrogatorio da parte dell'imputato o del suo difensore.
La legge regola i casi in cui la formazione della prova non ha luogo in contraddittorio per consenso dell'imputato o per accertata impossibilità di natura oggettiva o per effetto di provata condotta illecita.
Tutti i provvedimenti giurisdizionali devono essere motivati.
Contro le sentenze e contro i provvedimenti sulla libertà personale, pronunciati dagli organi giurisdizionali ordinari o speciali, è sempre ammesso ricorso in Cassazione per violazione di legge. Si può derogare a tale norma soltanto per le sentenze dei tribunali militari in tempo di guerra.
Contro le decisioni del Consiglio di Stato e della Corte dei conti il ricorso in Cassazione è ammesso per i soli motivi inerenti alla giurisdizione".

[29] "L'Italia è un Paese dove sono particolarmente acute le contraddizioni tra il diritto scritto nei libri, a cominciare dalla Carta fondamentale, e il diritto che vive nella società civile, nonché nei rapporti tra i cittadini e le diverse articolazioni del potere"; S. Chiarloni, 'Riflessioni minime sui paradossi della giustizia civile', (2019) 1, Rivista Trimestrale di Diritto e Procedura Civile, 131.

[30] https://www.movimento5stelle.it/programma/

[31] https://www.movimento5stelle.it/programma/giustizia.html

called *Legge Pinto*), that provided for a remedy to resort to in case of unreasonable length of judicial proceedings and was passed in response to the many cases that in the previous years had been lodged against Italy with the European Court of Human Rights; it is also the case with the Legislative Decree n. 28/2010, that introduced in Italy civil mediation, following EU directive 2008/52/CE and with Legislative Decree n. 130/2015, that introduced ADR for consumers, following EU directive 2013/11/EU.

This kind of emergency legislation was also behind the reformation of legal aid in 2001 and 2002 (consolidated law no. 115 of 2002, on litigation costs, Articles 74190), because private lawyers, well represented in parliamentary chambers, wanted to prevent the possible introduction of a staff attorney model (see 5.1) and so decided to promote a reformation that could replace a liberal *pro bono* model with a direct judicare model.

The result of all this is that the regulatory framework is fragmented, unclear and deficient, because there are many other fields relevant in granting access to justice, that are not covered by any provisions: for example, in real life every legal need, whether it is a right to defend or a contract to be draft, due to the lack of legal alphabetization in the population requires the assistance of a lawyer. This implies a fee for the advice, which is not covered by the legal aid system[32]. Also, many kinds of ADR solutions, like mediation and assisted negotiation, when not provided as mandatory steps before accessing the courts[33], are not covered by legal aid provisions; for people who cannot afford a lawyer, these limitations undermine the general purpose of ADR, that is to avoid a trial as a mean to resolve the dispute more quickly and without the expenses of a judicial proceeding.

A public debate around access to justice problems does not really exist, and the scholarly debate is not so heated: if we except a general study of 2016 in which Alessandra Osti tried to evaluate the constitutional and European problems of the access to justice in Italy, comparing to those of other countries[34], very few other studies present a

[32] It is so despite the fact that the European Law grants also free legal consulting before the process has started. See 2003/8/Ce, art. 3: «Legal aid is considered to be appropriate when it guarantees: (a) pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings».

[33] Because in compulsory cases there are judgements ruling that poor people have the right to receive legal aid from the State as in court; E. Ferraris, 'ADR e patrocinio a spese dello Stato', (2019) Il Giusto Processo Civile, 175-196.

[34] A. Osti, *Teoria e prassi dell'*access to justice: *un raffronto tra ordinamento nazionale e*

detailed examinations of the general problems of granting access to justice[35]. Some do so from the point of view of European law[36], while others compare the approach followed by different countries[37], but in general they deal only with specific issue in the field of access to justice, such as legal aid[38] or ADR[39].

5. LEGAL AID SYSTEM

5.1. History of legal aid

The Italian State began his history officially as a Kingdom on 17 March 1861, after a cultural and political process of constructing the national identity known as 'Risorgimento. It aimed at overcoming the political fragmentation of the country into many regional States and to expel foreign powers out of the Peninsula, for instance the Austrian Empire, which ruled the Lombardo-Veneto. Therefore, this process developed through a series of war events, led by the Savoy dynasty (which until then had governed the regional Kingdom of Sardinia), or conducted somehow in agreement with it (for example, the famous expedition of the "Mille" led by Giuseppe Garibaldi). All these efforts finally brought about the creation of a new state entity in 1861, even though the goal of completing national unification was achieved only with the conquest of the Papal State in 1870 and with the annexation of Trento and Trieste in 1918.

The sudden formation of the new State required a considerable effort to harmonize the legislation in force in the pre-unification

ordinamenti esteri, (Giuffrè 2016).

[35] For example D. Dalfino, 'Accesso alla giustizia, principio di effettività e adeguatezza della tutela giurisdizionale', (2014) 3, Rivista trimestrale di diritto e procedura civile, 907; F. Carpi, 'Note sull'accesso alla giustizia', (2016) 3, Rivista trimestrale di diritto e procedura civile, 835.

[36] N. Carboni, 'From Quality to Access to Justice: Improving the Functioning of European Judicial Systems', (2014) 3, Journal of Civil Legal Science, 131, https://www.omicsonline.org/open-access/from-quality-to-access-to-justice-improving-the-functioning-of-european-judicial-systems-2169-0170.1000131.php?aid=32150; D. Strazzari, 'Access to Justice e stranieri: l'effettività della tutela nella prospettiva pluri-ordinamentale', (2018) 3, Diritto Costituzionale. Rivista Quadrimestrale, 157.

[37] U. Mattei, 'Access to Justice. A Renewed Global Issue?', (2007) 11.3, Electronic Journal of Comparative Law, https://www.ejcl.org/113/abs113-14.html .

[38] I. Frioni, 'Aspetti sostanziali del nuovo patrocinio dei non abbienti alla luce del D.P.R. 30 maggio 2002, n. 115', (2003) 2, Cassazione penale, 702.

[39] For example G. Alpa, 'Commissione di studio per l'elaborazione di una organica disciplina volta alla «degiurisdizionalizzazione»', (2017) 2, Rivista trimestrale di diritto e procedura civile, 793; N. Trocker, 'Accesso alla giustizia e «degiurisdizionalizzazione»: il tramonto del diritto al giudice e al giudizio?', (2018) 3, Diritto Costituzionale. Rivista Quadrimestrale, 37.

States: for reasons of speed, the strategy was often limited to extend the Sardinian-Piedmont legislation to the other territories, with the modifications that were deemed necessary from time to time. At first, this led to apply to the entire national territory the judiciary existing in the Kingdom of Sardinia, which also included some offices assigned to the defense of the poor according to a mixed model known as the Advocacy for the Poor (*Avvocatura dei poveri*).

The statute on the judiciary drawn up in 1859, in fact, provided every Court of Appeal with an office of the Advocacy of the Poor, composed of lawyers and prosecutors paid by the State and included in the career of the judiciary (of which they represented the first step). The office offered advice and procedural defense activities for free to the poor, in both civil and criminal matters; it also provided a lawyer for any accused person who had appointed one of its choice. In all inferior courts, however, these activities were attributed by the judge to one member of the local Bar Association, who performed his tasks free of charge (*pro bono*).

The admission to the 'benefit', as it was called, required the presentation of a poverty certificate issued by the mayor of the city of residence and, in civil cases only, the demonstration of the probable substantiation of the claims that the plaintiff wanted to take to court (*fumus boni iuris*); it included the exemption from litigation costs, which were possibly recovered from the losing party at the end of the trial.

This model had its roots in the paternalism of medieval Sabaudian rulers, who believed that this way they would fulfill their task as guardians of the weak and the marginalized subjects of their crown. It was an exception, compared to the legal systems of the other pre-unification States, which in large majority confined themselves to entrust the defense of the poor to private lawyers, who were supposed to perform their duties *pro bono*.

The effort for national unification in terms of war expenditures, as well as the union of the public debts of the pre-unification states and the difficulties in standardizing and rationalizing the tax levy on the whole territory led to a financial emergency that filled the parliamentary debates at least until 1867 and that was addressed with a policy of abrupt intervention on public spending.

Therefore, in this context it is not surprising that some of the criticisms already made to the Advocacy of the poor, mainly linked to the impossibility of the defender's autonomous choice and to the suspicion that a public defense magistrate was too conniving with the

equally prosecutor's public magistrate, converged with the budgetary requirements in causing the abolition of the public office for the defense of the poor, in favor of a complete *pro bono* regime.

The Royal Decree-Law n. 2627 of 1865 established the 'honorary and obligatory' responsibility to grant the defense of poor people and entrusted it with private lawyers *pro bono*. The same statutory instrument set up a Commission for legal aid, composed of judges and lawyers, with a view to evaluating the right of any applicants to take legal action free of charge. As in the past, applicants were required to demonstrate both their inability to sustain the costs of litigation and, in civil matter, also the probable substantiation of their claims. A positive evaluation by the Commission granted the anticipation of the costs of litigation by the tax authorities; these costs would be paid by the losing party or, in the alternative, by the poor if he had won the case, obtaining from the judgment an amount of money sufficient to cover the costs. However, the poor could bear the responsibility of reimbursing the costs if he lost the case and his financial conditions improved in the future.

The other irony was that the litigants could not even choose a lawyer on their own, because in civil cases the lawyer would be assigned by the Commission, while in criminal cases he would be chosen by the judge in charge of the case: in any event, the lawyer would be selected from a list formed by the Bar Association.

This new way to provide legal aid to the poorest people rose an intense criticism: in fact, the reality was that Bar Associations excluded many leading lawyers from the list, so that they could avoid *pro bono* cases, and therefore only the youngers and less skilled lawyers were generally chosen. On the other hand, it was said that to compel a private lawyer to defend someone free of charge would undermine his commitment and would reduce the time he was inclined to spend for the defense, if compared to the time that he devoted to paying clients, thus reducing the general quality of his work and jeopardizing the success of the case.

In spite of all this criticism, the worries of the Government about budgetary needs pressed the Parliament to pass a statute that could further reduce the costs of the legal expenses that the State had to anticipate, *de facto* decreasing the number of individuals who could take advantage of the "privilege". As a matter of fact, in 1880 a statute was passed (statute no. 5526, all. D) that required to the applicant a demonstration of his inability to face litigation costs based on the property tax he paid every year; the tax officer was also compelled

to send to the Legal Aid Commission an opinion about the poverty status of every applicant. The hope nurtured by the Government was to restrict the 'privilege' only to those who really needed it, but in fact the result was that only those who owned literally nothing could apply, while many other individuals who were not rich enough to pay the litigation costs were excluded.

Despite the fact that in the subsequent years there were many attempts at modifying this system (for example, by reintroducing the Advocacy of the poor or by entrusting the legal aid to the jurisdiction of the town councils)[40], nothing was really changed and the new statute that was passed in 1923 (no. 3282) was just an updating of the previous ones.

After the World War II, the claim for a reform in the legal aid model, so as to grant a more equal access to justice to those in need and also to provide for a reasonable reward of the lawyers involved, was taken into consideration by the Constitutional Assembly. However, nothing happened due to the unresolved conflict between the proposal to reintroduce some kind of public institution fully entrusted with the task of legal aid, and the other proposal, which simply wanted to bind the State to pay for those in need not only the litigation costs, but also the legal defense by a private lawyer.

The result was the sec. 3 of Article 24 of the Italian Constitution, which tried to combine the different approaches, but does not state anything clear about the way to provide this new form of legal aid: 'The poor (*non abbienti*) are entitled by law to proper means for action or defense in all courts'[41]. The debate in the Constitutional Assembly reached only one objective that is impossible to notice in the official English translation: it overcame the idea that the legal aid system was addressed only to poor people who had not enough income to pay litigation costs, and instead it widened its application to everyone who had an income lower than a standard threshold established by the State; this was done by replacing the word "poor"

[40] In the first decade of the XX century, the emersion of the industrial proletariat in many cities of the country gave rise to a new attention to the problems of social justice, problems that could not be answered only by the Church assistance programs and therefore became a central political task for the Socialist party, founded in 1892. In fact, there were many attempts at introducing some reforms in the legal aid model by socialist deputies or by representative of the Historical Left or the liberal wing of the Parliament, often also linked to each other by masonic belonging: for example, the deputy Carlo Gallini, or the ministers of Justice Francesco Cocco-Ortu, Nicolò Gallo, Vittorio Emanuele Orlando and Carlo Finocchiaro Aprile. None of these reform projects was finally approved.

[41] "Sono assicurati ai non abbienti, con appositi istituti, i mezzi per agire e difendersi davanti ad ogni giurisdizione".

(*povero*) with an expression that could perhaps be translated as "not wealthy enough" (*non abbiente*).

After that, the focus on legal aid system was renewed only at the end of the Sixties, in the Protests of 1968 context that gave new life to social equality claims and was accepted by many legal scholars of the time[42], like Giuseppe Marafioti, Vittorio Denti, Mauro Cappelletti and Nicola Trocker, who tried to find a new possible way of granting access to court with a comparative legal approach; more so, they began to understand the problem of legal aid in a broader sense, not limited to an individual court case, but extended to a variety of interests, all linked under the denomination 'Access to Justice"'[43].

The critics against the Italian *pro bono* model were essentially focused on the fact that poor people did not have any possibilities to find free legal advice before going to court, because the law covered only the assistance and the litigation costs, but only after the applicant had been admitted to legal aid by the Commission; therefore, he had to hire and pay a lawyer in order to apply to the Commission, and in his application he had to prove the *fumus boni iuris*. This was also likely to undermine his defense, because his legal arguments would be known to his opponent long before the judgement.

Many of these remarks formed the basis for a reformation bill submitted to parliamentary discussion in 1968 and again in 1972, and advancing several changes to the past model: for example, it changed the requirements to be met, providing that the applicant was expected to demonstrate only that his annual income was under the legal threshold and that his legal claims were not groundless. The bill also provided that the applicant could at last choose his lawyer, who would be paid by the State, exactly like any other experts that could take part in the proceedings.

However, despite the relevance of the changes and the common opinion of legal scholars, lawyers and judges that the legal aid system did not work at all, the bill was rejected due to financial reasons. In

[42] In the paper "The Justice of the Poor" ('La giustizia dei poveri', (1968) 91, Foro italiano 113-114; 119-120), one of the firsts on our topic, published in 1968 in the political review *L'Astrolabio* and then in the *Foro italiano*, Mauro Cappelletti referred to his discussion with Florentine students at the University in 1967-1968 and to the School of Barbiana run by don Milani, one experiment of a new form of educating children that went against the official educational programs of the time and was inspired also by the socialistic battle for equality in education and justice.

[43] This was particularly the case of the Florence Access to Justice Project, funded by the Ford Fundation and directed by Mauro Cappelletti and Bryan Garth, which took place in 1978 and 1979.

spite of that, a positive step was taken in 1973, when a new legal aid scheme was established for labor cases (statute no 533 of 1973), even though the person was not allowed to choose his own lawyer, who was appointed by the court in charge of the case. Later, the same scheme was extended to adoption cases (statute no. 184 of 1983, art. 75) and to cases brought against judges claiming damages for judicial misconduct (statute no. 117 of 1988, art. 15).

In any event, the legal aid system as provided for by the Decree of 1923 was collapsing, because it did not meet the new requirements laid down by civil and criminal procedure (as clarified by the Constitutional Court in 1983 and in 1992. In fact, it was clear that, particularly in criminal cases in which the representation in court by a lawyer was mandatory, the absence of any financial compensation doe the lawyer made the system totally ineffective. This was also voiced in a judgement issued by the European Court of Human Rights (*Artico vs. Italy*, 6694/74, 13th may 1980): "The Government [...] regarded the obligation as satisfied by the nomination of a lawyer for legal aid purposes, contending that what occurred thereafter was in no way the concern of the Italian Republic. [...] The Court recalls that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defense in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive".

This judgment forced the Parliament to pass a reform of legal aid, but that was limited only to criminal proceedings, because many believed that for civil cases a new legal aid was not necessary: as a matter of fact, poor people did not go to court unless they were certain that they could win the case, provided that their case was against a wealthy opponent, who could pay the legal expenses if he lost the case.

The new statute no. 217, enacted the 30th July 1990, solved a few problems that had arisen under the previous regulation: it widened the list of people who could benefit from it, including not only the defendant, but also the aggrieved party and the plaintiff claiming damages. It widened the range of professionals who could be paid by the State for their advice in judicial proceedings: not only the lawyer, chosen by the "not enough wealthy" defendant within a list formed by the local Bar Association, but also experts, witnesses and any other persons taking part in the proceeding. They would receive compensation, paid in advance by the State (even though at a minimum level); the preliminary request for the admission submitted to the

judge of the trial was covered, too. In short, the statute introduced a judicare system in Italian criminal legal aid.

It was better than in the past, but not a real revolution: particularly, the fact that lawyers will be paid at a minimum level and often after a long delay of time did not really grant a more efficient defense to their clients. The result was that only the younger and less experienced lawyers wanted to inserted in the list for legal aid, like in the past. Again, the access system was too cumbersome and discouraging for both poor people and individuals with low income, too. Finally, it created an unreasonable difference between criminal cases and civil ones that appeared to be a violation of the constitutional right to an equal treatment.

Legal scholars criticized this new missed opportunity to change radically the model of legal aid: some proposed to create a hybrid system, that could mix judicare with a staff attorney model (that is a state organism for direct provision of legal services). This proposition was taken into account later, in 1997, during the debate in the Bicameral Commission for the revision of the Constitution. It was in fact suggested a change in art. 24, sec. 3, so as to provides that 'The law establishes public offices in charge of legal aid in order to grant an effective defense at every stage of judicial procedures to those devoid of adequate means"[44].

For political reasons the Commission failed and no revisions whatsoever were approved, but for the opponents of a staff attorney model of legal aid (essentially, private lawyers who were fighting every attempt at creating a public attorney figure) it was enough to advance a different proposal.

In 1998 they submitted a bill to modify the statute of 1990, but again only in criminal trials. It was only during the parliamentary debate that it was suggested to extend the judicare system to civil and administrative cases as well, which was done by statute no. 134 of 2001. The statute simplified the access to legal aid, increased the income level and solved a few other procedural issues; above all, it finally repealed the 1923 statute and the mandatory *pro bono* model in favor of a general judicare system in any types of judicial process.

The following year the entire legislation on legal aid was recast in a consolidated text that regulated the whole field of legal costs (T.U. no. 115 of 2002) and it is still the law in force.

[44] "La legge istituisce uffici pubblici di assistenza legale per rendere effettivo l'esercizio del diritto di difesa, in ogni fase del procedimento, anche da parte di chi non ha mezzi adeguati".

In conclusion, the history of legal aid in Italy is just the result of emergency measures adopted any time the legislator was compelled to take action by international court decisions or by internal political risks, and not the outcome of a sensible reform; again, it is still deficient in responding to the legal needs of the poor when they arise out of court: for example, any kinds of legal advice, like preventive advocacy, assistance in writing contracts and legal documents, and defense in out of court procedures.

5.2. Legislative framework for legal aid

The applicable law on the subject of legal aid in Italy is the consolidated law n. 115/2002 (*D.P.R. 30 maggio 2002, n. 115*), which regulates the matter of legal costs in general and, in its articles from 74 to 190, the legal aid system in criminal, civil and administrative proceedings.

In criminal matters, the recipient of the benefice could be every person (citizen, foreigner or stateless person who is resident in the country[45]) insofar he is indicted, defendant, convicted, victim of a crime or the plaintiff claiming damages, provided that the annual family income[46] is lower than €11,493.82 (in 2019: the exact amount is updated every year by a decree issued by the Ministry of Justice[47]). For victims of sexual crimes, especially if against children, the income limit does not apply[48].

In civil and administrative cases, the recipient can be every person (citizen; stranger and stateless, both if legally residing in the country) and also non-profit organizations[49] whose annual income is under the above-mentioned limit, if they can prove that their claims

[45] "Il trattamento previsto per il cittadino italiano è assicurato altresì allo straniero e all'apolide residente nello
Stato"; art. 90.

[46] "Salvo quanto previsto dall'articolo 92, se l'interessato convive con il coniuge o con altri familiari, il reddito è costituito dalla somma dei redditi conseguiti nel medesimo periodo da ogni componente della famiglia, compreso l'istante"; art. 76 comma 2. However, the limit is increased for each member of the family of 1032, 91 €: "Se l'interessato all'ammissione al patrocinio convive con il coniuge o con altri familiari, si applicano le disposizioni di cui all'articolo 76, comma 2, ma i limiti di reddito indicati dall'articolo 76, comma 1, sono elevati di euro 1.032,91 per ognuno dei familiari conviventi"; art. 92.

[47] D.M. 16 gennaio 2018 in G.U. n. 49 del 28 febbraio 2018.

[48] See art. 76, § 4 bis, 4 ter and 4 quater.

[49] "Il trattamento previsto per il cittadino italiano è assicurato, altresì, allo straniero regolarmente soggiornante sul territorio nazionale al momento del sorgere del rapporto o del fatto oggetto del processo da instaurare e all'apolide, nonché ad enti o associazioni che non perseguono scopi di lucro e non esercitano attività economica"; art. 119.

are not groundless[50].

The petition in criminal cases must be addressed to the judge in charge of the trial[51], while in civil processes to the Bar Association of the district in which the court having jurisdiction over the case is located; in administrative cases, the petition must be lodged with a mixed Commission composed by lawyers and judges of the courts. The authority decides within ten days and is supposed to send the petition also to the tax officer for a check[52].

Once granted, legal aid will be in operation in any stage of the process, without the need of submitting a new petition.

As a result of the granting of legal aid, a "not wealthy enough" person could choose his own lawyer in a list kept by every Bar Association; a few judicial fees are advanced by the State (for example, taxes, travel expenses and fees for advisors, appraisers, judges, bailiffs, witnesses and lawyers), while other activities are free of charge (for instance, copies of judicial documents)[53]. The fees advanced by the State can be recovered from the losing party or from the same party to whom the legal aid was granted, if the privilege is later withdrawn[54] or if the person is able to earn at least six times the amount advanced by the State[55].

[50] "È assicurato il patrocinio nel processo penale per la difesa del cittadino non abbiente, indagato, imputato, condannato, persona offesa da reato, danneggiato che intenda costituirsi parte civile, responsabile civile ovvero civilmente obbligato per la pena pecuniaria. È, altresì, assicurato il patrocinio nel processo civile, amministrativo, contabile, tributario e negli affari di volontaria giurisdizione, per la difesa del cittadino non abbiente quando le sue ragioni risultino non manifestamente infondate".

[51] "L'istanza è presentata esclusivamente dall'interessato o dal difensore, ovvero inviata, a mezzo raccomandata, all'ufficio del magistrato innanzi al quale pende il processo. Se procede la Corte di cassazione, l'istanza è presentata all'ufficio del magistrato che ha emesso il provvedimento impugnato"; art. 93 § 1.

[52] "Copia dell'istanza dell'interessato, delle dichiarazioni e della documentazione allegate, nonché del decreto di ammissione al patrocinio sono trasmesse, a cura dell'ufficio del magistrato che procede, all'ufficio finanziario nell'ambito della cui competenza territoriale è situato l'ufficio del predetto magistrato.
L'ufficio finanziario verifica l'esattezza dell'ammontare del reddito attestato dall'interessato, nonché la compatibilità dei dati indicati con le risultanze dell'anagrafe tributaria, e può disporre che sia effettuata, anche avvalendosi della collaborazione della Guardia di finanza, la verifica della posizione fiscale dell'istante e degli altri soggetti indicati nell'articolo 76.
Se risulta che il beneficio è stato erroneamente concesso, l'ufficio finanziario richiede il provvedimento di revoca, ai sensi dell'articolo 112"; art. 98. For civil and administrative processes see art. 127.

[53] See articles 107, 108, 131 and 132.

[54] See articles 112, 113, 114 and 136.

[55] Art. 133: "Il provvedimento che pone a carico della parte soccombente non ammessa al patrocinio la rifusione delle spese processuali a favore della parte ammessa dispone che il

5.3. Institutional framework for legal aid

As mentioned above, legal aid in Italy is organized as a direct judicare model, according to which the legal activity performed by lawyers is paid with public funds on a case-by-case basis. The fact that there is always an individual relation between a single lawyer and a single client implies that an organized client community that could be involved in setting priority for legal aid or in participating in governance does not exist.

The system is implemented thanks to a cooperation between the State and local Bar Associations. There is a Bar Association in every court district throughout the country; there is also a National Bar Association in Rome, that coordinate the activities of local Bar Associations and represents interests of lawyers vis-a-vis the Ministry of Justice.

Every district Bar Association is responsible for keeping an updated list of the lawyers available to provide legal aid to those in need. The Bar Association is also in charge of exercising control over the respect of professional standards by all lawyers.

It is impossible to know exactly the national number of lawyers in the lists for legal aid; it goes from 4.901 for the district in which Milan sits with its 3,256,000 permanent residents, to 524 for the district in which a small southern town like Vibo Valentia (with only 162,516 permanent residents) sits; however it is certain that the lawyers listed for legal aid cover more or less the whole country, even small villages.

5.4. Legal aid budget

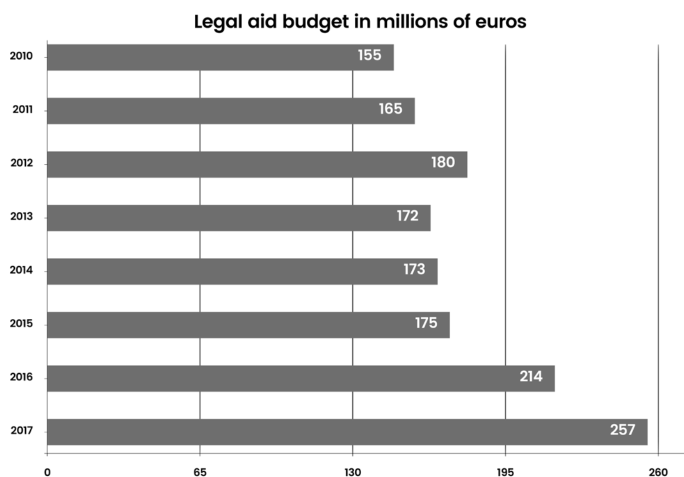
The legal aid funding is fully provided by the government in the annual budget for justice as a part of an item called 'justice expenses' (*spese di giustizia*), which however includes many other expenses, such as travel expenses of judges, witnesses, police officers; the service of procedural documents; the extradition of criminals, and so on.

pagamento sia eseguito a favore dello Stato".
Art. 134, § 1 and 2: "Se lo Stato non recupera ai sensi dell'articolo 133 e se la vittoria della causa o la composizione della lite ha messo la parte ammessa al patrocinio in condizione di poter restituire le spese erogate in suo favore, su di questa lo Stato ha diritto di rivalsa. La rivalsa può essere esercitata per le spese prenotate e anticipate quando per sentenza o transazione la parte ammessa ha conseguito almeno il sestuplo delle spese, o nel caso di rinuncia all'azione o di estinzione del giudizio, può essere esercitata per le sole spese anticipate indipendentemente dalla somma o valore conseguito".

The legal aid budget is increased every year, because of the annual revision of the income threshold applicants must respect.

The level of national budget for legal aid from 2010 to 2017 is described in the graphic below[56]:

Chart 06. Legal aid budget in millions of euros



5.5. Legal aid providers

To be added to the list for legal aid kept by the district Bar Association, a lawyer must have been practicing for at least two years; he should not have been the subject of any disciplinary actions and is supposed to demonstrate aptitude and experience[57]; every local

[56] Data extracted from the annual report on justice expenses to the Parliament since 2010: http://documenti.camera.it/_dati/leg18/lavori/documentiparlamentari/IndiceETesti/095/001_RS/INTERO_COM.pdf; http://documenti.camera.it/_dati/leg17/lavori/documentiparlamentari/IndiceETesti/095/001/INTERO.pdf; for the years 2018 and 2019 data are not yet available.

[57] "L'elenco degli avvocati per il patrocinio a spese dello Stato è formato dagli avvocati che ne fanno domanda e che siano in possesso dei requisiti previsti dal comma 2. L'inserimento nell'elenco è deliberato dal consiglio dell'ordine, il quale valuta la sussistenza dei seguenti requisiti e condizioni:
a) attitudini ed esperienza professionale specifica, distinguendo tra processi civili, penali, amministrativi, contabili, tributari ed affari di volontaria giurisdizione;
b) assenza di sanzioni disciplinari superiori all'avvertimento irrogate nei cinque anni precedenti la domanda;
c) iscrizione all'Albo degli avvocati da almeno due anni.
È cancellato di diritto dall›elenco l›avvocato per il quale è stata disposta una sanzione disciplinare superiore
all'avvertimento.

Bar Association decides how to interpret these conditions in a more or less strict sense. These requirements were established in order to assure a minimum of experience and skills in the legal defense, so as not to leave poor people in the hands of the youngest and less experienced lawyers.

When a lawyer wants to be added to the list, he must fill out an application form, specifying if he prefers to plead in civil, administrative or criminal cases, and stating that he meets the requirements laid down by the law. The district Bar Association verifies only that the requirements are met, but it can exclude a lawyer from the list if he has received disciplinary sanctions.

Lawyers are paid in force of a payment order issued by the judge of the case, according to the provisions of ministerial decree no. 55 of 2014; this regulatory measure gives some broad indications depending on the type of assistance provided by the lawyer, on the value of the case, on the kind of procedure adopted and other factors. Normally, standard fees are reduced by 1/3 for criminal cases[58] and by 1/2 for civil and administrative cases[59] which means that lawyers, when providing legal aid, earn much less than what they could make if they represented paying clients[60].

Other problems were related to the fact that the average payment time by the State was around two or three years from the conclusion of the judicial proceeding[61]. This downgraded the work carried on by lawyers, because it placed upon them a burden that they had to bear only because they decided to assist the ones in need. Fortunately, in 2016 a new rule was adopted so that the judge in charge of the case is now required to issue an order for payment when he closes the proceeding: the result is that the time that elapses before the payment is made is reduced to one or two years.

Another attempt to solve this problem was introduced by the budget law of 2016 (l. 28th December 2015, no. 208), which provided that any credit a lawyer has toward the State can be offset with any

L'elenco è rinnovato entro il 31 gennaio di ogni anno, è pubblico, e si trova presso tutti gli uffici giudiziari situati nel territorio di ciascuna provincia"; D.P.R. 30 maggio 2002, n. 115, art. 81.

[58] Art. 106 bis D.P.R. 30 maggio 2002.

[59] Art. 130 D.P.R. 30 maggio 2002.

[60] The National Bar Association (*Consiglio nazionale forense*) had set up standard protocols to calculate lawyers' fees in more or less any kind of procedures; see https://www.consiglionazionaleforense.it/web/cnf/protocolli-sui-compensi.

[61] https://www.consiglionazionaleforense.it/documents/20182/40233/La+proposta+del+CNF+di+riforma+della+legge+sul+patrocinio+a+spese+dello+Stato+%283-7-2018%29.pdf/99c3188d-0b6f-49dd-9dd7-356ff38bf173

tax or fee the lawyer must pay to the State.

However, all these measures do not always work, due to the ambiguity of the law that allows judicial offices to adopt different practices in validating lawyers' fees. For this reason, in 2018[62] the National Bar Association (*Consiglio Nazionale Forense*) submitted a proposal to the Minister of Justice, as of now the proposal has not become a bill pending before the Parliament.

5.6. Quality assurance

In the Italian judicare system, lawyers who provide legal aid are subject to the professional code of conduct and to the disciplinary power of the Bar Association like any other lawyers [63]. There are no specific mechanisms designed to monitor the quality of the work performed by the lawyers providing legal aid.

5.7. Criminal legal aid

5.7.1. Scope of criminal legal aid

The principle of legal aid was introduced in the Italian Constitution (art. 24 sec. 3) since 1948, but its effective enforcement in the Italian criminal procedure has required substantial time and efforts[64], and it is still to be completed[65]. The limit of the legal aid principles affirmed in the Constitution (as well as in the supranational legislation, like art. 6 of the European Convention of Human Rights (hereinafter referred to as the EHCR); art. 14 of the International covenant on civil and political rights (hereinafter referred to as the ICCP); art. 47 of the Charter of fundamental rights of the European Union) derives from the difficulty of implementing it in practice without dealing with the economic challenges posed by it.

Only after the entering into force of the new code of criminal procedure, the implementation of legal aid has been attempted in practice. After several amendments, legal aid is now governed by d.p.r. of 25 May 2002, no. 115 (hereinafter referred to as the TU), applicable to all legal proceedings, which contains a few provisions

[62] See the previous footnote.

[63] See the code of conduct here: https://www.consiglionazionaleforense.it/documents/20182/451926/CODICE+DEONTOLOGICO+FORENSE++-+annotato+con+lo+specchietto+delle+sanzioni.pdf/da35b877-379c-4a4d-856c-4403750ae9dc

[64] M. Chiavario, *Processo e garanzie della persona*, (Giuffrè 1984), 371 ss.

[65] G. Bellucci, *Il patrocinio a spese dello Stato*, (Giappichelli 2019); nonché L. Dipaola, *Difesa d'ufficio e patrocinio dei non abbienti nel processo penale*, (Giuffrè 2016).

(artt. 90-118 TU) specifically referring to criminal proceedings.

Subsequently, European Directive 2016/1919/UE, on legal aid paid by the State for suspects and accused persons in criminal proceedings and persons who are researched in furtherance of European arrest mandates, introduced minimum provisions on: 1). the right to defense for individuals who are under arrest or which are needy individuals; 2). the need that such right be widely and promptly recognized; 3). the quality of the assistance and the adequate formation of all participants to the administration of justice[66]. The Directive was implemented by d. lgs. 7 March 2019, no. 24. Only minor changes to the existing provisions on legal aid were needed to implement the Directive in Italy, as the Italian system was already compliant, at least on paper[67].

Among different models, the Italian system provides for the right of the person entitled to legal aid to choose a defense lawyer, the cost of whom would be liquidated by the judicial authority and paid by the State. Legal aid has a wide application both as far as the entitled subjects are concerned and the type of procedural activities. In particular, art. 98 of the Code lists among the potential recipients of legal aid the accused, the victim of the offence, and the person responsible for the damages (in reality, pursuant to art. 74 TU, the list includes the suspect, the convicted person and the person which is jointly liable for the fine). Witnesses are not entitled to legal aid, on the contrary.

Legal aid rights are granted to all Italian citizens as well as to (i) foreigners regularly residing in Italy (albeit with a temporary permit)[68] and to stateless persons residing in Italy (art. 90 TU); (ii) non-profit entities and associations that do not carry out economic activities (art. 119 TU).

According to the Parliament's Report on the application of the

[66] L. Camaldo, 'La direttiva 2016/1919/UE sul gratuito patrocinio completa il quadro europeo delle garanzie difensive nei procedimenti penali', www.penalecontemporaneo.it, 13 dicembre 2016; C. Peloso, 'L'approvazione della direttiva 2016/1919 sul patrocinio a spese dello Stato: la battuta finale nel cammino verso la mappatura dei diritti procedurali fondamentali', *www.legislazione penale.eu*, 4 maggio 2017.

[67] For some critical comments, v. F. Dri, 'Vizi e virtù dell'attuazione della direttiva 2016/1919/UE sul patrocinio a spese dello Stato: una prima lettura', http://www.processopenaleegiustizia.it (2019) 5; E. Grisonich, 'L'attuazione della direttiva 2016/1919/UE: un timido intervento di patrocinio a spese dello Stato', *www.penalecontemporaneo.it*, 2016 (5), 213-230.

[68] The number of foreigners interested in the benefit, in absolute terms, was always increasing in the period examined (only 3,335 foreigners in 1995, increased to 44,527 in 2018; in percentage terms, however, the access of foreigners remained proportionate to that of citizens.

TU[69], about 90 per cent of the legal aid recipients fall within the categories of suspect, accused or convicted persons, while the number of victims is increasing. In general, the data relating to the period under review (1995-2018) show that legal aid applications have been increasing from 16,585 (1995) to 199,176 (2018), out of which 171,314 applications were granted.

Pursuant to art. 75 TU legal aid is granted in all phases of the proceeding. Although not expressly stated, procedures before international courts are included, too[70]. In addition, a new par. 2 *bis* extended legal aid to European arrest mandate procedures, in which Italy is an active or passive party.

Legal aid is applicable essentially to all offences. There are some limitations with respect to certain crimes for which there are legal presumptions of legal aid exclusion for lack of personal prerequisites (*infra*, 5.7.2.).

5.7.2 Eligibility criteria for criminal legal aid

While in civil and other proceedings legal aid is not available when the action manifestly lacks sufficient legal grounds (art. 4 TU), in criminal proceedings the only condition is that the applicant is a low-income person. Art. 76 par. 2 TU sets a general personal income threshold of €11,528.41, to be assessed based on the last tax return. Such threshold applies to all jurisdictions and is subject to a biennial review. Limited to criminal proceedings, the threshold is increased by €1,032. 91 for each family member.

Although the income threshold has been increased over the years, the current threshold is still too low, excluding from legal aid those individuals who are not in poverty, but are clearly lacking the necessary resources to properly defend themselves. In order to address this problem, it has been observed that new rules should be devised in line with the aforementioned EU Directive 2016/1919/UE. Paragraph no. 8 of the whereas clauses of such directive states that «in granting legal aid paid by the State, the competent authorities of the Member States should be able to request the suspect, the accused or the person under search warrant to bear some of such costs in proportion to their financial assets». It would therefore be appropriate

[69] *Relazione al Parlamento sull'applicazione del D.P.R. 115/02 "Testo unico delle disposizioni legislative e regolamentari in materia di spese di giustizia" (Analisi relativa agli anni 1995-2018*), in *www. giustizia.it*

[70] F. Della Casa, 'Soggetti', in Bargis (eds.), *Compendio di procedura penale*, (Cedam 2018), 147 ss.

for the Italian system to do so.

In order to avoid abuses, the law provides the following: (i) the procedure which the legal aid applicant must follow in order to provide evidence of her income, (ii) the power of the judge to check the correctness of such evidence before granting legal aid, and (iii) subsequent review of the legal aid admission order (art. 98 TU). A presumption that legal aid cannot be granted for lack of the applicable income conditions, applies to individuals who were convicted with final decision for certain crimes (criminal association mafia-related and all related common crimes, criminal association related to drug trafficking or to smuggling of foreign tobacco products, legal aid related crimes, income tax and VAT evasion). The presumption can be overcome by the applicant who provides adequate evidence to the contrary. Differently, legal aid is granted without any conditions to victims of a number of family or sexual-related offences: the judge is required to grant legal aid, if requested, since the law intends to grant the victims of those offences an easier access to justice through legal aid. In consideration of the social awareness surrounding this kind of offences, the same treatment has been recently extended (art. 1 par. law 11 January 2018, no. 4) to minors and to individuals over 18 who are not economically independent and are orphans following a homicide committed by the spouse or the unmarried partner, whether legally recognized or living together based on a stable relationship, without regard to the possibility that the relationship at the time of the crime was legally or factually terminated. That aside, in general specific provisions apply to minors: those who have not appointed a defense lawyer are entitled to legal aid *ex officio*, and the State will recover the relevant costs *ex post* in the event that the income thresholds were not met.

5.7.3. Process for obtaining criminal legal aid

The person under investigation must be informed about her right to legal aid any time a defense attorney must be appointed *ex officio* (art. 103 TU e 369 *bis* CPP), i.e. before any act that must be done in the presence of the defense attorney.

In the same communication the person under investigation is informed that: a) in Italian proceedings the legal defense cannot be waived; b) the person under investigation can appoint a defense lawyer and that, absent such appointment, a defense lawyer will be appointed *ex officio;* c) the lawyer appointed *ex officio* is entitled to seek compensation from the person under investigation in the event

the conditions for obtaining the benefit of legal aid paid by the State are absent, benefit which shall be also mentioned in the communication. Also, the victim of the offense, at the time of the acquisition of the information regarding the crime, must be informed by the public prosecutor and the judicial police of the right to appoint a defense lawyer and the possibility to obtain legal aid paid by the State (art. 101 CPP).

Regarding the procedure for the granting of legal aid, the application (art. 93 TU), signed by the applicant and authenticated by her attorney, is filed with the proceeding judge; pursuant to case-law, the application may also be made orally, as long as it is regularly documented in the proceeding minutes. Once it has been filed, it is valid for all phases of the proceeding, including incidental and collateral procedures. It is not valid for the enforcement phase, for the revision proceeding, for any proceeding before the judge or the monitoring court, for the application of security or prevention measures.

The application is filed with the judge before which the proceeding is pending (art. 93 TU) and is decided upon by the same judge; in the preliminary phase, absent a clear legal provision, the case law has indicated that the preliminary investigations judge, being impartial, shall be competent to receive the application rather than the public prosecutor. If the application is made while the proceeding is pending before the Court of Cassation, the application shall be filed before the judge who issued the decision which is being challenged.

The decision upon the application is taken within ten days. According to the case law, the breach of such term results in a mere irregularity when the applicant was not actually prevented from exercising her defense rights.

After examining the conditions for the granting of legal aid, the judge – without specific formalities - may declare the application inadmissible, reject or approve it, with a decree filed or read at the hearing; the application is rejected if there are reasons to believe that the applicant does not meet the requirements of art. 76 e 92 TU, in the light of judicial records, life style, personal and family conditions, and business activities.

The decree is subject to verification after its issuance and can be revoked at any time, if the underlying conditions result to be different. If the decree rejects the application, it may be challenged by the applicant and -according to case-law- also by the applicant's attorney with a motion to the Court or to the Appeals Court to which

the first judge belongs. The decision can be challenged with a motion to the Court of Cassation solely on legal grounds. The challenge does not suspend the decision.

Art. 107 TU differentiates between free-of-charge disbursements (e.g. copy of proceeding documents, which are necessary for the defense) and costs that the State anticipates, which can be recovered from the applicant in case legal aid is revoked (art. 111 TU). In case of fraud or omissions in the income declarations made by the applicant, the recovery of past payment is also retroactive (art. 95), and so are the following: a) allowances and costs of judges, employees and bailiffs for travel related to proceeding acts to be performed away from the proceeding location; b) witnesses travel allowances and costs; c) travel allowances and costs , duties and mailing costs for notifications of bailiffs upon request by the court or of one of the parties; d) travel allowances and costs, fees of authorized consultants and expert witnesses and private investigators; e) custody indemnity; f) fees and disbursements of attorneys; g) cost of ads published by the court.

The determination of the above costs is due also when the criminal charges are dropped, whatever the conclusion of the criminal proceeding is and also in case of evident lack of grounds. It is however considered not due in case of a challenge that is declared inadmissible (art. 106 TU). Attorney's fees, as well as fees due to consultants, expert witnesses and private investigators are determined based on the applicable tariffs, with a one third discount.

In conclusion, legal aid in Italian criminal proceeding is in principle well structured, covering a very ample spectrum of proceedings, on the basis of a procedure offering sufficient guarantees to the applicants. Conversely, the relatively low-income threshold which is a condition of access to legal aid and the discounts applied to standard fees of attorneys and other professionals involved are weak points which should be reconsidered in the future. From a statistical point of view, a positive data is the growth of legal aid budget which, according to the Report mentioned above, has grown 30 times from 1995 to 2018, reflecting a comparable growth in the number of individuals granted the legal aid benefit.

5.8. Civil legal aid

Article 24, sec. 3 of the Italian Constitution provides that 'The poor are entitled by law to proper means for action or defense in all courts.' In spite of that, until recently the possibilities offered to indi-

viduals who did not have the financial resources to retain a lawyer of their choice where negligible. They could only rely on the so-called *gratuito patrocinio*: it was an old fashion scheme, according to which attorneys had the 'honorary' duty to provide their services for free. This scheme, established in 1865, had navigated unharmed through the Fascist Era and had even outlived the advent of the Constitution. Needless to say, the *gratuito patrocinio* was not a satisfactory reply to the needs of those who could not afford the assistance of a lawyer.

The first attempt at establishing a legal aid scheme supported by public funds was made in 1973: it concerned labor disputes only and it was never successful for a variety of reasons, but most of all because of the low-income threshold set for the eligibility of the scheme. But Italy had to wait until 1990 for the introduction of a real legal aid scheme, limited though to criminal cases. What prompted Italian legislators to get rid of the obsolete *gratuito patrocinio* was a drastic reform of criminal procedure, which was – so to say – Americanized, since it embraced the canons of the adversary process: a true revolution after centuries of inquisitorial system. It is worth mentioning, though, that no less than ten years before the enactment of the statute on legal aid supported by the public purse, the European Court of Human Rights, in the case of *Artico v. Italy*, had found Italy in violation of article 6, sec. 3 of the ECHR due to the many flaws of the system of *gratuito patrocinio* then in force. In particular, the Court stated that

> 'The Court recalls that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defense in view of the prominent place held in a democratic society by the right to a fair trial. […] Article 6 par. 3 speaks of "assistance" (*of a lawyer*) and not of "nomination". Again, mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties'.[71]

Only in 2001 was legal aid extended to civil cases; the year after all the rules and regulations on legal aid were consolidated in a single act (Consolidated Act on Costs of Legal proceedings of May 30, 2002: in Italian, *Testo unico delle spese di giustizia*) and a few

[71] *Case of Artico v. Italy* (application no. 6694/74), May 13, 1980, para. 36, available at https://hudoc.echr.coe.int/eng#{"itemid":["001-57424"]}

changes were introduced to the previous provisions.

At present, the basic rule on legal aid is Article 74 (L) of the Consolidated Act: sec 1 deals with legal aid in criminal cases, while sec. 2 provides that 'legal aid is guaranteed in civil and administrative cases, in cases concerning accountancy and taxation matters, as well as in non-contentious matters for the defense of low-income citizens provided that their claims are not clearly groundless' (my translation). Legal aid is granted at every stage of judicial proceeding and before any courts; the rules apply both to plaintiffs and defendants. Unfortunately, though, legal aid only applies to litigation, which means that in principle no legal aid is available for out-of-court advice and assistance.

Eligibility for legal aid (both in criminal and civil matter) is subject to a means test: in other words, the applicant's annual taxable income must be below a predetermined threshold. This threshold, which is supposed to be increased every second year, is very low, currently being set at a little less that €12,000.00 (approximately, USD 13,000.00). It is clear that such a low threshold means that many applicants who certainly are neither well off, nor close to the poverty line have no access to legal aid Things are made even harsher if one keeps in mind that if the applicant has a family, the means test signifies that the annual taxable income of the whole family must be taken into account. If this situation occurs, the threshold is increased by €1032,91 per each family member, but such rule applies only if the application for legal aid concern criminal proceedings.

The application for civil legal aid must be lodged with the Council of the local bar association established in the district of the appellate court within which the court having jurisdiction over the case sits. The application is relatively simple as far as formal requirements are concerned; if it is granted, the person can choose his lawyer only among the lawyers listed in a special roster kept by the local bar council. Nor any licensed lawyer can be included in the roster: among the necessary requirement, one can mention a certified professional experience of at least two years and the fact of not having incurred in any disciplinary sanctions during the last five years.

The person who has been deemed eligible for legal aid is exempted from any payments concerning his case in court, since the State supports any costs, including attorney fees and the fees charged by expert witnesses. A serious downside of the scheme is that legal aid lawyers are paid much less than their colleagues, since the law provides that their fees cannot exceed one half of the average amount

of ordinary fees. Furthermore, considering the extenuating length of Italian civil proceedings, years can go by before the legal aid lawyer receives the clearance of payments and yet more years before the actual payment is made by the State.

It was not possible to find recent statistical data on civil legal aid. Rumor has it that civil legal aid is mostly resorted to in disputes concerning family law[72], but there is no certainty that this statement holds true. Many technical aspects of civil legal aid (aspects that did not seem important enough to be described overcoming the hurdles of legal terms impossible to translate in a way that makes any sense) should be improved, but what is the most striking shortcoming is the ridiculous income threshold conditioning the availability of the scheme, in a country where the individuals with the major financial problems are those belonging to the lower-middle class, not poor enough to be eligible for social welfare benefits (including legal aid in front of civil courts) and not rich enough to be able to afford a lawyer of their choice.

In 2005, when Italy had to implement Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, the national legislators failed to take the opportunity to develop the 'minimum common rules' laid down by the Directive so as to extend them to legal aid in domestic civil and commercial cases. That has left a few problems open and still unresolved. For instance, Article 10 of the Directive provides that 'Legal aid shall also be extended to extrajudicial procedures, […], if the law requires the parties to use them, or if the parties to the dispute are ordered by the court to have recourse to them', and the Italian statute implementing the Directive provides for the same rule almost verbatim:[73] the paradox is that legal aid is available for out-of-court procedures for the resolution of cross-border disputes, while legal aid is not available for the same procedures aimed at resolving domestic cases, even though these procedures are mandatory and require the necessary assistance of a lawyer.

A final remark on legal aid: it is a subject that seems devoid of any interests for legislators, lawyers, and scholars. Scholars, in particular, focus on technical subjects that belong to the dogmatism of legal culture: unfortunately, the problems of social justice and the

[72] See V. Varano and A. De Luca, 'Access to Justice in Italy' (2007) 7 Global Jurist (Article 6) at 21.
[73] Legislative decree no. 116 of May 27, 2005, Article 10.

search for a 'justice with a human face'[74] belong to another era.

5.9. Holistic Legal Services

To this author's knowledge, the concept of holistic legal services, as structures that integrate legal services with programs aimed at breaking the cycle of poverty and increasing access to justice for vulnerable individuals, is unknown in Italy. There are non-profit organizations that offer a variety of services, including legal services, but it is not possible to list them since often they do not belong to any national schemes and exist only at a local basis. The only organization that is worth mentioning is '*Avvocati di strada*' (Street Lawyers: my translation): it is a project established in 2000, with offices in a few Italian cities (concentrated most of all in the Northern and central part of the country). Lawyers working *pro bono* offer legal advice and representation to homeless individuals.[75]

5.10. Alternative sources for legal assistance

This is a wide and complex topic, because there is a real fragmentation in the alternative sources of legal assistance; many of them are included in services provided by a wide range of associations, that goes from the feminist ones (like the National Female Union – *Unione femminile nazionale*), to the consumers ones (Like *Altroconsumo*), from trade unions to charities (like *Caritas* and its Legal Assistance Pool – *Nucleo di assistenza legale*); however, every association grants legal assistance in only its areas of interest, in general using volunteer lawyers. So, National Females Union is concerned with family law, *Altroconsumo* with consumers law, trade unions with labor law, and so on. There are also associations whose specific aim is to grant free legal assistance, as Street Lawyers (*Avvocati di strada*), that assist only homeless people. It is impossible to examine every kind of help, because every association has its norms.

It is also practiced by some lawyer, although illegal in Italy, the 'no win no fee' arrangement (*patto di quota lite*), which grants the lawyer a percentage of what the client will obtain from the losing opponent. This method could allow poor people to obtain legal assistance outside the legal aid system and without its limitations concerning income thresholds.

[74] It is well known that this expression echoes the title of a collection of influential essays published in the 1970s: M. Storme (ed), *Towards a Justice with a Human Face* (Springer 1978).

[75] See the website of '*Avvocati di Strada*' at https://www.avvocatodistrada.it/.

6. COSTS OF RESOLVING DISPUTES WITHIN THE FORMAL JUDICIAL MACHINERY

6.1. Overview of judicial costs for litigants

For what concerns litigation costs related only to procedural costs (and so without the amount needed to pay the fee of a lawyer), they can be found in the yet cited consolidated law 115/2002, which is known in fact as "Bill on judicial costs" and which contained also, as we have seen, the regulation of legal aid.

There is a general difference between criminal trials and any other proceeding, in term of litigation costs: in criminal trials there is not a court tax required and the costs are prepaid by the State and inscribed as a debt for the charged person. This means that he will be required to pay them back once the trial will end and if he will be condemned to it by the judge while passing the judgement.

In any other proceeding (civil or administrative one) each litigant will pay the expenses required for what he wants to do in the process (for example legal notices or the summoning of witnesses) and at the end he will pay only court expenses; in this cases litigants are also generally required to pay a court fee, known as "*contributo unificato*", to start a proceeding both at first instance and on appeal. The amount of this court fee is based on the value of the claim (art. 13): it ranges from 43 euros for claims whose value is under €1,100 euros to €1,686 euros for claims with a value in excess of €520,000 euros, but it is increased by a half for appeals and doubled for the proceedings before the Court of Cassation. However, there are many particular cases and exceptions that can cause a more relevant grow of the court fee before courts of first instance; on the other hand, there are particular kinds of proceedings exempted from the court tax. Therefore, it is impossible to have a general idea of the litigation costs that could be applied to every legal proceeding: this s also due to the fact that there are many other costs one might have to pay during the proceeding and which are summarized in art. 5: expenses for the notification of judicial acts and the travel of the bailiffs; allowances and travel refunds for the witnesses; fees and travel refunds for the auxiliary staff of the judge; custody allowances for goods or assets seized; expenses of maintenance during detention; costs of publication for judge's ruling; expenses for the eventually demolition of illegal buildings and for the restoration of the landscape; extraordinary expenses.

6.2. Exemption from judicial costs

In criminal cases, litigation costs prepaid by the State could be written off in the case of a disadvantaged person, that maintain a good behavior, both in and out of the prison, or in the case it was granted to him the legal aid.

In any other case the exemption from judicial costs is a result only of legal aid and so it follows the same eligibility criteria and the same process for application.

For criminal trials the copies of judicial documents are free of charge; any other expense is prepaid by the State and could be asked back to the charged person just in case it could be demonstrated that he hadn't the exact requirements for receiving legal aid.

In any other proceeding there are some processual acts or expenses (generally court taxes and rights of copying judicial documents) that are standing to the debit of the State; however others (the fees for the lawyer and for the experts, the travel expenses for witnesses and bailiffs and so on) are prepaid by the State; in both cases the person legally aided could been asked to pay them back (if the State has not get them from the losing counterpart) in the case she has gained from the trial six times the amount required, in the case she has opted out the action or if it will be declared the extinction of the process. Only the expenses prepaid by the State could be asked back irrespectively of the gain acquired. In case of a proceeding that will end in a settlement, the expenses done in debt must be paid by all (art. 134).

It seems clear, then, that from the point of view of the costs of justice, the Italian legal aid system grants that a person who is eligible for legal aid can begin a proceeding without any expense; the principle that one has to paid the costs of the proceeding if he will gain six times the amount required seems also reasonable, and in fact legal scholars do not seem to have underlined this aspect in the context of the criticism of the system in force.

6.3. Mechanisms to reduce costs by variations to courts and procedures

No mechanisms of this kind exist in Italy, since courts of special jurisdiction cannot be established due to a specific prohibition laid down by the Constitution.[76] As far as simplified procedures are con-

[76] Article 102, sec. 2 reads 'Extraordinary or special judges may not be established. Only

cerned, one may argue that ADR schemes at large at aimed at reducing costs for litigants. Furthermore, in certain specific areas the trend is to move away from judicial procedures and turn to administrative (or quasi-administrative) procedures: for instance, this is the case of the procedures that since 2014 have allowed the separation of spouses, as well as the dissolution of marriage through a special procedure in front of the Registrar in charge of the registers of the municipality where one of the spouses resides or where the marriage was registered.

7. THE PROTECTION OF DIFFUSE AND COLLECTIVE RIGHTS.

Italy has a few forms of collective redress: group actions for injunctive relief; class actions for damages; and the so-called public class actions. The first two are on the verge of a thorough reform, due to a comprehensive statute that was passed in 2019 but will enter into force in November 2020.[77] Both types of collective redress will be governed by rules inserted in the Code of civil procedure; standing to sue, originally granted to consumers and users only has been extended and a few new procedural features have been laid down, with a view to making collective redress, and most of all class actions for damages, more attractive. As a matter of fact, Italian group actions, in theory available since 2010, have never been successful.[78] Class actions for damages, in particular, had multiple procedural defects that the new rules are not likely to cure: the opt-in option is the main problem, since it implies cumbersome procedures to join the action. Furthermore, the fact that contingent fees arrangements are not allowed means that probably the most powerful drive that makes class actions interesting for attorneys is missing.

The so-called public class actions are special group actions available against public bodies in order to promote the efficiency of their action. They fall within the jurisdiction of administrative courts and can be considered as a 'variation on the theme' of collective

specialised sections for specific matters within the ordinary judicial bodies may be established, and these sections may include the participation of qualified citizens who are not members of the Judiciary.'

[77] See E. Silvestri, 'Rebooting Italian Class Actions', in C. H. van Rhee and A. Uzelac (eds), *Class Actions – The Holy Grail of (European) Civil Procedure?* (Springer 2020).

[78] See extensively E. Silvestri, Class Actions in Italy: Great Expectations, Big Disappointment, in V. Harsági and C. H. van Rhee (eds), Multy-Party Redress Mechanism in Europe: Squeaking Mice? (Intersentia 2014) 197-208; R. Nashi, 'Italy's Class Action Experiment' (2010) 43 Cornell Int'l L. J. 147-172.

action for injunctive relief. They appear to be quite successful, even though they present two serious defects. The first one is that when the court finds for the class but the public entity fails to comply with the judgment, a new, special procedure must be commenced in order to obtain compliance with the court order. The second, even more serious defect has to do with the fact that if damages are claimed yet another special judicial proceeding must be instituted.

8. PROFESSIONAL LEGAL ETHICS.

A famous Italian scholar, Guido Alpa, who is also the former President of the National Bar Council of Italy, wrote:

> 'That lawyers had to abide by ethical principles, transcendent of the legal regulations of professional behaviour, was such a widespread and consolidated conviction during previous centuries as to be considered almost obvious, and therefore such as not to need declarations or official positions on the part of representatives of the Bar.'[79]

That may explain why the first Code of Ethics for Italian lawyers was issued only in 1997. The Code was amended several times and, as a consequence of the enactment in 2012 of a statute redefining the structure and the role of the legal profession in Italy,[80] the adoption of a new Code of Ethics became a priority. The Code of Ethics in force at present dates back to 2014. It consists of 73 articles and it is available in English, too.[81]

Not many law schools have courses on legal ethics; when they do are part of the curriculum, these courses are hardly mandatory. In practice, a prospective lawyer is forced to study legal ethics when he is preparing to take the oral part of the bar exam (see above, para. 2). Licensed lawyers must follow programs of continuing legal education in order to maintain their qualification, so as to get at least nine credits (within a period of three years) attending conferences, seminars and the like dealing with legal ethics, provided that they are certified by the local Bar Councils as official events for the con-

[79] See G. Alpa, 'Lawyers' ethics in Italy – an historical treatment with some comments on recent changes in approach' (2010) 17 Int'l J. Legal Profession 307-318, at 307.

[80] Statute no. 247 of December 31, 2012 carrying new rules governing the legal profession (in Italian, *Nuova disciplina dell'ordinamento della professione forense*).

[81] The English version of the Code is available at https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/DEON_National_CoC/EN_Italy_Code_of_Conduct_for_Italian_Lawyers.pdf.

tinuing legal education.

Only occasionally do lawyers lobby for law reform: in general, lawyers associations seem interested only in rules and regulations that could force them to give up prerogatives for which they claim a sort of monopoly. For instance, when an attempt at mediation was made mandatory and parties were supposed to appear in front of a mediator by themselves, lawyers went on strike. They do lobbies so that when mandatory mediation was reinstated (after it had been repealed by the Constitutional Court: see above, para. 3.3.) the assistance of lawyers was made compulsory from the very beginning of the mediation procedure. Furthermore, a new rule provided that lawyers are mediators 'as of right', while anyone else is supposed to follow a special training theoretical and practical.

9. TECHNOLOGICAL INNOVATION AND ACCESS TO JUSTICE

E-justice is quite developed, but it is fair to say that no promising initiatives exist – at least to these authors' knowledge – with the view to improving access to justice. Even though most people have smart phones, they do use them either for leisure or occasionally for accessing services that have nothing to do with access to justice. As mentioned, many times in this report, if a person has a legal issue of any kind, the simplest thing to do is to turn to a lawyer, making an appointment and visit him in his office since most lawyers do not offer advice via telephone or the web.

10. UNMET LEGAL NEEDS

In Italy there has never been a countrywide study assessing the needs for a better and easier access to justice. In general, any kinds of legal problem forces individuals to turn to a lawyer, since public services in charge of granting legal advice are lacking. The legal aid system, available throughout the whole country, can be resorted to only for court procedures but is not accessible when a person wants to jot down a contract or is simply interested in understanding his own rights. It is only up to the lawyer to decide whether or not to provide legal advice free of charge.

11. PUBLIC LEGAL EDUCATION

The only program of public legal education existing in primary

and secondary schools was introduced in 2019[82] and includes the study of the Constitution, of the principles of European Union law and organization, in order to raise awareness for environmental sustainability and support an active citizenship, as well as the right to health and well-being of the person[83]. Every school should decide the program, which must last at least 33 hours.

From a more general point of view, neither programs of public legal education for the general citizenship nor programs devoted to inform the population about the legal aid system exist. Therefore, it is difficult for a lay person to understand correctly his rights or to know about the availability of legal aid: this is the reasons why in Italy to turn to a lawyer and rely on his advice is still a fundamental step in the access to justice process.

12. CONCLUSIONS

The preparation of this Report has been for one of its authors the occasion for taking out of the bookshelves the volumes of *Access to Justice* and engaging in the reading of the General Report written by the late Mauro Cappelletti and Bryant Garth. The discovery of a few passages underlined in red and blue showed that many years have gone by from the first reading of the book: to the contrary, though, the concepts and principles emerging from the General Report fill pages that could have been written just yesterday.

The vision of a better access to justice, so as to make justice more accessible to everybody, including the underprivileged individuals, without the trade off of a lower quality in the services offered, is still a beacon of inspiration for many, even though the hardships of recurring economic recession and ensuing budgetary restrictions make it difficult to adopt measures suitable to turn this vision into reality.

The Italian situation seems to mirror this difficulty. The administration of justice, whether civil, criminal or administrative, is definitely one of the most critical aspects of the present situation: excessive delay of judicial proceedings, a myriad of different procedures, overcrowded dockets, jam-packed prisons, an uncontrolled army of lawyers, you name it.

Alexander Hamilton once said that the first duty of society is justice: if this is the goal of Italian society, there is still a long way to go.

[82] L. 20 agosto 2019, n. 92.
[83] Art. 1.

BIBLIOGRAPHY

G. Alpa, 'Lawyers' ethics in Italy – an historical treatment with some comments on recent changes in approach' (2010) 17 Int'l J. Legal Profession 307-318, at 307.

G. Alpa, 'Commissione di studio per l'elaborazione di una organica disciplina volta alla "degiurisdizionalizzazione"', (2017) 2 Rivista trimestrale di Diritto e Procedura Civile, 793.

E. Antonuccio, R. Aragona, L. Degl'Innocenti, *Il patrocinio a spese dello Stato nel processo penale. Aspetti teorici e profili pratici,* (Dike 2012), 1-308.

G. Bellucci, *Il patrocinio a spese dello Stato*, (Giappichelli 2019), 1-207.

V. Bonini, 'Il patrocinio a spese dello Stato', Negri-Renon (eds), *Nuovi orizzonti del diritto alla difesa tecnica*, (Giappichelli 2017), 405 ss.

L. Breggia, 'La giustizia del XXI secolo dentro e fuori la giurisdizione: una riflessione sul principio di effettività', (2016) 2 Rivista trimestrale di Diritto e Procedura Civile, 715.

A. Buzzoni, *Il gratuito patrocinio spiegato a mia nonna*, (FAG, 2010).

M. Caianiello, 'The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?' (December 23, 2011).

L. Camaldo, 'La direttiva 2016/1919/UE sul gratuito patrocinio completa il quadro europeo delle garanzie difensive nei procedimenti penali', *www.penalecontemporaneo.it*, 13 dicembre 2016.

N. Canestrini, 'La direttiva sull'ammissione al patrocinio a spese dello Stato per indagati e imputati nell'ambito di procedimenti penali e per le persone ricercate nell'ambito di procedimenti di esecuzione del mandato d'arresto europeo', (2017) Cassazione penale, 839-847.

M. Cappelletti & J. M. Perillo, *Civil Procedure in Italy* (Martinus Nijhof 1965), 130-143.

M. Cappelletti, 'La giustizia dei poveri', (1968) parte V Il Foro italiano, 114.

M. Cappelletti, 'Povertà e giustizia', (1969) parte V Il Foro italiano, 42.

L. Carbone, 'I limiti di reddito per l'ammissione al gratuito patrocinio', (2017) II Foro italiano, 4-10.

N. Carboni, 'From Quality to Access to Justice: Improving the Func-

tioning of European Judicial Systems', (2014) 3-4 Civil and Legal Science, 131.

F. Carpi, 'Note sull'accesso alla giustizia', (2016) 3 Rivista trimestrale di Diritto e Procedura Civile, 835.

A. Carratta, 'La "funzione sociale" del processo civile fra XX e XXI secolo', (2017) 2 Rivista trimestrale di Diritto e Procedura Civile, 579.

S. Chiarloni, 'Riflessioni minime sui paradossi della giustizia civile', (2019) 1 Rivista trimestrale di Diritto e Procedura Civile, 131.

F. Cipriani, 'Il patrocinio dei non abbienti in Italia', (1994) 117-V Il Foro italiano, 83.

D. Dalfino, 'Accesso alla giustizia, principio di effettività e adeguatezza della tutela giurisdizionale', (2014) 3 Rivista trimestrale di Diritto e Procedura Civile, 907.

F. Della Casa, 'Soggetti', in Bargis (eds.), *Compendio di procedura penale*, (Cedam 2018), 147 ss.

V. Denti, 'A proposito di riforma del gratuito patrocinio', (1969) parte V Il Foro italiano, 132.

V. Denti, 'L'avvocato e la difesa di interessi collettivi', (1969) parte V Il Foro italiano, 112.

V. Denti, 'Patrocinio dei non abbienti e accesso alla giustizia: problemi e prospettive di riforma', (1980) parte V Il Foro italiano, 126.

L. Dipaola, *Difesa d'ufficio e patrocinio dei non abbienti nel processo penale*, (Giuffrè 2016), 1-230.

F. Dri, 'Vizi e virtù della direttiva 2016/1919/UE sul patrocinio a spese dello Stato: una prima lettura', http://www.processopenaleegiustizia.it (2019) 5.

J.N. Fenoll, 'Mediazione e arbitrato: una illusione deludente?' (2017) 1 Rivista trimestrale di Diritto e Procedura Civile, 126.

I. Frioni, 'Aspetti sostanziali del nuovo patrocinio dei non abbienti alla luce del D.P.R. 30 maggio 2002, n. 115', (2003) 2 Cassazione penale, 702.

M. Giacca, 'Il patrocinio per i non abbienti nella disciplina italiana e statunitense: due sistemi a confronto', (2000) 2 Rivista italiana di diritto e procedura penale, 684.

M. Gialuz, L. Luparia, F. Scarpa, *The italian code of criminal procedure: Critical Essays and English translation*, (Cedam 2014), 1-507.

M. Golia, ‘I costi della negoziazione assistita obbligatoria alla prova del diritto Ue. Un limite all’accesso alla giustizia?’, (2019) 1 Rivista trimestrale di Diritto e Procedura Civile, 345.

F.A. Goria, *L’avvocatura dei poveri. Vicende del modello pubblico dal Piemonte all’Italia*, (Il Mulino, 2017).

A. Graziosi, ‘Media-conciliazione e negoziazione assistita: limiti o incentive alla deflazione del contenzioso civile?’, (2019) 1 Rivista trimestrale di Diritto e Procedura Civile, 35.

E. Grisonich, ‘L’attuazione della direttiva 2016/1919/UE: un timido intervento di patrocinio a spese dello Stato’, in *www.penalecontemporaneo.it*, (2016) 5, 213-230.

K. Gromek-Broc, ‘The Legal Profession in the European Union – A Comparative Analysis of Four Member States’ (2002) 24 Liverpool L Rev 109-130, at 126.

T. Groppi, ‘The Italian Constitutional Court: Towards a ‘Multilevel System’ of Constitutional Review?’ (2008) 3 J Comp L 100, at 115.

Handbook on European law relating to access to justice, https://www.echr.coe.int/Documents/Handbook_access_justice_ENG.pdf

E. Luna, M. Wade (eds), *Transnational Perspectives on Prosecutorial Power* (Oxford University Press, 2011), available at SSRN: https://ssrn.com/abstract=1976204

M. A. Lupoi, *Civil Procedure in Italy* 3 (Wolters Kluwer 2018);

M. A. Lupoi, ‘Recent Developments in Italian Civil Procedure’ (2012) 3 Civil Procedure Rev., 25-51.

F. Mastroberti, *Sodalitio Advocatorum. La Congregazione di sant’Ivone e la difesa dei poveri. Le origini francesi e la sua attività a Napoli (1607-1860)*, (Il Mulino, 2017).

U. Mattei, ‘Access to Justice. A Renewed Global Issue?’, 2007 11.3 European Journal of Comparative Law, http://www.ejcl.org

J. H. Merryman, ‘The Italian Style I: Doctrine’ (1965) 18 Stan L Rev 39.

L. Moccia, ‘Italian Legal System in the Comparative Law Perspective: An Overview’ (1999) 27 Int’l J Leg Info 230.

R. Nashi, ‘Italy’s Class Action Experiment’ (2010) 43 Cornell Int’l L. J. 147-172.

C. Pace, ‘Un aspetto dell’offerta di giustizia: il problema del gratuito patrocinio’, (1971) 30 Giornale degli Economisti e Annali di Economia, 801.

C. Peloso, ‘L’approvazione della direttiva 2016/1919 sul patrocinio a spese dello Stato: la battuta finale nel cammino verso la mappatura dei diritti procedurali fondamentali’, www.legislazione penale.eu, 4 maggio 2017, 1-30.

C. Pinelli, ‘The 1948 Italian Constitution and the 2006 referendum’, available at https://www.scienzegiuridiche.uniroma1.it/sites/default/files/docenti/pinelli/italian-constitution-2006-referendum.pdf

A. Pizzorusso, ‘L’art. 24, 3° comma della Costituzione e le vigenti disposizioni sul gratuito patrocinio’, (1967) 90 Il Foro italiano, 1.

F.G. Scoca, ‘Il “costo” del processo, tra misura di efficienza e ostacolo all’accesso’, (2014) 4 Diritto processuale amministrativo, 1414.

O. Sechi, ‘La legge sul gratuito patrocinio e gli avvocati e procuratori’ (1936) 61-IV Il Foro italiano, 363.

P. Sechi, *Il patrocinio dei non abbienti nei procedimenti penali*, (Giuffrè 2016), 1-470.

E. Silvestri, ‘Rebooting Italian Class Actions’, in C. H. van Rhee and A. Uzelac (eds), *Class Actions – The Holy Grail of (European) Civil Procedure?* (Springer 2020).

E. Silvestri, ‘Too Much of a Good Thing: Alternative Dispute Resolution in Italy’ (2017) 21 Netherlands-Vlaams Tijschrift voor Mediation en Conflictmanagement 29-38.

E. Silvestri, ‘Evidence in Civil Procedure in Italy, available at https://pf.um.si/site/assets/files/3223/evidence_in_civil_law_-_italy.pdf (2015).

E. Silvestri, ‘Italy: Civil Procedure in Crisis’, in C. H. van Rhee, F. Yulin (eds), *Civil Litigation in China and Europe. Essays on the Role of the Judge and the Parties* (Springer 2014) 235-255;

E. Silvestri, ‘Goals of Civil Justice When Nothing Works: The Case of Italy’, in A. Uzelac (ed.), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer 2014) 79-103;

E. Silvestri, ‘Class Actions in Italy: Great Expectations, Big Disappointment’, in V. Harsági and C. H. van Rhee (eds), *Multy-Party Redress Mechanism in Europe: Squeaking Mice?* (Intersentia 2014) 197-208;

E. Silvestri, ‘The Antique Shop of Italian Civil Procedure: Oath and Confession as Evidence’, in C. H. van Rhee and A. Uzelac (eds), Truth and Efficiency in Civil Litigation. Fundamental Aspects of Fact-Finding and Evidence-Taking in a Comparative Context (Intersentia 2012) 47-58.

E. Silvestri and R. Jagtenberg), 'Tweeluik-Dyptych: Juggling a Red Hot Potato: Italy, the EU, and Mandatory Mediation' (2013) 17 *Netherlands-Vlaams Tijschrift voor Mediation en Conflict management* 29-38.

E. Silvestri, 'The Legal Profession in Italy: Regulation v. Competition?', in A. Uzelac and C. H. van Rhee (eds), The Landscape of the Legal Profession in Europe and the USA: Continuity and Change (Intersentia, 2011), 145-159.

M. Storme (ed), *Towards a Justice with a Human Face* (Springer 1978).

D. Strazzari, 'Access to Justice e stranieri: l'effettività della tutela nella prospettiva pluri-ordinamentale', (2018) 3 Diritto Costituzionale, 157.

N. Trocker, 'Accesso alla giustizia e "degiurisdizionalizzazione": il tramonto del diritto al giudice e al giudizio?', (2018) 3 Diritto Costituzionale, 37.

C. Vaccà, 'Accesso alla giustizia e legal aid: un'esperienza italiana', (2006) 11 I Contratti. Rivista di dottrina e di giurisprudenza, 1058.

V. Varano and A. De Luca, 'Access to Justice in Italy' (2007) 7 Global Jurist (Article 6) at 21.

V. Vigoriti, 'Access to Justice in Italy', M. Cappelletti e B. Garth (eds) 'Access to Justice, I, A World Survey', (A. Giuffrè - Sijthoff and Noordhoff, 1978), 649.