Chapter I
Constitutional principles and effective justice

SUMMARY: 1. Access to justice as the supreme constitutionally guaranteed principle. – 2. Work as a vehicle for the principles of equality and solidarity toward substantial justice. – 3. Effectiveness, efficiency and economy of the judgment: illusion or reality? – 4. The demands of justice based on health, migration, climate change and social relations. – 5. Constitutional foundations: The principle of horizontal subsidiarity and the search for alternatives to a trial.

1. Access to justice as the supreme constitutionally guaranteed principle

As we begin our analysis, we must mention a fundamental methodological observation: discussing legal clinics as an element of access to justice is conceptually different from examining access to justice alone. Therefore, the aim here is not to address fully the issue of access to justice, which goes beyond the limits and objectives of this discussion. Rather, we will construct a model in which to insert legal clinics and the cultural movement accompanying and sustaining them. Be that as it may, we should offer a general reconstruction of the institution, since losing its frame of reference and support would limit the study's depth, especially from a constitutional standpoint. Therefore, we have consciously chosen to trace a pathway in the broad topic of access to justice that includes the topics discussed below, while remaining within the operational nature of legal clinics.

At the same time, it is essential that we refer to the authoritative legal theory that has considered the issue of access to justice [1].

[1] Remember: VARIOUS AUTHORS, *La convenzione di Aarhus e l'accesso alla giustizia in materia ambientale*, edited by A. TANZI, E. FASOLI, L. IAPICHINO, Cedam, Padua, 2011; VARIOUS AUTHORS, *Accesso alla giustizia dell'individuo nel diritto internazionale e del-*

So, based on all this, our starting point must be the fundamental charter. By virtue of article 24 of the Italian Republican Constitution of 1948: "*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*". (All may institute legal proceedings to protect

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l'Unione Europea, edited by F. FRANCIONI, M. GESTRI, N. RONZITTI, T. SCOVAZZI, Giuffrè, Milan; A. ANGELETTI, *Partecipazione, accesso e giustizia nel diritto ambientale*, Esi, Naples-Rome, 2011; A. ANZON, *Prospettive di accesso alla giustizia costituzionale: atti del seminario di Firenze svoltosi il 28-29 Maggio 1999*, Giuffrè, Milan, 2000; B. CAPPONI, *Giustizia civile e accesso alla giustizia: nuovi modelli verso l'Europa?*, in *Foto it.*, 1993, c. 216 ff.; S. CHIARLONI, *La domanda di giustizia: deflazione e/o risposte differenziate*, in *Riv. trim. dir. proc.*, 1988, p. 752; L.P. COMOGLIO, *Tutela differenziata e pari effettività nella giustizia civile*, in VARIOUS AUTHORS, *Le ragioni dell'uguaglianza*, edited by M. CARTABIA, T. VETTOR, Giuffrè, Milan, 2008, p. 225 ff.; E. CRIVELLI, *La tutela dei diritto fondamentali e l'accesso alla giustizia costituzionale*, Cedam, 2003; L. D'ANDREA, *Effettività*, in *Diz. dir. pubbl.*, directed by S. CASSESE, Giuffrè, Milan, 2006, p. 2119; A. DE LUCA, *L'accesso alla giustizia in Inghilterra fra Stato e mercato*, 2007; G. GAVAZZI, *Effettività (principio di)*, in *Enc. giur. Treccani*, Rome, XII; M. LUCIANI, *Funzioni e responsabilità della giurisdizione. Una vicenda italiana (e non solo)*, in *Giur. cost.*, 2013, p. 3823 ff.; M. LUCIANI, *Garanzie ed efficienza nella tutela giurisdizionale*, in *Rivista AIC*, n. 4/2014; M. JULINI, *Conflitti negoziati e negoziatori. Dimensioni del dialogo attraverso la storia*, 2015; M. MAGRI, *Esiste un terzo pilastro della Convenzione di Aarhus?*, in *Quad. cost.*, n. 2/2012, p. 444; P. PIOVANI, *Effettività (principio di)*, in *Enc. dir.*, XIV, Giuffrè, Milan, 1965, p. 430; G. RICCIO, *Diritto al contraddittorio e riforme costituzionali*, in *Pol. dir.*, no. 3/1999, p. 483 ff.; R. ROMBOLI, *L'accesso alla giustizia costituzionale: caratteri, limiti, prospettive di un modello*, 2006; N. SCANNICCHIO, *Accesso alla giustizia e attuazione dei diritti*, Giappichelli, Turin, 2015; S. SENESE, *Giudice (nozione e diritto costituzionale)*, in *Dig. disc. pubbl.*, VII, Utet, Turin, 1991, p. 215; G. SILVESTRI, *Giustizia e giudici nel sistema costituzionale*, Giappichelli, Turin, 1997; V. VARANO (editor), *L'altra giustizia. I metodi alternativi di soluzione delle controversie*, Giuffrè, Milan, 2007. It is worth mentioning the untiring work of M. CAPPELLETTI: as well as the monumental M. CAPPELLETTI, B. GARTH, *Access to Justice. A World Survey*, Milan-Alphenaandenrjin, Giuffrè-Sijthoff, 1978; recall: M. CAPPELLETTI, *Accesso alla giustizia come programma di riforma e come metodo di pensiero*, in *Riv. dir. proc.*, 1982, p. 233; ID., *Accesso alla giustizia*, in *Enc. giur. Treccani*, Rome, I, 1988; ID., *Appunti su conciliazione e conciliatore*, in *Riv. trim. dir. proc. civ.*, 1981, p. 49 ff.; ID., *Dimensioni della giustizia nelle società contemporanee: studi di diritto giudiziario comparato*, Il Mulino, Bologne, 1994; ID., *Giudici irresponsabili?: studio comparativo sulla responsabilità dei giudici*, Giuffrè, Milan, 1988; ID., *Giudici laici. Alcune ragioni attuali per una loro maggiore utilizzazione in Italia*, in *Riv. dir. proc.*, 1979, p. 698 ff.; ID., *Giudici legislatori?*, Milan, 1974; ID., *Giustizia e società*, Milan, 1972; ID., *L'accesso alla giustizia dei consumatori*, in *Studi in onore di G. Vignocchi*, Modena, 1992, p. 293 ff.; ID., *Toward equal justice: a comparative study of legal aid in modern societies*, Giuffrè, Milan, 1975.

their rights and legitimate interests. Defence is an inviolable right at every stage of proceedings. Through specific institutions, the underprivileged are guaranteed the means to act and defend themselves before every jurisdiction).

This provision, revealed by Marta Cartabia's report, from which much of this chapter draws inspiration, qualifies a supreme and therefore indispensable principle characteristic of our legal system [2].

Indeed, in this regard, the Constitutional Court has stated: "*Né può dimenticarsi, comunque, che è l'art. 24 della Costituzione ad assumere nella disciplina processuale valore preminente, essendo il diritto di difesa inserito nel quadro dei diritti inviolabili della persona, talché, anche secondo l'indirizzo costante di questa Corte ... esso non potrebbe essere sacrificato in vista di altre esigenze, come quella relativa alla speditezza del processo*" (Nor can it be forgotten that article 24 of the Constitution assumes pre-eminent value in procedural disciplines, since the right of defence is one of the inviolable rights of the person, such that, according to this Court's constant focus …, it cannot be sacrificed in favour of other needs, such as that regarding the promptness of the hearing) [3].

Likewise, at the supranational level, article 6 of the ECHR, under "*Right to a fair trial*", states: "*... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...*" and "*Everyone charged with a criminal offence has the following minimum rights: ... (c) to defend himself in person or through 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 require*".

Article 13 of the Convention, "*Right to an effective remedy*", states: "*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity*".

Similarly, article 19 of the Treaty on European Union: "*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*".

In this regard, we must refer to the Charter of Fundamental Rights of the European Union, of which Chapter VI is dedicated to justice and article 47,

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[2] Arguments drawn from the report by M. CARTABIA, Vice President of the Constitutional Court, at the *L'accesso alla giustizia dei soggetti svantaggiati*, congress held at the Court of Milan on 15 December 2015.

[3] Constitutional Court, judgment 98/1994.

"*Right to an effective remedy and to a fair trial*", enshrines: "*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice*".

We must also read article 13 of the European Convention on Human Rights in the same sense. It states: "*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority ...*".

Based on these principles, every individual should then be able to defend themselves or present their arguments in every circumstance regardless of their economic, social, cultural, religious or environmental conditions (and we should also add gender, marital, physical and mental conditions).

More than others derived from our Constitution, the principle we are discussing makes the judgment responsible for rendering rights concrete, regardless of their origin. Therefore, we could then assert that this should apply especially and above all to the rights of particularly fragile and vulnerable persons or of those who for various reasons lack the tools they need to be heard in the appropriate fora.

According to this doctrine, we cannot settle for merely formally recognising rights, whether our own or those of others. Every individual, especially the most defenceless or vulnerable, regardless of their personal conditions, must be able to defend every one of their legal positions actively, subjectively and advantageously. Everyone deserves protection by the law, equally as regards their human rights, their legitimate interests and, we might add, their broad and collective interests.

Should they encounter obstacles hindering or even denying the right they claim, democratic and social states such as our own and supranational organisations should always be capable of guaranteeing justice, providing a competent, independent and impartial third judge in the event of a dispute.

The judge should, however, represent the *extrema ratio*. We know, however, that this is not the case. Court statistics are clear.

The picture that emerges when we analyse data provided by the Italian Ministry of Justice is bleak. The report on the evolution of Italian justice presented by Minister Andrea Orlando on 20 January 2016 states that at that time there were a staggering 4.5 million pending civil suits, 52,164 inmates

in Italian prisons, and 67,420 criminal proceedings that had lapsed in the first half of 2015 alone [4].

It is clear that judicial issues absorb a large proportion of private and public resources allocated to this delicate sector of the administration, and that litigation appears far more common than would seem necessary, to the detriment of the quality of service and certainly not to the benefit of our weakest citizens.

The reasons, which we will not discuss here, are many and varied.

Ignoring physiological ones, the reasons for this absolute flood could lie in the now widespread practice of using civil proceedings as a means of delaying the effects of a breach of contract, as well as in the equally common practice of delaying criminal proceedings until they lapse. In administrative proceedings, parties often have the barely concealed intent of indefinitely postponing a decision against them through appeals, in the hope of eventually obtaining a more favourable outcome.

There are also many situations in which, for reasons other than delaying tactics, the courts are overwhelmed by totally unexpected or underestimated circumstances, such as the exponential growth of opposition proceedings for non-recognition of residence permits or refugee status.

To get an idea of the sheer scale of the issue in this area, simply consider that 123,000 asylum applications were submitted in 2016 alone, and of the 90,000 examined by the commissions assigned to them, a full 60,000 were rejected and are likely to be contested (albeit with little chance of being accepted on the merits) [5].

So, returning to article 24 of the Italian Constitution, the question of access to justice cannot necessarily be resolved through sufficient numbers of qualified judges ready to restore the correct legal positions of the contenders in court.

There may be adequate numbers of well-prepared magistrates, but if their time is occupied disproportionately by certain issues rather than others, the risk is that any efforts made at central levels to guarantee justice will be inadequate.

To ensure that the right to obtain justice is effective, as a fundamental principle, in addition to adequate numbers of judges, public officials and judicial offices, we also need to provide preventive initiatives aimed at

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[4] http://www.infodata.ilsole24ore.com/2016/01/23/i-numeri-della-giustizia-italiana-calano-i-procedimenti-civili-ancora-pendenti/.

[5] http://www.interno.gov.it/it/sala-stampa/dati-e-statistiche/i-numeri-dellasilo.

informing, directing, receiving and assisting individuals or groups (especially those in greatest difficulty) in the legal issues they face.

Stressing that access to justice is an essential element of any democratic state and a prerequisite for the full enjoyment of human rights, the Council of Europe considers that technology can make a significant contribution in terms of effectiveness.

Information technologies are considered to have great potential in guaranteeing access to justice that may be denied due to a lack of information and knowledge; this is too often the first insurmountable obstacle to defending one's rights.

A special resolution encourages using the internet's potential to pursue alternative methods to litigation, through On-line Dispute Resolution (ODR)[6].

The Council considers that the use of the internet to resolve disputes is destined to grow, also given the development of forms of e-commerce and e-governance that appear increasingly fated to govern interactions between individuals, businesses and governments.

For the issue of interest to us, the more significant question emerging from all this is certainly the one linking the effectiveness of justice to an understanding of the law and to ease of access to the dispute settlement system, which could also be provided by a computer network.

In light of the above, technology could represent a valid tool providing dispute resolution procedures via the internet that reduce the need for traditional judgments, because they are immediate and inexpensive.

If, as the Council has stated, the role of legal professionals appears crucial, they should be better informed of the potential of these complementary instruments. We, however, believe greater involvement by all citizens is even more important.

It is obvious that a conscious diffusion of alternative methods aimed at increasing knowledge of the law, both through technologies and in university education, could attenuate the problem of access to justice, i.e. that complex and expensive system consisting of registries, courts and courtrooms, governed by substantive civil, criminal, accounting, administrative rules and proceedings that are difficult to understand; these should be considered a last resort.

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[6] Since 15 February 2016, European Union residents and operators have access to the new *Online Dispute Resolution* (ODR) platform, created by the European Commission as a useful aid for the resolution of disputes between consumers and merchants regarding contracts for on-line purchases of goods or services. The legislative basis is Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes, which was followed by Regulation 524/2013 providing for the creation of an interactive website.

Navigating these increasingly specialised and selective networks is no longer easy even for experts and professionals. It becomes even more traumatic and perilous for those whose health, mental, cultural or economic situation is less than ideal, i.e., who are in conditions considered vulnerable, weak or insufficient in many ways.

This is why, when considering litigation, it is so essential that both the parties demanding justice and the professionals involved (and public officials, magistrates and lawyers in particular) have the right to information and a greater sense of responsibility, awareness and self-control.

That being said, lawmakers are certainly aware of the problem of process inflation and of the risk of rights being watered down by the overload.

Still, it is not always easy to understand why certain methods are adopted to make the work done in the halls of justice more sustainable. While it may seem sensible to require an attempt at mediation before a civil suit can be filed, it is difficult to understand why, for example, the cost of failed mediation should be borne by the defendant. Similarly, while it makes sense to pay court fees, it is less clear why these (quite high) fees should also be paid by associations or committees that protect collective or various interests, for example [7].

Both individuals and institutions should not be forced to waive judicial proceedings because of procedural or financial costs imposed by the State. Instead, they should be offered the opportunity to do so because of the possibility – and not just hope – of obtaining justice in a different, faster and more tolerable way.

A useful alternative might be to provide neutral and inexpensive places to increase knowledge of the law and of the alternatives in order to avoid failure to consider mutual interests or to prevent the rules governing the case in question from degenerating to the point that a judge needs to intervene. That is why investments in cultural tools such as legal clinics are increasingly urgent and necessary.

Certain efforts made by universities are appreciable because they leverage the freedom of science and teaching to push research beyond the traditional canons of the sharing of knowledge, to promote practical knowledge of the law and of rights – in the field – through direct and immediate social or public engagement offered as a team [8].

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[7] See P. BRAMBILLA, *La clinica legale ambientale e le ong: formazione e partecipazione*, in *Teorie e pratiche nelle cliniche legali*, cit.

[8] On the concept of public engagement, see the Conclusion, Chapter VI, *Contextualising elements of legal clinics*, section 4. *The Italian context*.

Breaking the taboos related to the rigid scanning of subjects in academia, some universities have established targeted actions (clinics) specifically to protect migrants, prisoners, foreigners, minors, the environment and people with disabilities (just to name a few), to increase their awareness or learn about their rights regardless of the type of dispute.

In this way, universities help people avoid litigation, aiding them, especially the most vulnerable, to concretely understand the legal effects of their actions or omissions in advance.

Elderly persons suffering cognitive decline, youth with mental illnesses, economic migrants, nomads, stateless persons, certain categories of workers, asylum seekers, prisoners, minors, battered women, and citizens exposed to environmental decay and pollution most deserve protection from a judgment that, if begun without consideration of the consequences, might be harmful, certainly expensive and in any case unsustainable.

So, article 24 of the Constitution could also be interpreted as requiring the general guarantee of a judgment being accompanied and preceded by an equal and contrary guarantee of receiving similar support to avoid that judgment through better knowledge of one's rights, of one's limits with respect to others' rights and of the complex regulatory framework and reference practices.

The same consideration applies to the European or international context. Today, more than ever, there is no guarantee that domestic cases will not end up in higher courts in search of a final and perhaps more favourable ruling.

While the many seats, jurisdictions and competences constitute an indispensable guarantee in an instrumental meaning, they lead to longer time and higher costs, with the obvious risk of watering down even further the constitutional safeguards to which we have referred.

2. Work as a vehicle for the principles of equality and solidarity toward substantial justice

With a dynamic and proactive view, the Italian Constitution does not merely clarify the right to take legal action as stated in article 24, but clearly spells out how to reduce distances and lead the citizens of this country to effective law.

Indeed, the founding fathers entrusted to the entire "*Republic*" the task of "*rimuovere gli ostacoli di ordine economico e sociale, che, limitando di fatto la libertà e l'eguaglianza dei cittadini, impediscono il pieno sviluppo della persona umana e l'effettiva partecipazione di tutti i lavoratori all'organizzazione politica, economica e sociale del Paese*" (removing economic and

social obstacles that de facto limit citizens' freedom and equality, hindering the full development of the person and the effective participation of all workers in the Country's political, economic and social organisation) (article 3, subparagraph 2, Italian Constitution) [9].

In practice, through what is known as the principle of substantial equality, it appears that they wanted to call everyone – institutions and citizens alike – to give concrete expression to the substantive rights of the person.

However, we believe that we cannot even hope to reach this aim of equality unless the complex and delicate technicalities of justice function properly, contributing through their synchronisms and connections to substantially guarantee the rules are respected for the benefit of everyone involved, including our guests – whether permanent or temporary, welcome or unwelcome.

Indeed, this issue increasingly involves not only citizens but also people without a homeland or those who have been forced to flee their homes because of environmental decay, energy crises, poverty, persecution and war, and who pass through our Republic [10].

Because equality and justice are two sides of the same coin, we must ensure the currency can actually be spent. And we can only do this through constant and continuous effort, through that morally binding, individual and collective commitment that the Constitution calls solidarity.

Active citizenship is called to this obligation. From an ethical, social and legal viewpoint, we are called to affirm and apply that relationship of brotherhood and mutual support that binds us and creates a sense of belonging to the same society and values with respect to which many of the interests and aims should be common if not shared.

Both environmental protection and the protection of all humanity appear

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[9] There are endless contributions on the subject. See: U. ROMAGNOLI, *art. 3, paragraph 2*, in G. BRANCA, *Commentario alla Costituzione*, Zanichelli-Il Foro italiano, Bologna-Rome, 1975, p. 162 ff.; C. ESPOSITO, *Eguaglianza e giustizia nell'art. 3 della Costituzione*, in ID., *La Costituzione italiana*, *Saggi*, Cedam, Padua, 1954, p. 26 ff.; L. PALADIN, *Il principio costituzionale d'eguaglianza*, Giuffrè, Milan, 1965; A. BALDASSARRE, *Diritti sociali*, in *Enc. giur. Treccani*, Rome, 1971, p. 1 ff.; C. ROSSANO, *Il principio di eguaglianza nell'ordinamento costituzionale*, Giuffrè, Milan, 1966.

[10] In this respect, see the interesting essay by C. MAZZA, *La prigione degli stranieri. I centri di identificazione e di espulsione*, Ediesse, Rome, 2013, in which Mazza analyses the structural characteristics of Italy's Identification and Expulsion Centres (CIE), focusing on their operation, living conditions, critical features of the phenomenon and the effectiveness of this administrative detention instrument for deportation purposes.

to be irrefutably linked and binding as the very lifeblood of the Republic and its institutions. This must not be reduced to mere survival at the expense of social changes related to the passage of time.

The institutionalisation of the solidarity principle in the Constitution, which the best doctrine recognises as a fundamental and indispensable principle on a par with access to justice, would have jeopardised that renewable and sustainable human and environmental capital which is essential for the continuing and unceasing construction of a democratic State and that should remain so, through the creation of ideal conditions in which we can all find a way to be useful to each other [11].

Again, the Republic is responsible for recognising and guaranteeing "*i diritti inviolabili dell'uomo, sia come singolo sia nelle formazioni sociali ove si svolge la sua personalità*" (the inviolable rights of humans, both as individuals and in the social groups in which their personality is developed). The Republic, and all of its citizens and institutions are also called upon to "*richiede*(re) *l'adempimento dei doveri inderogabili di solidarietà politica, economica e sociale*" (require the fulfilment of the inviolable duties of political, economic and social solidarity).

The founding idea that emerges is that the spontaneous fulfilment of these very broad and unspecified duties will generate a continuous exchange of resources and experiences destined to spread out in all possible directions: between citizens, between the State, the regions and citizens, between citizens and regions and the State, and between citizens-State-regions and foreigners, as well as between present and future generations [12].

The heritage handed down to us by the authors of the Constitution would have wanted to include everyone in their republican and democratic ambition and for all to work to make effective not only their own rights, but also the rights of others, near and far, both geographically and generationally.

And while this line of reasoning certainly does not specifically identify the beneficiaries of these rights, making it apparently difficult to reconcile with the classic categories of constitutional legal thinking, it could offer

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[11] S. GALEOTTI, "*Si deve dire che questo principio è previsto espressamente nel nostro sistema, e quindi esiste come valore giuridico, non solo, ma esiste a livello della Costituzione*" (This principle is expressly provided for in our system, and therefore exists not only as a legal value, but also at the Constitutional level), in *Il valore della solidarietà*, in *Dir. soc.*, 1996, p. 10.

[12] S. PRISCO, *La solidarietà verticale: autonomie territoriali e coesione sociale*, at http://www.lexitalia.it/articoli/prisco_solidarieta.htm.