

Access to Justice

After Covid 19



July 2020

The risk of (too much) digitalisation

FBE - Commission on Access to Justice.

The Access to Justice Committee met several times during the COVID emergency, using video communication.

It examined the measures that had been taken in the various States due to “Covid state of emergency”.

A series of measures have been adopted that affect the population in all areas. We can highlight among them, the confinement and reduction of the business activity.

Only the activities that have been considered as essential by the Governments were carried out.

However, in the area of Justice, as a result of the state of alarm, a series of measures have been agreed.

The measures adopted in relation to the provision of essential services in the Administration of Justice and the suspension of deadlines.

In general we had 3 sectors:

1. total suspension of judicial activities deemed unnecessary;
2. judicial activities that could be carried out by means of a written cross-examination of the case; hearing that have been held in telematic form with remote audio video communication;
3. few cases in which the Judge held a hearing in person (with physical caution), in which it could not be done otherwise.

The consequences were serious both as regards the protection of civil and economic rights and as regards the situation of defendants in criminal trials.

What had the greatest impact - also in the future - were the remote hearings with video.

It seemed to many that it could represent the future, almost as if the direct relationship with the Magistrate or Judge could be cancelled and replaced with a video call.

An established professor, really clever and concrete, Prof. Giuliano Scarselli, wrote that we must be very careful about the restarting of judicial activities and ensure that remote hearings are an exception.

If we accept the idea that justice can be dematerialized, for the sake of consistency, it will be necessary to complete the work by taking further, consequential steps.

From a regulatory point of view, the first step will be to abolish all the rules of jurisdiction for the territory of the court.

Step 1.

1.1. It will be said that if the trial is completely telematic, and everything happens and takes place at a distance, without reference to a spatial place, it makes no more sense to talk about (making Italian examples) the Court of Roma, rather than Palermo or Milano.

The trials, in fact, will no longer take place in Palermo or Rome or Milano, but sine loco, outside any spatial dimension. There will then be a centralized telematic system managed by the Ministry of Justice, and so the first 50 articles of the Code of Civil Procedure will disappear.

1.2. With the abolition of all the rules on jurisdiction, a number of other provisions of the Code of Civil Procedure will then be abolished, and the whole idea that the process should be predetermined by a code will be called into question by doctrine, which will call for streamlining, flexibility, modernisation in its place.

The dematerialization of justice will lead to the disappearance of the palaces of justice.

Step 2.

At this point, Step 2 could start.

Weakened, and largely suppressed, the code of procedure, we will begin to consider as harmful the procedural rules that predetermine the trial regardless of its concrete needs, and, always in the name of flexibility, we will begin to support, on ideas that it must be by the judge, albeit with the help of lawyers, to establish the rules of the trial, case by case.

This phase will mark the end of the code of rite and procedural law.

Also in this phase the telematic systems of data collection and previous jurisprudential precedents will be improved; it will strengthen a tendency already in place to exclude that the judge can decide according to science and conscience, and it will be affirmed that every judge will have to decide according to the precedents that result from the telematic system.

The idea of a so-called "p.d. justice" will be reinforced.

Step 3.

Yes, it will be said at this stage that a trial without predetermined rules, and with predictive resolutions, no longer needs either lawyers or judges in the traditional sense.

It will be the beginning of the end.

As far as lawyers are concerned, it will be said that their function has ceased, at least in the sense that it is no longer necessary, and indeed it is contrary to the objectives of this new justice, that of a professional figure who makes an exception to the affirmation of a rule, who elaborates an antithesis to the exposition of a thesis, exalting a right to be heard, which is nothing other than the sterile exercise of a cavalier and deviant claptrap

And finally, it will be said that the increasing access to regulatory and jurisprudential data that all citizens can enjoy through the internet makes the presence of a lawyer in the trial superfluous, since no one will need to be helped (ad vocatus) to make a right in such a well organized system.

But Step 3 won't save the judges either.

The idea of the judicial office will no longer exist, the rules on jurisdiction will be abolished, and the trial will be dematerialized, the judges will no longer be granted any career: there will no longer be the presidents of the offices, the presidents of sections, everything will go automatically with the system of justice organized by the Ministry.

The judges will be given the career for grades but then, as said, suppressed most of the appeals, in a project of justice that aims to do without controls, even that kind of career will be prevented.

Moreover, computer techniques will be perfected and it will be imagined that a series of simpler disputes can be decided directly by machines, without any human intervention.

The judges will then be left with the most delicate cases, the rest will be decided without them; for this reason they will decrease in number, in step with the decrease in the amount of litigation; and probably their salary will be reduced, in proportion to the loss of their social function.

Step 3 will thus close an era.

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