DIRITTO PENALE CONTEMPORANEO

THE ROLE OF THE COURTS OF APPEAL IN THE CHANGING WORLD

The experience of the Court of Appeal of Milan in civil procedures

Francesca Fiecconi
(Corte d'Appello di Milano)

Abstract. *Questa relazione è stata svolta alla quarta conferenza europea dei presidenti delle Corti di appello che si è tenuta a Turku, Finlandia, il 18 settembre 2015, avente per oggetto "il ruolo delle Corti di appello in un mondo in cambiamento", in rappresentanza della Corte di appello di Milano chiamata a dare il suo contributo alla discussione unitamente alle Corti d'appello di Francia, Finlandia e Norvegia. L'analisi si sofferma sui risultati ottenuti in sede civile dalla Corte di appello di Milano nell'ultimo lustro, proprio perché in questo campo si è reso possibile trarre le prime conclusioni sull' impatto delle recenti riforme delle leggi processuali, mirate a dare maggiore discrezionalità ai giudici nella scelta delle decisioni di primo grado che meritano migliore analisi o revisione e a consentire loro l' utilizzo di nuove forme di organizzazione interna del lavoro.*

Thank you to everyone for being here today. On behalf of the President Giovanni Canzio of the Court of Appeal, I will focus on the Role of the Court of Appeal in the changing world.

Let's start considering the experience of the Court of Appeal of Milan. I have decided to limit the topic to civil procedures as those may share more aspects with the other European systems of justice.

Introduction

The dramatic situation of Italian delays and procedural backloads both at the first and second level of the jurisdiction has been clear for everyone to see in the European Union. Nevertheless, the analysis of the past of the Italian justice system has shown how a better, fair and efficient system of justice can be enforced. The role of the Courts of Appeal appears to be of a paramount importance giving optimism in building up and enhancing a fair and efficient legal system.

The purpose of this presentation is to underline which conditions are essential in order to attribute to the Court of appeal the role of milestone in a fair multilevel justice system.

Reliability and fairness of a justice system are deeply, and necessarily, linked to a rational national circuit of appellate Courts. On the one hand, those guarantee the establishment of judicial precedents; on the other, they guarantee also the enhancement of a virtuous, effective and proactive vigilance of local internal strategic means. In particular, the aspects that should be –and that have been- considered in the improvement of the entire justice system are:

Human Resources and Internal Organization;

Procedural Laws and Reforms;

Digital Instruments in Proceedings;

Role of Lawyers in enforcing the rule of law.

Focusing on the experience of the Court of Appeal of Milan, each of the above mentioned aspects will be, in details, described.

Human Resources and Internal Organization

The number of lawyers that operate in the town of Milan (about 11.000) and the number of inhabitants (6,6 millions that represent the 10% of the national population) and factories (at least 817.113 in the west part of Lombardy) territoriality connected to the city, at least from a quantitative point of view, prove the important role of the Court of Appeal of Milan. Indeed, records show that every year about 5000,00 proceedings are filed before this Court. The amount of proceedings that require to be decided by the Court led to a deep reorganization of its structure: even if the total available financial resources did not increase, the Court of Appeal of Milan has been recently reorganized.

In particular, such reorganization has impacted on the judicial body, the administrative body, the role of internal trainees and the rationalization of space and procedures.

The **judicial body** consists of 112 professional judges; 18 of those are presidents and 94 are judges although the organic plant has a capacity of 131 unities. Judges work in panels of three components and decisions are taken by the majority through a collegial method. Significant the percentage of women involved as a judge: the 63,4% of judges are women, a percentage that is considerably higher compared to the national one (which is about 43%). Considering the percentage of female presidents, those represent the 44% of the 18 presidents of the Court. The strong presence of female judges in the judicial body testifies a "no gender oriented" justice, whereas in other working contexts the law had to establish the minimum percentage of female presence in order to break the so called "crystal ceiling" (*plafond de verre*) that generally jeopardizes the achievement of leading positions to female workers (i.e. public corporations). Moreover, 30 new judges will work in the Court: those lay judges

(appointed lawyers) are in the course of being selected as temporary appellate judges by an internal commission.

As to the **administrative body**, only 176 out of the total 227 established in the organic plant are public servants. Administrative and accounting tasks are dealt by the 37% of those employees. Insufficient financial resources has stopped the Government in planning to hire new resources since several years (at least 25 years) and this has caused an increase on the average age of the administrative body. The 46% of public servants is over the age of 50 and this fact initially entailed a negative attitude towards technical adjournment.

In order to increase efficiency and help several economic regional sectors in crisis, in 2007 a new law introduced the possibility for the Court of Appeal to cooperate with younger workers coming from those industries. This law contributed to improve, from a quantitative and qualitative point of view, the internal work and to increase the level of common trust in the justice system. Nowadays the Court counts 69 temporary workers.

In the light of the spontaneous cooperation with young law graduates, in 2013 the legislator introduced the possibility for those students to take part in the work through an unpaid **traineeship**. The support given by the new working force has increased the work capacity of judges (plus 30%) and showed the first steps in the creation of a new motivated class of competent lawyers and judges. So far, there are about 150 trainees employed in the Tribunal and in the Court, 17 of those in the latter.

The existing space, internal procedures and regulations have been rationalized by the President of the Court. In practice, such **rationalization** implies the possibility for lawyers to keep their own documents and briefs after the first hearing until the proceedings get to the final step and the introduction of a digital system at a national level helped in saving space, human energies and paper.

The process that aimed to an efficient zero-costs reorganization of the Court has been supported by the integration of a constant multilevel surveillance on length and quality of work. The cooperation between those involved on different levels in the justice system represents the successful key in order to achieve the purpose of a fair system of justice. An important role has to be recognized to the Presidents of Tribunals and the President of the Court, chief clerks and to the Consulting District Chamber of the Judiciary. The latter, composed by the President of the Court, appointed judges, prosecutors, academics and lawyers, plays a fundamental role in exercising an itinerant full surveillance over the Tribunals of first instance. Moreover, it represents the authority that studies and approves new methods of internal organization; its weekly assemblies are open to judges and also to European visiting judges. In analyzing those institutions involved into the reorganization process, the Official Lawyers Association (OLA) definitely gave a substantive support to the project; in particular, concrete results have been achieved through its cooperation with judges. Last but not least, the

Superior Council of Magistracy and the Ministry of Justice through periodical auditing of the internal records and results report satisfying results with respect of backlog reduction and time of the process, as we will see further.

Procedural Laws and Reforms

In 2012, the legislator deeply reformed the appellate civil system by delineating the appeal as a "limited revision instance" of the first decision. In particular, considerable limits have been imposed to the possibility for the panel to proceed with a new evaluation of facts and law, evaluation that can be done within the track of the appellant's claim. The importance given to reasons on which the appeal is based increased. Indeed, the appellant has the burden to precisely point out the misleading reasoning of the decision against which the party is appealing. The panel will, consequently, have to analyze the first instance decision in the light of the critics underlined by the appellant who, therefore, has the chance to lead the deciding panel by proposing a different solution of the case (article 342 civil procedure code). This procedural rule is the result of years of best practices and precedents established at the appellate level.

The legislative reform did not modify the composition of the panel that will decide the case, three judges will be sitting in the panel. Such composition is still considered as a guarantee of internal judicial stability and unification of case law, also because first instances cases are mostly decided by a single judge. From a structural point of view, the second level proceeding differs from the first instance one given that the process is mainly based on written evidence and scripts and the adversarial trial generally consists in two audiences. Except for certain restricted cases, introduction of new evidence has been forbidden.

As to the length of the proceedings, the law indicated the limits of the duration of the trial according to the average European standards. Specifically, the first instance proceeding should last no more than 3 years, the second instance trial 2 year whereas the Supreme Court should decide the case within 1 year. In the 11,5% of the cases, decisions are justified by a short motivation.

Following the German and the UK systems, the 2012 legislator has introduced a preliminary "filtering system": article 348-*bis* of the Italian civil procedural code provides for a preliminary test on the reasonable possibility to grant the appeal. If the decision on the appeal is judged to be unlikely overruled, the appeal will be considered not admissible and the appellant will be condemned to pay a double judicial fee. In other words, through a preliminary test, the panel of judges avoid to proceed with the process in those cases in which an overruled decision has not the chance to be taken. This rule has been thought as a powerful measure of dissuasion of "strategic appeals" but so far its application involved only the 5% of the total appeals. In this prospective, a doubled judicial fee has been introduced against the losing party in case of rejection of the appeal and this possible event actually worked as a real deterrent and preventive

measure aginst strategic appeals . Most part of these fees increases the state funds for legal aid.

The introduction of the "filtering system" has not been without criticism and a strong request for revising the "filtering system" has been supported by a great number of lawyers. Such critics emphasise the high costs that will incur against the appellant party. Based on that, the right to appeal appears to be substantially jeopardized. However, even if at first sight those critics may find a general and common support, the analysis of the practical application of such rule will lead to the conclusion that the "filtering system" in practice represents an instrument in order to guarantee fairness and rapidity in justice. Its application has, indeed, involved only the 5% of the total civil claims proving a scrupulous use of such admissibility test by the judges.

In details, it should be considered that the "filtering system" imposes to judges to *study&discuss* each case at the very beginning of the proceeding. In this way, delays will be avoided and the caseload will decrease. A very first step screening of the main features of the case and a first examination of the reasons on which the appeal is based definitely help judges in organizing their agenda. Again, delays will be avoided and decisions will be taken in a shorter period of time, meaning a more efficient use of the available resources in the respect of the rule of law. In any event, the right to appeal the first decision before the Supreme Court is a constitutional right, guaranteed for all civil and criminal proceedings. Therefore, the combination between the "filtering system" and the fundamental right to appeal before the Supreme Court guarantees the right of a second instance decision. In this respect it may be sustained that limitations introduced through article 348-*bis* c.p.c. do not jeopardize the right to appeal.

The same conclusion should be drawn in the light of those rules set by the European Convention of Human Rights. In particular, the ECHR establishes the right of appeal as essential in criminal matters. Indeed, art. 2 protocol 7 of the ECHR reads: "*everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal*".

The wording of the rule is clear and a limitation on the right to appeal has to be allowed when there is a superior Court . On the other hand, art. 6 ECHR shall not be considered as a criterion in order to guarantee an unlimited right to appeal. Such rule, indeed, focuses on the fairness of the trial in terms of impartiality of the tribunal, publicity of the process, presumption of innocence and minimum rights that might be equally guaranteed by the Supreme Court, the third instance Court. However, it should be considered more advisable a system where the right to appeal is guaranteed by two levels of jurisdiction, given the fact that the Court of Appeal may revise the interpretation of facts and enhance stability and efficiency at the territorial level.

Since 2010, Procedural law established that the panel has the possibility to motivate the decision taken through a short motivation that has to be given right after

the first hearing. Such succinct motivation is considered to be sufficient, in the light of an effective reasoning, for cases that do not require strong revision of facts or law but only a slight review (that regards 11,5% of cases).

In the same year, an ADR system has been conceived as a mandatory first step for most of civil trials on a the first instance level. In particular, lawyers have the duty to attempt a successful negotiation process before filing new proceedings. Negotiation, mediation and arbitration, as alternative dispute resolution, can achieve the effectiveness that the judicial decision is often not able to guarantee. The use of ADR, based on the cooperation between the involved parties, represents, in most of the cases, an economically convenient method in order to get a resolution. Considering such advantage, the Court of Appeal may promote ADR when the appeal seems, in terms of costs, inconvenient for the involved parties. As to the efficiency of each of those ADR methods, recent records show that mediation has been less successful than what expected because it does not attribute space or relevant role to lawyers. That is one of the reasons why negotiation is proving to be much more preferable.

It is interesting to consider some data in order to evaluate the impact of the above said reforms.

Throughout the examination of number of pending and decided civil proceedings, the Court of Appeal of Milan showes an inversion of the trend with a variation of -27% of the pending proceedings. Making a comparison between year 2012, 2013 and 2014, in the last year 10.374 are pending out of 12.203 pending in 2013 and 14.560 pending in 2010. In 2014, a higher number of cases have been decided: 6.991 decisions have been taken compared to 5.668 taken in 2010. Analyzing the substance of the case, the majority of appeals concern contracts, torts liability, bank and insurance law, labour law, family law, corporate law, intellectual property, trademark law and antitrust law (these last ones have a faster track guaranteed by a specialized section).

Rapidity and reasonable duration of the process, from a negative prospective, belong to the history of the Italian justice system. Nevertheless, real steps forward, in this sense, have been done. In particular, the Court of Appeal of Milan has, with the facts, underlined the importance of a reasonable duration of the trial as an essential element in considering the fairness of the process. Indeed, the average length of trials has consistently decreased in the period 2012/2014 and it currently amounts to 26,7 months. The fairness of such duration is proved by the limited number of complaints based on the unreasonable length of the process: 68 appeals have been based on the unreasonable length of the trial in 2014 out of the 460.000 decisions taken in the entire district. This number has considerably decreased compared to year 2012 and year 2013: 178 during the first one, 135 in the latter.

From a general perspective, stability in civil decisions may be also affirmed. In this sense, numbers appear to be clear: the 19,3% of first degree decisions are appealed before the Court of Appeal of Milan compared to the 20% of appeals registered on a national level. In the 52% of the cases, the Court of Appeal confirm the first instance decision whereas a partial confirmation is taken in the 26% of cases. Only the 13% of appeals lead the Court to reverse the first instance while the remaining cases are closed by different decisions. In other words, the 80% of decisions are confirmed or partially

confirmed by the Court of Appeal of Milan delineating a low reversal rate in comparison with the national percentage that amounts to 68%. The 27% of the decisions are appealed before the Supreme Court and the 80% of those are confirmed. As on the second instance level, the reversal rate amounts to 20% compared to 32,2% registered on a national level. Based on such data, the stability rank is of substantial consideration: in total 98,2% of total district civil decisions remain stable or confirmed by the Supreme Court.

Digital Instruments in Proceedings

After a long period of regional experimentation in some Tribunals of North Italy, in 2012 the use of digital instruments has been established as mandatory at national level. In particular, digital proceeding has become compulsory for the first instance in 2012 and subsequently, in 2015, for the second instance. Among those new instruments that support the work made by the Court, the program "Consolle", as defined by the Ministry of Justice, gives a substantial assistance in organizing and recording the civil proceedings. Indeed, the 70% of Court clerks uses the national "Consolle" as an essential support to their work and for the notification of acts to parties and lawyers. Digital proceedings concern notice of pleadings, answers and decisions, registration of documents and briefs, public clerks communications, case management and Court management. Those new means through which the job can be done definitely increase the general working capacity in terms of quantity, quality and rational distribution of work.

In practice, an important change occurred considering the use of digital signatures by judges and Court clerks, the possibility to have "on site" assistance that helps in solving digital issues and the digital assistance guaranteed to the public which implies well-timed feedbacks to those involved in proceedings.

The digital recording system has also impacted on the unity of local case-law creating a digital internal library of precedents. The chance to consult previous decisions and to adopt the constant interpretation given in respect to a certain rule of statute law guarantees uniformity and stability in decisions. If judges do not stick to the common interpretation of law, they do it with full consciousness of giving a new precedent.

Thanks to such uniformity and stability also the certainty in the applicable law increases.

The use of digital instruments has improved a standardisation process in terms of formats used by judges and lawyers. Even if the Court does not provide a format that *Lawyers&Judges* should use but only recommendations for paper drafting, the digital system automatically spurs *Lawyers&Judges* in adopting rational and efficient as well as uniform formats.

The main issue that the digitalization process may have to face concern its enforcement. However the Court has found an efficient support in the cooperation with young trainees, temporary workers and the Lawyers Association.

Role of Lawyers in enforcing the rule of law

The Court of Appeal and the Tribunals cooperate with the local Official Lawyers Association in order to improve best practices in the light of a better system of civil justice. This cooperation commonly results in financial support by the OLA that shows its interest in the refinement of the digital process.

Secondly, continuous traineeship of lawyers and judges is locally organized by both the Superior School of the Judiciary and the OLA: this makes jurists coming from both sides feel as a part of a common project, in the sense of belonging to the same reality that increase the improvement of the entire justice system.

Thirdly, also the legislator has recently highlighted the importance of the role attributed to lawyers.

Lawyers have been trusted in order to find new forms of ADR and to increase the use of the existing ones. As an example, negotiation, that was mentioned above, is now regulated by law, assigns a leading role to parties' lawyers in helping those involved in the dispute to find a joint resolution. In 2014 the legislator has introduced, over certain matters, a mandatory negotiation as a precondition for taking action. Those areas mainly concern cases about traffic accidents and requests for payment up to 50.000 euro. Compared to mediation, this form of ADR seems to be more successful.

Conclusions

In times of spending review and short resources, a successful receipt does not exist and a general formula that suits to each legal system cannot be drawn down. However, the recent experience proves that, at zero-costs, cooperation and joint traineeship between *Lawyers&Judges* is essential in creating a reliable system of justice. Digital proceedings, filtering systems, systematic professional traineeship and adjournments are helping in reaching the ambitious purpose.

Therefore it may be sustained that the role of the Courts of Appeal is still fundamental in order to coordinate and locally promote unity of law and virtuous connections among the above described common resources. Modern times should not undermine the positive influence of Appellate Courts in building up an harmonious system of justice.