

The Constitutional Court does not stop during an emergency, now is a good time for cooperation among institutions

COVID-19 emergency. Interview with the President of the Italian Constitutional Court, Marta Cartabia.

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President Cartabia, in your last presidential decree on the organisational measures to be adopted by the Constitutional Court to manage the epidemiological emergency, you started by highlighting “the necessity to operate in the spirit of loyal cooperation with the other institutions of the republic, in a common effort to cope with the current situation”. Why this emphasis?

The Covid-19 emergency represents, in all respects, a moment of crisis and times of crisis call for cooperation. On a personal level, it is time for solidarity and, on an institutional level, it is time to reinforce cooperation. We must not forget that among our constitutional principles there is the principle of “loyal cooperation”: among Courts, between the State and the Regions, among Ministers, between the Government and Parliament, between Courts and the Legislator, etc. In full respect of the different roles and the separation of powers, all institutions are called to loyal cooperation, especially with the President of the Republic. If there is something to reflect upon – as I am personally doing – it is institutional cooperation, starting from the reinterpretation of some classic contributions, as the one by Vittorio Bachelet on coordination, cooperation and agreements. They are core aspects of public law, that underline the “relational” profile of institutions, able to prevent conflict and to increase the effectiveness of public actions, in full respect of everyone’s autonomy.

What are the main organisational problems that the Constitutional Court is currently facing, and which of these could be subject to interventions from the Court in terms of normative self-regulation or for case-law?

We were all caught by surprise, citizens as well as public institutions: we all had to rapidly adapt our actions to an upsetting situation, previously unknown and unpredictable. The Constitutional Court is no exception and tries to ensure, as it consistently underlines in its case-law, a reasonable and proportionate balance among different needs. In this case, the needs are the protection of everyone’s health, understood both as an individual right and a common good, as well as the guarantee of the continuity of the State’s essential functions, including the Court’s competence of constitutional guarantee.

How did you manage to reconcile these two needs?

Our first concern was to create the necessary conditions to allow the Court to operate without exposing people to any risk of infection, and by limiting transmission as much as possible, without compromising the functionality of the institution. Attention was first paid to people: judges, lawyers, assistant lawyers, all the staff that make the machinery of constitutional justice work. Suddenly, we had to re-organise the whole institution to protect each and every one, without stopping the Court’s engine. It was not an easy operation, due to the characteristics of the institution, even if – I want to stress this point – the *sense of unity* of the Court, I will venture

to say the sense of deep understanding by all, has really simplified the job of who is now in charge.

Many constitutional judges come from outside Rome.

Yes, and that was our first complication. The judges of the Court come from all over Italy: at the moment the College is composed of colleagues from Lombardy, Veneto, Tuscany, Trentino-Alto Adige, Emilia-Romagna and Lazio. The same is true for the research assistants, who play a crucial role in the functioning of the Court. However, the number of people involved, and that come from all over the country, is even larger, because, due to the very nature of constitutional adjudication, lawyers who defend cases in front of the Constitutional Court, come from everywhere. Therefore, the first measures – in particular the decree of 12 March 2020 – were directed at introducing “*telematic forms of communication of trial documents*”, notwithstanding the current regulations requiring that the documents are to be materially lodged at the Court’s Registry. At the same time, we managed to organise forms of *smart work*, also called “*agile work*”, for all staff conducting relevant tasks. For the others, who, due to the nature of their work need to be present, we *reduced the work schedule and planned shifts*, to reduce direct contact to a minimum level, *without closing the Palace [Court building]*.

In this way, we introduced the very first *telematic trial*, which was a bit improvised to deal with the emergency, in the simplest and most immediate form, via Certified Electronic Mail, on a transitional basis. Simultaneously, we recovered a more organic project of dematerialisation of the constitutional procedure to be approved.

My hope is that, pushed by the current emergency, the telematic trial as well as the forms of remote work could become the subject of a *stable reform*, valuable also for the future. We are working on it.

The message is that the Constitutional Court is not stopping, and is continuing its work. What are the measures concerning hearings?

As concerns public hearings, we slowed down, as done by other European constitutional and supranational courts.

First, we *suspended the sessions scheduled for March*, and we continued to work only in the Council Chamber, arranging a *specific courtroom*, in the wider Conference Room, using the old furniture of the Lockheed case, to be able to follow all suggested precautions, to guarantee distance between participants, and to technologically equip the Council Chamber.

Then, with the second decree discussed in the College on 23 March, we decided to continue the *deliberation work in the Council Chamber and the remote reading of judgments*. The same applies to the other internal activities of the Court. A significant change for an institution which was not used to these kinds of interactions.

It was a different matter for the public activities of the Court. In fact, for the time being, we have decided not to conduct videoconferences for public hearings. The trials to be held in a *public hearing* will be postponed for as long as is required, *allowing the parties to request that the decision of the trial proceed through the Council Chamber without an oral procedure*. For this option to apply, all parties must be in agreement.

What response do you expect from lawyers?

We are expecting that in more than one case lawyers will take advantage of this possibility, considering that the constitutional adjudication takes place mostly in written form, and, for some types of trials, all the arguments required to reach a final decision are available in the trial documents. For this choice, we draw inspiration from administrative proceedings, and specifically from what is provided by Article 84 of legislative decree no. 10/2020, applicable to constitutional cases with the proper adjustments under Article 22 of Law no. 87/1953. However, unlike administrative proceedings, we intend to give more value to the *will of the parties*: in constitutional adjudication, the public procedure can be really important, be it to safeguard adversarial proceedings, or for the publicity of trials of particular public interest. In this respect, it could be worth underlining that the [Court's] President may decide to postpone the judgment at any moment, to allow for ordinary proceedings, as one of his/her tasks is to govern the work schedule.

In a situation of serious emergency, as the one we are currently experiencing, conflicts among powers may arise. In that case, would the Court be ready to intervene?

Most certainly. All the rules dictated by the emergency will not apply where there is a need for an *immediate proceeding in a particularly serious trial*: it should not be forgotten that the Court is the guardian of the Constitution, protecting individual rights as well as ensuring the separation of powers and the balance of powers. No democracy can renounce to this task, not even temporarily or in times of emergency. In any case, the Constitution does not allow it.

When will it be possible to deal with the postponed trials?

The Court has already arranged to intensify its meetings immediately after the end of the emergency, if necessary, also during the summer, to deal with the backlog in public hearings that could not take place. We propose a *more intense schedule in June, July, and September*. We hope to increase our work even before then.

Your Presidency has given great impulse to a process of regulatory changes started in January 2020, to render the trials more efficient and more participatory. Do you believe that this process will suffer a slowdown due to the epidemiologic emergency?

I do not believe so, and I hope it will not. The changes we introduced on the participation of *amici curiae*, of experts and of third parties are now written rules, and they were shared by the College. It is a positive fact that the reform has been approved and finalised before the emergency: it will benefit the Court in the future. After all, we have already planned in our schedule, the hearing of some *experts* – we were supposed to meet them this week, but it was postponed as well –; and *amici curiae* started participating spontaneously. Presumably, there will be a temporary standstill, as in all other activities: it has all slowed down; but I am confident that the participation in constitutional trials will resume as soon as conditions allow.

Over the past few years, the Court has been very attentive to communication with the public. What will happen in this period?

The activities of ordinary communication will continue, with the usual press releases and the constant update of our website, both in Italian and in English. The communication via our social media channels continues as well. However, we had to suspend the *annual meeting with the press*, originally scheduled on 9 April: a consolidated tradition that was kept almost without interruption since the beginning of the activities of the Court. Even in this case, though, we will figure out a different way to propose a meeting with the media, as soon as conditions allow.

We are experiencing extremely difficult times, that have exposed a number of weaknesses. The mind quickly goes to the aging population and to all the people in penitentiary facilities. Would you be willing to share any thought with respect to these people?

An institution that is in charge of protecting and guaranteeing constitutional rights cannot but be particularly aware of people living in precarious conditions: *the elderly, the disabled, the ill*, and the many people suffering from different pathologies other than the coronavirus, and the many *single people or families that are dealing or will be dealing with unstable economic conditions*. Among those living in particularly difficult conditions, there are inmates and all those who work in the penitentiary environment: prison guards, the administration, educators, health staff, volunteers. In these closed communities, there is a wider exposure to risks and resources for prevention. I know that there is an ongoing debate on this issue, on a legal and institutional level, and I am following it with great interest. The Constitutional Court, that has learned to look closely at the world of penitentiaries, follows carefully and anxiously each news item coming from prisons.

Could you imagine a solution or say a few words to those who are experiencing these dramatic times?

Given its functions, it is not the job of the Court to think about or propose solutions, not even to adopt an initiative. However, when requested, the Court is always ready to defend the constitutional rights of everyone. To those who are currently living in these dramatic conditions I cannot do anything else but repeat the words of my predecessor, President Lattanzi: the Constitution is a “shield” for everyone. And on my part, I can add that the Court is ready to protect those rights, as well as the Constitution itself. *The Court is ready.*

The emergency that Europe and the rest of the world is facing certainly involves other Constitutional Courts as well. What can you say about this point? Do you believe that the process of cooperation between national Courts and the European Court of Human Rights could slow down in this period?

In the last decades, a virtuous cooperation among Courts has been developed, at the national and supranational level. We cannot allow for this achievement to be lost, since, thanks to the debate with other judges on common problems, new legal instruments have emerged, more precise techniques of judgment have been formulated, *the protection of human rights and the rule of law has been strengthened.*

In the past few years, the Italian Constitutional Court put a lot of effort in constructing a solid international cooperation, and it intends to keep doing so. Of course, in the next few months, sadly, we will have to cancel all scheduled international meetings. The Constitutional Court also had a busy schedule: Riga, Prague, Budapest, Rome along with the German Court at the end of April, then we had a meeting with France, Spain and Portugal at the end of June. Then

with Israel in September. These meetings might only be temporarily postponed, as is the meeting of the Conference of European Constitutional Courts scheduled in May.

However, many of the relations among Courts were “institutionalised”, either with *specific procedures*, or with the establishment of a *network of judges*, such as the Conference of European Constitutional Courts and the World Conference on Constitutional Justice, established as a result of the propulsive action of the Venice Commission within the Council of Europe, in which I have the honour to represent Italy. These legal structures, often formalised as a result of Italian initiatives, will allow us to pick up where we left off once the emergency has ended: we have all experienced how beneficial every exchange among Courts is. Within the Italian Constitutional Court, there are people who are spending much time and energy to foster international relationships, and over the past few years we have also established a committee of judges that specifically deals with these aspects. I am sure that the benefits of these relationships built over time will not get lost.

Legal scholars and practitioners are dealing, as is the Constitutional Court, with a new way of exercising their profession. Do you believe that from this tragedy a new awareness of environmental issues could arise, in a perspective free from the concept of nationality?

Within a few weeks, we have experienced a major turning point. This period will change all of us. Many people have already underlined this aspect: crisis could be the prelude of a catastrophe, or they could be seen as opportunities, as factors of greater progress and innovation. Nothing happens automatically. There is a reflection on crisis by Hannah Arendt to which I am particularly attached, and that might be worth re-reading: “A crisis forces us back to the questions themselves and requires from us either new or old answers, but in any case, direct judgments. A crisis becomes a disaster only when we respond to it with preformed judgments, that is, with prejudices. Such an attitude not only sharpens the crisis but makes us forfeit the experience of reality and the opportunity for reflection it provides” [Hannah Arendt. *Between Past and Future. Six exercises of political thought*. New York: The Viking Press, 1961: 174-175]. A crisis and the questions: this is the time for questions and for reflection. Today is the time for authentic and fundamental questions, which could lead to a real renaissance.