

Justice and Profession in 2020

CCBE *Virtual 2021 European Presidents' Conference*

Roma, 3 febbraio 2021
(Ufficio studi, Scheda n. 8/2021)

Coronavirus pandemic: an overview of the emergency measures and challenges to legal profession

In order to deal with the epidemic emergency and to ease the burden of coronavirus' impact on society and market economy, the Italian government adopted several measures in the past year, by the means of emergency decrees (Law Decrees), gradually introducing restrictions – at the same pace of the progressive spread of the virus – for all kind of activities, and focusing on the management of judicial workload, the organization of judiciaries and the administration of justice.

The Italian National Bar Council (**CNF**) worked in constant synergy with the Government, suggesting the necessary and appropriate measures to be adopted and regulations to be amended in order to ensure ordinary judicial activity, respecting the necessary safeguards preventing the spread of the virus, while complying with the rule of law and ensuring the protection of rights, as well as addressing issues involving local Bar Councils and lawyers, whose ordinary activity was at risk or not pursuant to statutory limits or specific relevant emergency provisions.

After the January 31st declaration of the state of emergency, the Government introduced emergency provisions, restricting the exercise of fundamental rights in order to contain the infection due to coronavirus, initially only in a few designated and limited areas of the country (11 municipalities), the most affected by the virus. While national health authorities started to draw a shortlist of recommendations to avoid the infection and promoting the adoption of protocols for occupational safety, the **Italian National Bar Council (CNF)** and the **Ministry of Justice** adopted a paper of **Common Guidelines** on 28.02.2020 for the containment of the virus, urging all judiciary offices to observe precautionary health rules, as set out by national health authorities and specified for the judicial system, for the management of hearings and access to courts, praising a close collaboration between judiciary personnel and lawyers in order to grant judicial services, encouraging the use of digital tools (such as electronic filing for civil procedures), so to reduce physical access and personal contacts. Restrictions kept increasing day-by-day, reaching the peak with the nationwide lock-down, established by Decree of the President of the Government of 9 March 2020, which brought nearly all activities to a halt, and led to the definition of a complex intervention of economic relief to assist families, workers and companies. Several Law Decrees introduced provisions regarding judicial system, initially limited to the areas (n. 9/2020, n. 11/2020) and later extended to the entire territory (Law Decree n. 18/2020, the so-called “Cura Italia”, and Law Decree n. 23/2020, known as “Liquidity” Decree), establishing an emergency legal framework for the exercise of jurisdiction, so to grant access to justice and ensure the protection of rights in all sectors of jurisdiction.

To achieve the main goal of reducing the risk of infection, the first intervention introduced **immediate measures**, for the entire period of country lock-down, effective between 9 March and 11 May 2020, postponing automatically all scheduled hearings and

pending proceedings to a later date (after May 11th). In order to neutralize the negative impact of the postponement of most of the judicial activities on the protection of rights a suspension of all procedural statutes of limitations was deemed necessary.

On the other hand, a transitional period was established, to achieve the complete reprise of judicial activity, entrusting Court Presidents with the power – and the duty – to issue a set of **organizational measures**, to provide and ensure that all hearings taking place were to be carried out in compliance with certain health and safety rules, according to common guidelines.

In the suspension period (first phase), initially set due at the end of March, then on April 15th and furthermore extended to May 11th, all the hearings of civil, criminal, juvenile, administrative and tax-law proceedings, in all Italian courts, were automatically postponed and (all) statutes of limitations (including enforcement procedures) suspended, as well as the terms for the adoption of judicial acts. However, such measures did not apply to specific proceedings (among which proceedings held by juvenile courts regarding declarations of adoptability and minors entrustment; civil matters such as alimony and support obligations, precautionary proceedings connected to the protection of fundamental rights, protection orders against domestic violence; criminal proceedings regarding *habeas corpus* hearings in case of arrest, or hearings with defendants in pretrial detention upon the request of the accused, urgent evidentiary hearings) and to any other proceeding in which, according to the judge's appreciation, postponement would cause serious harm to the parties, provided that the competent court issued a declaration of "urgent and immediate trial". Such a resolution was deemed as a balanced result of an attentive evaluation led by the judge on the urgency of the proceeding and the seriousness of prejudice, considered also factors such as personal state of need, potential harm to individuals' rights and potential economic harm.

Since the end of the suspension period, from the opening of the transitional phase starting from 12 May 2020 (second phase), the Italian justice system has strived to get back on track, implementing the emergency provisions adopting the necessary organizational measures, such as: limiting public access, ensured only for urgent matters; limit the opening hours of judicial offices; regulate access to services (requiring reservations, even by electronic means, or setting a detailed schedule for hearings, in order to avoid gatherings); order that all hearings (not only for criminal procedures, but any type of hearing) can be:

- postponed after 30 June 2020;
- held behind closed doors;
- to be conducted through the new tools introduced by the "Cura Italia" Decree to manage judicial proceedings, such as:
 - o through a remote connection (**virtual hearing**), or
 - o through the electronic exchange and filing of written notes, containing only the claims and conclusions of the parties, which will be followed by subsequent adoption of the judge's act (**written hearing**).

Given the uniqueness and the novelty of the new "**types of hearing**", as they have been universally referred to, **CNF** cooperated with the other institutions involved in the exercise of jurisdiction, such as the Supreme Council of the Judiciary (**CSM**), developing a series of **operational guidelines** for managing virtual and written hearings, in order to provide a strong core of **common rules** for all the **different proceedings**, compliant with the right to a fair trial and to an effective remedy and due process guarantees. Moreover, CNF emphasized the necessity to ensure a **uniform application of the law**, given that

the legislator left to the local judge evaluation the choice of whether to use the new means, on a case-by-case basis, depending on the coronavirus' spread and trend. Several **Protocols** have been signed with CSM, with regard to civil, criminal and juvenile proceedings, with the **Court of Cassation** for the last grade of civil and criminal appeal, and with the Administrative State Council (**Consiglio di Stato**) for administrative proceedings, with strong suggestions regarding the new measures, so that all hearings taking place until 30 June 2020:

- when requiring the attendance of parties and counsels could be held by means of remote connections (**virtual hearing**);
- when requiring the attendance on counsels only could be carried out in written form (**written hearing**);
- when requiring the presence of further attendants (such as witnesses, third parties, experts), could be carried out in the traditional way, complying with the specific rules of conduct implemented in order to ensure health and safety of all attendants (**in-person hearing**).

Unfortunately, most of the Protocols were not immediately effective, for it was demanded to the head of the local Court the adoption of specific measures, which had to set in force specific rules according to local needs. The only exception concerned administrative proceedings, since all public law practicing lawyers and magistrates deemed more effective the adoption of a national uniform Protocol.

Despite the divergencies in local application, CNF succeeded in its efforts, contributing to the interpretation of the emergency provisions in accordance with the rule of law, the right of a fair and to an effective remedy and due proceedings guarantees, suggesting the proper procedure for the hearings, and trying to clear the doubts on several issues not disciplined by the law, both for *virtual hearings* and *written hearings*, for instance suggesting the appropriate procedures for party summoning, the need of informing in advance the parties of day, time and mode of connection, stressing on the legal consequences of failure of attendance, recommending the minimum requirements of the IT system for videoconferences – able to grant the concomitant participation of the parties and the exercise of defense rights – and reminding of requirements for electronic filing of documents – already provided for ordinary civil proceedings in first instance cases, but extended to most of the proceedings in order to avoid access to judiciary offices so to reduce gatherings and the virus' spread. – calling for simplification and stressing on due respect for terms and formalities not to incur in any time limitation. The extension of electronic filing to criminal proceedings, as well as the other different filed of law where it was not provided for yet, led the CNF to **praising** strongly for **lawyers' cooperation** with judges and judiciary personnel, for instance providing the electronic production of copies of acts already submitted in paper, as well as synthesized written notes, in order to speed up proceedings where the electronic-telematic production was not compulsory, and solving at the same time the issues of personnel working from home and unable to access physical or digital archives.

Nonetheless, on several occasions the National Bar praised the Government to adopt adequate measures and guidelines – such as for family proceedings, to be considered urgent by definition, and not by the judge's evaluation – or to advise from restraining in the use of the new procedures for specific reasons and safeguard the principles of orality, concentration, immediacy and publicity, at the base of the criminal judicial system, for instance in order to rule out the chance to use remote hearing for the collection of evidence, deemed not sufficient to guarantee an effective participation of the defendant

counselor. At the same time, it was suggested to encourage alternative dispute resolution remedies, such as assistive negotiations, quite effective in family matters, endorsed with economic benefits, but the proposal led only to the provision allowing the use electronic communications.

As we're all quite aware, after June 30th the pandemic was all but over, so the Government decided to extend the above-mentioned measures – remote and written hearings, local courts' organizational guidelines – encouraging the use of telematic and electronic tools, introducing compulsory electronic filing of document for criminal proceedings, allowing lawyers to access court clerks' registries online, as a new system was developed and implemented, in order to avoid any unnecessary contact with judiciary personnel, which was significantly worked remotely, as many public offices personnel has in the last year.

At the same time, CNF has worked non-stop to support lawyers and local Bars, for the organization of daily work, since legal offices were not listed among the suspended activities, and subject to comply with safety rules adopting specific Protocols to contrast the spread of the virus; at the same time, support was essential for training, regarding the use of videoconference systems, useful not only for virtual hearings, but also for continuing education events, meetings, and so on. Such a system, for instance, allowed CNF to keep in touch with all the local Bars, and evaluate the issues emerged in different territories regarding access to justice, and the local safety rules.

Legal Profession: the Decree on the Specialization system for Lawyers.

On 12 December 2020 was published the Ministry Decree n. 163 on lawyers' specialization, that redefined the system already disciplined by the Decree n. 144 of 12 August 2015, introducing the necessary amendments for the system to work properly. The measure is the result of a virtuous and constant cooperation of CNF with the Ministry of Justice, and of a consistent dialogue with local Bars and specialistic lawyers' associations, according to the provisions of Law n. 247 of 31 December 2012, which laid down a new regulation of the legal profession, invited to share ideas and proposals, and developed into a significant contribution.

The implementation of a specialization system is a landmark for the legal profession: on one hand, is going to play a key role for legal professionals' qualifications, and on the other hand it will be a useful tool for citizens and individuals, when facing the choice of a lawyer, since they'll be given a new crucial parameter, which could be decisive for hiring and entrusting the handling of a case.

The specialist title is conferred by CNF, evaluating the application and the relevant submitted to the local Bar, according two different routes:

- effective attending of two-year (200 hours of didactic) **specialization courses**, organized by law faculties according to protocols subscribed with the National and/or the local Bars, with the cooperation of specialistic lawyers' associations, compliant with the *Guidelines* set out by a permanent Committee of lawyers and professors nominated at the Ministry of Justice, so to ensure a specialistic orientation and approach of the courses, with a final exam to determine the fair level of education and fulfillment of the courses' goals;
- **acquired experience in the sector**, though the exercise of professional activity, submitting the application and relevant documentation to the local Bar, and then having an interview with a specific evaluation Committee at the CNF, with the

presence of experienced lawyers and professors, chosen by CNF and the Ministry of Justice from a list of subjects with the required experience and requirements. During the interview the lawyer will be asked to discuss the titles and documentation, in order to validate the acquired experience in the sectors applied for.

The Decree 163/2020 disciplines thirteen sectors of specializations, setting to two the maximum limit of achievable specializations for lawyers, so to ensure adequate qualification. Along with traditional fields of law (civil, criminal, public, labor and so on) new disciplines are accounted, such as competition, sport, media, digital communication and data protection, human rights protection and protection of individual, family relations and minors. Regarding the civil, criminal and public sectors of specialization, a list of subsectors (called “indirizzi”) is introduced, specifying that for those three sectors the specialist title can be obtained attending the specific courses or on the base of substantial experience in at least one of the subsectors, and limiting to three the subsectors the titles that lawyers can obtain.

Different duties are entrusted to CNF with the new specialization system, a great opportunity for lawyers who are ready to improve their professional development, while emphasizing that the lack of a specialization title cannot be considered as a lack of professional competence dealing with client’s issues. It will be a chance to remind that specialization will not replace the issue of competence and continuing education, fundamental rules of deontology already binding for lawyers, who are required to acquire post-qualification training credits, in order to keep up with the rapid rates of change in law and in practice, and in the technological and economic environment.

Projects: CNF proposal for EU recovery plan, outlining a Justice system for (at the service of) the Individual, and setting three different objectives, such as simplification, a better organization and enhancement of competences

CNF decided to draft a proposal for the Italian Recovery and Resilience Plan, required to be submitted to benefit from the Recovery and Resilience Facility.

The approach is different from the traditional schemes, for it is focused on individuals and their need of protection, set at the core of the justice system.

This is the root principle which led to the development of detailed and integrated projects and agendas, shared with the Italian Government and to the Minister of Justice, to support justice modernization, considered as the leading item for the promotion of a more inclusive society, with larger levels of common well-being, able to grant the best answer to the citizens’ expectancies of rights’ protection.

CNF proposal, which falls within two different flagship areas chosen by the Government in the Recovery and Resilience Plan, Justice and Employment – which implement the “Modernize” and “Reskill and Upskill” areas highlighted by the European Commission in the guidelines for submitting the plans – stresses that any reform of the judicial system cannot be conceived solely on a budget basis but must be drafted and oriented to the constant improvement of the services offered to citizens and business services. That goal can be achieved working along three guidelines, which emerge to be closely connected:

- rationalization and simplification of the actual legal framework;
- investments in the organization of justice;

- high level training of professionals for the management of judiciary offices and implementing competences of specific personnel.

In order to contain the pending crisis which undermines the justice system, apart from any measure amending current civil or criminal proceedings rules, the project considers more urgent a call for competence and responsibility, such as specialization of the judges, aspect which has also been considered in positive terms by European institutions, in the scope of improving the quality and efficiency of justice.

The pandemic shed a light on some critical issues affecting structural conditions of the justice administration system: judiciary building (such as prisons and detention centers), safety of courtrooms, organization of role and personnel, besides the need to strengthen and implement the IT justice system, which helped supporting judicial activity in the past year, by means of filing documents, pleads, requests, but also for managing hearings, and not only for the scope of communication, as it was initially conceived and developed. So many critical issues demand to entrust administrative organization of justice to highly qualified professionals, thus discarding the current ambiguity of the double profile of the head of local Courts, who are both judges and administrators, and calling for a Court Manager, entrusting district Judicial Councils (*Consigli Giudiziari*) with the duty of supervising the efficiency of the adopted plans. For the implementation of the plan several steps are crucial: the introduction of a staff office at the service of court managers, with the tasks of gathering statistical data, taking care of contracts, public procurement and for the management of court personnel; a permanent continuing education of the management staff; compulsory resources planning and reports; budget autonomy of district managers. Moreover, lawyers have always been available to be entrusted more functions in the jurisdiction system, and therefore they need to share the same route of continuing education, along with Courts' Presidents and managers, so to be qualified in the governance field, in order to support them for the development of projects, planning, supervising, pursuing an organizational well-being, supporting and corroborating jurisdictional statistics and assisting in space management.

The proposal aims to express a global vision of justice, in accordance with the principle of competition and responsibility, aware that the extremely complex system, harshly tested during the last year, cannot decline its key role, the implementation of constitutional values and principles.