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JUDGES AND NOTARIES: INTERNATIONAL AND NATIONAL EXPERIENCES

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1. Introductory Remarks.

Distinguished representatives of the Notaries, distinguished organisers of this initiative, dear colleagues, dear friends.

It is a great honour and a pleasure for me to address you in the framework of this important event. I would like to thank, first of all, the Italian Supreme Court of Cassation and its Secretary-General, as well as the International Union of Notaries, for this invitation. I would like also to add that it is a particular pleasure for me to take the floor during an event organised by notaries, being myself a former teacher and lecturer for more than twenty years in the Notarial School of Turin.

The purpose of my speech here is to provide you with some information on the organisation I have the honour to represent here: the International Association of Judges (IAJ), as well as on the Italian judiciary and on the future of a possible improvement of the co-operation between judges and notaries, both at national and international level.

2. The International Association of Judges (IAJ): Its Organisation and Aims.

As maybe some of you already know, the main purpose of the IAJ is to reinforce the independence of the judiciary as an essential attribute of the judicial function, together with the protection of the constitutional and moral status of the judiciary and the guarantee of fundamental rights and freedoms (thorough information on the IAJ is available in the following web site: https://www.iaj-uim.org).

The IAJ has consultative status with the United Nations (namely the International Labour Office, the U.N. Economic and Social Council and the UNODC, but mainly with the office of the UN Special Rapporteur on the Independence of Judges and Lawyers), on one side, and with the Council of Europe, on the other side. As far as the latter is concerned, we enjoy the position of observer within the *CEPEJ* (*Commission Européenne pour l'Efficacité de la Justice* – European Commission for the Efficiency of Justice), as well as within the *CCJE* (*Conseil Consultatif de Juges Européens* – Consultative Council of European Judges).

The IAJ is governed by its Central Council, composed of representatives of the member associations (currently 94, from 94 different countries of the five continents), and also by the Presidency Committee, which is the administrative organ under the leadership of a President, who is elected every two years, as are the members of the Presidency Committee, consisting of the President, six Vice-Presidents and, for a period of two years, the immediate past President.

The Association has four Study Commissions, whose task it is to study a different topic each year in various fields:

- The first is engaged in the study of the status of judges, the independence of the judiciary, judicial administration and the protection of individual freedoms.
- The second commission is involved in the study of civil law and procedure;
- The third commission is engaged in the study of criminal law and procedure;
- The fourth commission is involved in the study of public and social law.

At meetings and congresses, the member countries try to gain a better knowledge of the country where the conference is being held, of its legal system, and of the problems encountered by its judges. Petitions and recommendations are produced at the conclusion of each congress.

Within the IAJ there are also four Regional Groups whose aim is to monitor closely specific questions relating to the judiciary in different parts of the world:

- the European Association of Judges (EAJ);
- the Ibero-American Group;

- the African Group;
- the "ANAO" (Asian, North American and Oceanian) Group.

As far as the Study Commissions are concerned, the one which is closer to your aims and activities is of course the second (civil law and civil procedural law).

3. IAJ's Studies and Topics of Interest for Notaries.

Actually, since its creation, IAJ'Second Study Commission has sometimes dealt with topics which may be of some interest for Notaries. Its conclusions for each annual meeting are available at the IAJ's website (https://www.iaj-uim.org/general-reports-and-conclusions-by-the-2nd-study-commission/).

Let me mention just some of them:

- (1980) "Effects of foreign judgements in fields not covered by international conventions. Possibilities, means and methods of executing urgent measures in the field of family law);"
- (1981) "Protection of the interests of mentally handicapped in private law;"
- (1983) "The equality of husband and wife in family law;"
- (1985) "What legal rules should apply to the couples living together not being married, both between themselves and towards their common children;"
- (1989) "The judge and the co-operation of other Justice-related professions: Lawyers, Law-Professors, Public Notaries, professional experts, and other State officials;"
- (1992) "The Legal Status of Children after a) Divorce, b) Separation, c) Annulment of Marriage and d) Separation of Parents Having Cohabited Without Being Married;"
- (2004) "The powers of the judge in family matters;"
- (2005) "Alternative Dispute Resolution as a means of improving the delivery of justice and reducing the delays in civil procedure;"
- (2006) "Legal rules regarding patrimonial interests, succession and duties of couples living together but not being married;"
- (2011) "Cross-border issues in the face of increasing globalization – as reflected in a series of individual fact scenarios".

As far as relations between Notaries and Judges are concerned, let me point out that already many years ago, during our Congress in Macau held on 23rd-27th October 1989, the IAJ approved, among other things, following conclusions on the subject of "The Judge and the Co-operation of Other Justice-Related Professions: Lawyers, Law-Professors, Public Notaries, Professional Experts, And Other State Officials":

"In the civil law countries which know the Latin Notary

- the Notary is a public official who advises the parties impartially and points out to them the legal implications of such deeds as they might wish to make, thereby preventing conflict between the parties,
- authenticated deeds drawn up by the Notary simplify evidence proceedings;

- the Notary represents the parties in Court in matters of voluntary jurisdiction;
- the Notary is further required by the Court to perform judicial acts such as inventories, divisions of property and affixing of seals;
- it is desirable that the functions of the Notary be consolidated and that resort to the notary's services in the administration of Justice be recognised and encouraged."

The IAJ and the International Union of Notaries (*UIN*) have signed almost thirty years ago (on 29th September, 1994) a cooperation agreement.

Coming to present times, our two organisations have successfully co-operated in the framework of EU law training in English language for European Notaries and Judges, involving judges and Notaries from Bulgaria, Hungary and Italy. The IAJ was also involved in the programme called "EU Cross-border Matrimonial and Registered Partnerships Proceedings: EU Regulations and E-Learning," developed by the Italian Notarial Foundation.

More precisely, a project financed by the European commission was launched in 2019 in co-operation with the Italian National Notarial Council and the Italian Notarial Foundation on "Action grants to support transnational projects on judicial training covering civil law, criminal law or fundamental rights" (JUST-JTRA-EJTR-AG-2017). Further information on this activity is available here: https://eventi.nservizi.it/evento.asp?evid=223.

The above-mentioned co-operation has as well produced a handbook on EU civil law. The document is available at the following URL:
https://eventi.nservizi.it/upload/223/altro/handbook%20def.pdf.

4. The Italian Judicial System in a Nutshell.

4.1. The Constitutional Jurisdiction.

Coming now to a very short illustration of the Italian judicial system, I will briefly dwell on the different kinds of jurisdictional authorities in my country.

Constitutional jurisdiction is attributed to the Constitutional Court, composed of fifteen judges, with one-third each appointed by the President of the Republic, by Parliament in a joint sitting and by the ordinary and administrative supreme courts (Article 135 of the Constitution).

The Constitutional Court deals (Article 134 of the Constitution): a) with controversies relating to the constitutional legitimacy of laws and enactments having the force of law, of the State and the Regions; b) with jurisdictional disputes between the powers of the State and those between the State and the Regions and between the Regions; c) on the accusations made against the President of the Republic, in accordance with the Constitution (see Article 90 of the Constitution).

The constitutionality of laws may be challenged primarily by specifically empowered subjects (State, Regions, autonomous provinces: see Articles 37-42 of the constitutional law 11th March 1953, No. 87), or incidentally by a judge who, during the case, doubts the constitutionality of the law to be applied to the individual case.

The issue of constitutionality must, in the latter case, be relevant for the decision of the litigation and not manifestly unfounded (see Articles 23-30 of the constitutional law 11th March 1953, No. 87).

4.2. The Ordinary Jurisdiction: Recruitment of Judges; Composition and Role of the Superior Council for the Judiciary.

Ordinary jurisdiction is composed by ordinary judges, considered such because they are established and governed by the judiciary rules (Article 102 of the Constitution; Articles 1 and 4 of the Royal Decree of 30th January 1941, No. 12) and their differentiation from other judges comes from the requirement of independence provided for by the Constitution (Articles 101-104 of the Constitution) and also for their being subject to the power of the Superior Council for the Judiciary (see below, in this Para. and below, under Para. 4.3), which constitutes the self-governing body of the Judiciary.

The organisation of the Italian judiciary has its constitutional status in Articles 101-113 of the Constitution. Before the reform of the year 2005 (see below, under Para. 4.3), the judiciary was governed by the provisions of Royal Decree of 30th January 1941, No. 12, by Royal Decree of 31st May 1946, No. 511, by the law of 24th March 1958, No. 195, as well as a number of provisions contained in subsequent laws which were enacted to adapt the judicial system provisions prior to the Constitution.

Access to the profession of judge and public prosecutor in Italy takes place through a public competitive examination pursuant to Article 106, Para. 1, of the Constitution. Rules on the entry to the profession of judge and prosecutor have been changed over the last years, on the one hand to simplify and expedite the examination procedure and, on the other, to promote the development of a cultural basis common to all the members of the legal world connected to the activities linked to the exercise of the judicial function: judges and prosecutors, notaries and lawyers. The legislator has thus constituted Schools of Specialisation for the Legal Professions, which are post-graduate schools set up within the Universities for law-graduate students that want to enter the legal professions (Legislative Decree No. 398/97).

The Superior Council for the Judiciary (*Consiglio Superiore della Magistratura – C.S.M.*) is therefore the self governing body of the ordinary judiciary. Under the judicial system's laws, the *C.S.M.* is entrusted with the appointment, assignment, transfer, promotion, and disciplinary measures concerning Judges and Public Prosecutors (see Art. 105 of the Constitution).

Currently the Council is composed of thirty-three members:

- the President of the Republic, who chairs the *C.S.M.*;
- the Chief Justice of the Supreme Court of Cassation;
- the Prosecutor General of the Supreme Court of Cassation;
- ten members appointed by Parliament (the so-called "laymen");
- twenty members appointed by the judges and prosecutors (the so-called "togati"–from *toga*, which means "robe"–or professional judges and prosecutors).

The Constitution (Art. 104) envisages that the President of the Republic and the Chief Judge and Prosecutor General of the Court of Cassation should be members of the Council "by right". The only other restriction it imposes is to require two thirds

of the other members to be elected by the ordinary judges and prosecutors belonging to the various ranks and one third by Parliament in joint session chosen from among ordinary university law professors and lawyers with fifteen years experience in the legal profession. Therefore, the number of elected members and the election procedures are regulated by ordinary law.

As mentioned earlier, the number of elected members is currently set at 27 (20 judges and 10 "lay" members). The ten "lay" members are elected by Parliament in joint session by secret ballot and by a majority of three fifths of the members forming the assembly. After the second ballot, a majority of three fifths of voters is, however, sufficient.

The members to be elected by the judges and prosecutors are chosen as follows: two from the judges/prosecutors with the rank and function of Court of Cassation judge/prosecutor, five from among the prosecutors performing their duties as prosecutors before first instance or appellate courts, thirteen from among judges performing their duties within first instance or appellate courts.

Before the last reform of the *C.S.M.* electoral system (Law of 28th March 2002, No. 44) the elections of the members chosen from among the Judiciary took place on the basis of an adjusted proportional election system in which all judges and prosecutors participated. Candidates formed electoral lists to be submitted to the colleagues. These lists reflected the four "wings" belonging to the National Judges and Prosecutors Association (*Associazione Nazionale Magistrati – A.N.M.*), thus acting as a sort of "political" parties.

This system was radically changed through Statute of 28th March 2002, No. 44. The old proportional system was replaced by a majority one. As usual all judges and public prosecutors have the right to vote, but "regional" constituencies (or electoral districts) have now been abolished. Currently there are only three constituencies concerning respectively:

- judges and prosecutors of the Supreme Court of Cassation,
- prosecutors before first instance and appellate courts and
- judges of first instance and appellate courts.

Any voter receives three ballots and has to cast a vote (just one vote) for any of the three ballots:

- one for one candidate of the Supreme Court,
- one from a candidate from a public prosecutor office before a first instance or an appellate court, and finally
- one for a judge from a first instance or an appellate court. Elected are those candidates who have received the most votes.

Under the Italian Constitution, *C.S.M.*'s elected members hold office for four years, and are not immediately eligible for reappointment (Art. 104 of the Constitution).

The Constitution (Art. 104) also provides for the *C.S.M.* to elect a Vice President from among the members designated by Parliament. The Vice President, who chairs the Presidency Committee, is entrusted with the task of promoting the *C.S.M.*'s activity and implementing its resolutions, as well as managing the funds in the budget. Furthermore, the *C.S.M.*'s Vice President will replace the President if the

latter is absent or unable to attend and will exercise the functions delegated to him by the President.

4.3. The Superior Council for the Judiciary: Constitutional Position and Activities.

As far as the *C.S.M.*'s position is concerned, the Constitutional Court has established that, although the *C.S.M.* is an organ that performs basically administrative functions, it is not part of the public administration, as it is extraneous to the organisational system directly under the control of the State or Regional governments.

With reference to the functions assigned to it by the Constitution, the *C.S.M.* has been defined as "a body of clear constitutional importance." Its functions may be defined as the "administration of the activities of the judiciary": as already said, they consist in the recruitment, assignment, transfer, promotion and disciplinary measures concerning judges and prosecutors, including also the organisation of the judicial offices with a view to ensuring and guaranteeing that each and every member of the judiciary is subject "only to the law" when exercising his/her office. In this latter respect, it should be stressed that at the proposal of the Presidents of the Appeal Courts, and after consulting the Judicial Councils, every two years the *C.S.M.* approves the personnel "tables" of the judicial offices of each district (i.e.: in how many sections each court is divided and to which of any section judges are assigned) and at the same time it approves objective and predetermined criteria for assigning the case files to individual judges.

The *C.S.M.* is thus the highest ranking body in charge of the administration of judicial activities. Local judicial Councils and the heads of individual judicial and prosecuting offices also co-operate, with different, mostly advisory, roles.

Works within the Council are always carried on through two phases. Any decision has to be first discussed within one of the Commissions of which the *C.S.M.* is composed. So e.g. the decision of appointing a candidate to the post of President of a court has to be discussed within the relevant *C.S.M.* Commission, which will issue a proposal. This proposal shall be brought before the plenary session, which shall take the final decision on it. Any commission is composed of six members (two "laymen" and four professional judges or prosecutors).

The law setting up the *C.S.M.* entrusts it the power to issue quasi-statutory measures which may be divided into three categories:

a) internal regulations and administrative/accounting regulation, both of which are envisaged by the law;

b) regulations covering the training of trainee judges and prosecutors, which is also expressly envisaged by the law constituting the *C.S.M.* It regulates the training of the judges/prosecutors once they have passed the entrance exam;

c) circular letters, resolutions and directives. Circular letters are used to self-discipline the exercise of the administrative discretionary power assigned to the *C.S.M.* by the Constitution and by ordinary laws. The resolutions and directives are used to propose and implement the application of judicial system laws pursuant to a systematic interpretation of the sources.

As far as the disciplinary power of the *C.S.M.* is concerned, it should be remarked that the Council cannot start before itself any disciplinary proceedings. This power is entrusted only to the Minister of Justice and to the Chief Prosecutor before the Supreme Court of Cassation. The proceeding is later carried on by a special Disciplinary Section of the Council.

The Council plays as well a relevant role in the field of judicial selection and—until the setting up of the School for the Judiciary—it also played an essential part in judicial training, as in Italy no school for the judiciary existed until 2012. After that year, both initial and ongoing training for judges and prosecutors have been carried on by the Superior School for the Judiciary, under the supervision of a steering committee *ad hoc*, constituted by people mainly selected by the Minister for Justice.

Legislative sources of secondary judicial status consist of regulations and circulars issued by the *C.S.M.* A relevant legal reform was implemented through six legislative decrees adopted pursuant to the law reform of 25th July 2005, No. 150, subsequently amended by the law of 30th July 2007, No. 111. The more relevant aspects of the reform concerned the access to the judiciary, the professional evaluation system of judges, initial and ongoing training, the organisation of prosecutor offices, the shifting from prosecuting functions to judicial functions and also the disciplinary system.

As far as the concrete administration of justice in Italy is concerned, according to the provisions of Article 1 of the Royal Decree 12/1941, "Justice, in civil and criminal matters, is administered: by the Justice of the Peace, by the Court, by the Court of Appeal, by the Supreme Court of Cassation, by the Juvenile Court, by the Supervisory Magistrate, by the Probate Court."

In particular the courts are distributed throughout the country as follows: 140 first instance courts (Tribunals) and 404 Offices of the Justices of Peace; 26 Regional Courts of Appeal, with second-degree competencies; the Supreme Court of Cassation situated in Rome, being the highest court in the system of remedies.

4.4. Civil and Criminal Sectors. Distribution of Judicial Courts in the National Territory.

Ordinary jurisdiction is divided into two sectors: criminal law, the object of which is the decision whether or not to prosecute taken by the public prosecutor against a given person; civil law, aimed at the legal protection of rights pertaining to relations between private individuals or between them and the public administration, when in the exercise of its duties this adversely affects the subjective right of another person. Criminal proceedings are brought by the prosecutor, who also belongs to the ordinary justice system (Article 107, last paragraph, of the Constitution).

Civil proceedings may be brought by any public or private person (called plaintiff) against another person (called defendant), who is the recipient of the request. Civil and criminal judgements are governed by two different procedural rules: the Code of Civil Procedure and the Code of Criminal Procedure.

Article 111 of the Constitution expressly guarantees in any case–civil, criminal, administrative or financial–the rule of a fair trial, according to which every process must take place in the form of a debate between the parties, on equal terms, before a third party and impartial judge and it must have a reasonable duration.

The right to a reasonable duration of the case has been expressly recognised with law of 24th March, 2001 No. 89, which gives the parties the right to request, where there is a violation, fair financial compensation from the State.

Ordinary jurisdiction is administered by "professional" judges and by "honorary" judges, both forming part of the judiciary (Article 4 of the Royal Decree of 30th January 1941, No. 12).

The first instance jurisdiction, either in civil and criminal matters, is performed by judicial bodies as follows:

- Justice of the Peace, which is a monocratic honorary body;
- Ordinary Tribunal, trying cases in monocratic or collegiate composition, depending on the kind of cases;
- Juvenile Court, trying cases in collegiate composition, including experts for minors;
- At the first instance level the prosecuting duties are performed by:
- Public Prosecutor's Office at the Ordinary Tribunal (also for crimes coming under the jurisdiction of the Justice of the Peace);
- Public Prosecutor's Office at the Juvenile Court;
- General Prosecutor at the Court of Appeal, concerning crimes falling to the Supervisory Court.

The second instance jurisdiction is exercised by judicial bodies as follows:

- Court of Appeal, for the appeals brought against the orders/judgements of the Ordinary First Instance Tribunal and of the Juvenile Court;
- Ordinary Tribunal, for the appeals brought against the decisions taken by the Justice of the Peace (and also for the appeals against personal freedom orders).
- The second instance prosecution is exercised by the Second Instance Court's Prosecutor General Office.

The jurisdiction on the conformity to law of judgements is exercised by the Supreme Court of Cassation; in the last instance proceeding the prosecution is delivered by the Prosecutor General at the Court of Cassation.

Lastly, it should be noted among the prosecution bodies also the National Anti-mafia and Anti-terrorism Direction, which is a National Prosecuting Co-ordination Body (Government Decree 160/2006).

4.5. The Honorary Judiciary.

The honorary judiciary today consists essentially:

- Of Justices of the Peace (law of 21st November 1991, No. 374; Presidential Decree of 28th August 1992, No. 404), who are given jurisdiction both in civil and criminal matters, on cases of minor value or of mild offensiveness, which are excluded from the competence of professional judges;
- Of aggregated honorary judges (law of 22nd July 1997, No. 276; legislative decree of 21st September 1998, No. 328, converted into law of 19th November 1998, No. 221), which make up the so-called "clearance sections," established in the courts in order to terminate pending civil affairs as at 30th April 1995;

- The honorary court judges (so-called *G.O.T.*) of support in judicial offices and honorary deputy prosecutors (so-called *V.P.O.*) within the investigators office;
- The tribunal experts and the Court of Appeal section for minors;
- The lay judges of the Court of Assizes (law of 10th April 1951, No. 287);
- The auxiliary judges of the Court of Appeal (legislative decree of 21st June 2013, No. 69, converted with amendments by the law of 9th August 2013, No. 98;
- The expert components of the special agricultural sections (see Articles 2-4 of the law of 2nd March 1963, No. 320).

4.6. The Special Jurisdiction.

The Constitution (Article 102 of the Constitution) prohibits the establishment of new "extraordinary or special" judges, in the ordinary jurisdiction allowing the creation of specialised sections in certain area, characterised by the presence in the same judicial body of ordinary judges and qualified individuals from outside the judiciary (for example, the special agricultural sections).

We must also mention special judges, such as the Administrative Courts, the Court of Auditors and the military judge, already existing when the Constitution entered into force (Article 103 of the Constitution).

The Court of Auditors is composed of accounting magistrates and within it is established a Prosecutor General, which is provided with prosecution functions. An organ of self-government is the Governing Council of the Court itself.

Besides expertise in preventive control of legitimacy of numerous acts of the Government and of other public bodies and of follow-up on budget management and assets of the public administration, the Court of Auditors is responsible for the legal actions regarding public accounting, pensions and the responsibilities of employees and officials of the State and of other public entities.

The military judges, who are attributed jurisdiction over military offences committed by members of the Armed Forces, form a distinct order from the ordinary courts, administered by an independent governing body, namely the High Council of Military Judiciary.

Administrative jurisdiction is attributed to a number of organs that are distinct from the ordinary courts: regional administrative courts, such as courts of first instance, and the Council of State, as a court of second instance.

The self-governing body of the administrative courts is the Presidency Council of the Administrative Courts, formed, apart from the President of the State Council, by four magistrates serving in the Council of State, by six magistrates serving in the regional administrative courts even lay members, namely four elected citizens–two from the Chamber of Deputies and two from the Senate of the Republic by an absolute majority from among full law Professors at the University or among lawyers with twenty years of professional practice. The body also consists of supplementary members, chosen from among the magistrates of the State Council and the regional administrative courts. The current composition with the presence of lay members is due to the modification of Article 7 of the law of 27th April 1982, No. 186, containing

regulations for the administrative jurisdiction, made by the law of 21st July 2000 No. 205 and in particular by its Article 18.

The administrative judge exercises the judicial review (and not the merit, in the sense of convenience) of administrative acts: the appeal before the administrative courts is aimed at obtaining the judicial annulment of an administrative act, which is assumed to be vitiated due to incompetence, violation of the law or abuse of power.

In general, the jurisdiction of the ordinary and the administrative courts is identified by reference to the subjective position—subjective right and legitimate interest—claimed before the court: the administrative jurisdiction (subject to particular matters within the exclusive jurisdiction of the administrative judge, which were increased by the law of 21st July 2000, No. 205) is the judge of the legitimate interests.

5. Ideas for Future Co-operation between Judges and Notaries: An Italian Example.

The best way of illustrating the possible future of the co-operation between Judges and Notaries can be inspired by a recent Italian reform of the "voluntary jurisdiction." It must be said here that by these words we mean in Italy all those activities which, albeit generally performed by judges, do not consist in the issuing of a decision on a conflict between two or more parties over one or more rights claimed by the litigants. In other words, we are talking of non-litigious, non-contentious activities, in which the judge is usually called to express an evaluation of convenience, rather than resolving litigation.

Now, due to a recent Italian reform, all authorizations to make public or private notarized deeds concerning person who do not have the full exercise of their rights (minors, interdicted or incapacitated persons) may be given directly by the Notary public, although they must then be served on the clerk of the competent court to fulfil the publicity formalities. Authorizations take effect 20 days after service without a complaint. The only exception, for which the exclusive jurisdiction of the court remains, is for the purpose of promoting, waiving, settling or compromising in arbitration of judgments and, especially, for the continuation of a commercial enterprise. The result of such a new law is, as just said, the attribution to Notaries of competence in matters of authorizations relating to affairs of "voluntary jurisdiction."

Therefore, authorizations for the making of public deeds and notarized private deeds in which a minor, an interdict, an incapacitated person or a person benefiting from the measure of support administration intervenes, or concerning hereditary property deferred to such people, may be issued, upon the written request of the parties, personally or through a legal attorney, by the Notary Public him/herself.

The Notary may be assisted by consultants, and take information, without formalities, from the spouse, relatives within the third degree and from relatives-in-law within the second degree of the minor or the person subjected to a protective measure, or in the case of hereditary property, from the other involved parties and creditors resulting from the inventory, if this latter is drawn up.

In all cases in which, as a result of the execution of the deed, consideration is to be collected in the interest of the minor or a person subject to a protective measure, the Notary, in the act of authorization, shall determine the necessary precautions for the reuse of the same.

As said, the authorization shall be communicated, by the Notary, including for the purpose of fulfilling publicity formalities, to the clerk's office of the court that would have been competent to issue the corresponding judicial authorization and to the prosecutor's office in the same court. The authorization may be challenged before the court in accordance with the rules of the Code of Civil Procedure applicable to the corresponding court order.

The authorizations, as already said, take effect twenty days after the notifications and communications provided for in the preceding paragraphs without a complaint being filed. They may at any time be modified or revoked by the tutelary judge, but the rights acquired in good faith by third parties under agreements prior to the modification or revocation shall remain unaffected.

Authorizations to promote, waive, settle or compromise in arbitration judgments, as well as for the continuation of the commercial enterprise, remain reserved exclusively to the judicial authority.

Legislative Decree No. 149 of October 10th, 2022, effective October 18th, 2022, then repeals Article 375 of the Civil Code, providing that the relevant authorizations are the responsibility of the Tutelary Judge and no longer of the Court, as well as the authorization for the continuation of the business activity (Article 320 paragraph V of the Civil Code). Thus, the authorizations of Article 374 of the Civil Code can be issued, as already said, by the Notary (i.e., the one in charge of drawing up the deed), whose jurisdiction is flanked by that of the Tutelary Judge, who remains the *dominus* of the matter (instead of the Court in collegial composition, as it was sometimes the case before the said reform).

The authorization is issued upon written request of the parties, either personally or through a lawyer and is communicated by the Notary Public to the clerk of the Tutelary Judge who would be competent for the homologation court order, as well as to the Public Prosecutor at the same court.

If I may add a personal remark on this reform, I have to say that it is a piece of legislation which was long-time due. The judicial "attitude" towards such kind of "affairs" was indeed always rather circumspect. The mentality (but sometimes the prejudices and the special love for complications) of many Italian judges brought them to try to always find "what was behind" a request of that kind, whereas all that "was behind" was the desperate and urgent need of a family to sell some goods belonging to an aged person, in order to provide to his/her maintenance. The final result was the creation of unbearable delays, with the bad result that the contractual counterpart in the meantime often changed his/her mind and/or the concerned person passed meanwhile away… This is why we must salute this new law as a modernizing legal asset of our system, which will remarkably contribute to the approximation of Italian cumbersome and outdated procedural legislation to the legal system of a civilized country.

This legislative solution had been preceded, many years ago, by the abolition, in the year 2000, of the so-called "homologation" review by the courts and the

subsequent assumption by the Notary of the responsibility for the establishment of new companies and corporations. Just to give an idea, it will be enough to say that until 2000 the process of homologation of company deeds needed about 150 days from their creation to their effective operation and now can be operating on the day of the deed, or at most in a few days.

6. Co-operation between Judges and Notaries in the Activity and Official Documents of the CEPEJ of the Council of Europe.

Another inspiring document on this subject could be a very recent proposal by the *CEPEJ* (*Commission Européenne pour l'efficacité de la justice*, European Commission for the Efficiency of Justice, created within the Council of Europe), which, on June 16th 2023, approved the draft prepared by the *CEPEJ-SATURN* Working Group (which I have the honour to preside over), aiming at the updating the Recommendation(86)12 of the Committee of Ministers to member states concerning "Measures to prevent and reduce the excessive workload in the courts."

We must say that *CEPEJ-SATURN* has been working on this document since its March 2022 meeting, based on two draft proposals submitted, respectively, by myself and by Prof. Marco Fabri (Italy). In the course of the discussion we consulted other *CEPEJ* Working Groups, as well as the (European Union of *Rechtspfleger*), the Pilot Courts Network of the *CEPEJ*. An important contribution was given by the International Union of Notaries, from which we received valuable comments and we thank them for it.

Once the proposal adopted, it has been sent to the European Committee on Legal Co-operation (*CDCJ*), which is the official "engine" of any initiative of that kind in the Council of Europe, especially when official recommendations of the Council of Ministers are concerned.

In a nutshell, I must say that the new draft Opinion refers to the necessity, in particular: (a) to redraft the provisions of the current Recommendation regarding alternative dispute resolution (ADR), while highlighting the need for raising awareness on the ADR methods among justice professionals; (b) to have the new Recommendation include new provisions related to the use of information and communication technologies (ICT) and the necessity to equip courts with adequate technical equipment (c) to refurbish the list of non-judicial tasks of which judges could be relieved from.

As far as this final point is concerned, I would like to compare, as follows, the current provisions of the Recommendation (dating back to the year 1986) and the new proposed list of tasks which could be given to other professionals, among which of course in the first place the Notaries.

Annex to the Original Rec. (86) 12	**CEPEJ-SATURN Draft Opinion on the Updating of Rec. (86) 12 – Proposed new Annex –**

Appendix to Recommendation No. R (86) 12 *Examples of non-judicial tasks of which judges in some states could be relieved according to the particular circumstances of each country* Celebration of marriage Establishment of family property agreements Dispensing with the publication of marriage bans Authorising one spouse to represent the other: replacing the consent of the spouse prevented from giving consent Change of family name—change of first name Recognition of paternity Administration of the property of those lacking legal capacity Appointment of a legal representative for legally incapacitated adults and for absent persons Approval of acquisition of property by legal persons Supervision of traders' books of account Commercial registers: traders companies trademarks motor vehicles ships, boats and aircraft Granting of licences for the exercise of commercial activities Judicial intervention in elections and referenda other than provided for in the Constitution Appointment of a judge as chairman or member of committees in which his presence is merely required to strengthen the committee's impartiality Collection of taxes and customs duties Collection of judicial fees Acting as a notary public Measures relating to estates of deceased persons Civil status documents and registers Land registry (control over registration of transfer of property, of charges over immovable property...) Appointment of arbitrators when such appointment is required by law.	***Proposal for the update: examples of non-judicial tasks that judges in some States could be relieved of, depending on each country's specific circumstances*** ***1. Law of persons*** - *Declaration of absence and death* - *Decision to authorise or record consent for organ donation* - *Decision to authorise the protection to safeguarding the rights of children and people with incapacities* - *Court approval or authorisation for the performance of acts of disposal, encumbrance or other acts relating to the property and rights of children or adults with incapacity* - *Granting powers of representation, such as "future protection mandate"* - *Judicial grant of emancipation and of the benefit of legal age* - *Gender reassignment* - *Non-litigious cases concerning the status of physical persons:* • *Appointment of tutors, curators, and other administrators* • *Administration of the property of those lacking legal capacity* ***2. Family law*** - *Divorce and legal separation by mutual consent for couples without children or with adult children only* - *Change of matrimonial regime* - *Conclusion and registration of civil partnerships* - *Granting alimony and determining issues arising from it* - *Adoption / consent to adoption of people over the age of majority* - *Approval or authorisation in non-litigious proceedings of the declaration of parenthood* *in respect of children born out of wedlock* - *Collection of consents in the context of medically assisted procreation* - *Handling non-litigious proceedings for the administration of common property when one of the spouses is unable to act* ***3. Real estate, property and succession law*** - *Supervision of real estate records* - *Supervision of property records relating motor vehicles, ships, boats, and aircrafts* - *Non-litigious proceedings in the field of succession law:* • *Presentation and publication of secret wills* • *Declaration of an opening of succession* • *Setting up of inventories* • *Issuance of a national or European certificate of succession* • *Acceptance of an inheritance with the benefit of inventory* • *Issuance of an authorisation for accepting or waiving an inheritance or a legacy, when such acts are submitted for authorisation* • *Submission of executors' accounts and removal of executors, authorisation of acts of disposition by executors (except for children and people with incapacity)* • *Authorisation of the sale and purchase inheritance goods* • *Liquidation and property division in the context of non-litigious and litigious cases* ***4. Commercial and contract law*** - *Issuing payment and injunction orders* - *Decision to authorise the establishment and registration of legal persons* - *Production of accounts by persons required to keep accounting records, or otherwise bound to produce accounts* - *Small claims relating to consumer disputes* - *Non-litigious proceedings concerning trusts:*

	• *Approval of particular "arrangements" on behalf of any person who may have an actual or contingent interest in a trust (including unborn children)* • *Varying or revoking all or any of the terms of the trust* • *Approval of transactions considered expedient but cannot otherwise take place for lack of power of the trustee or for any other reason* • *Issuance of declarations as to the validity or enforcement of a trust, the existence of any resulting or constructive trust, breach of trust or failure of a trust, etc.* • *Non-litigious proceedings concerning debt relief or debt settlement for natural persons* ***5. Criminal law*** - *Authorisation of payment or delayed payment of fines* - *Transcription of testimonies or depositions given during hearings and subsequently proofreading of related court documents* ***6. Procedural law*** - *Control of payment of judicial fees* - *Participation in out-of-court settlement disputes/conducting mediation/conciliation processes* ***7. Enforcement procedures*** - *Judicial sales by auction* - *Declaration of enforceability of court decisions* ***8. Others*** - *Appointment and participation of judges as members or presidents of disciplinary or selection boards/committees regarding persons who are not members of the judiciary (e.g. notaries, lawyers accountants)* - *Administering oaths for non-judiciary professionals (auditors, notaries), collection of testimonies and written evidence* - *Legalisation or apostille of documents*

7. Conclusions.

We know very well that, on the international level, we already have a whole array of instruments and declarations issued by international bodies, such as the U.N. (see the so-called "Basic Principles on the Independence of the Judiciary") and the Council of Europe (I am referring especially to Recommendation No.12/2010 and to several opinions of the Consultative Council of European Judges), which are stressing the need to safeguard the autonomy, independence and impartiality of Judges. However, if we reflect attentively on the fundamental issues at stake, we can easily discover that these very requirements are basically the same which can be relevant for the selection and training of Notaries.

In performing his function, the Notary must, by law, be independent and impartial: he must protect the interests of all parties equally, regardless of who has appointed him. He must, therefore, decline to act whenever there is a conflict of interest (for example, when his own relatives are parties to a transaction). He performs a function of prior control of legality: he has a duty to abide by the law and cannot and must not accept transactions prohibited by law. Just to give an example,

thanks to the checks carried out by notaries, in Italy there are essentially no disputes regarding real estate transactions (only 0.003% give rise to disputes).

Also at European level, as stated by the EctHR in its famous decision *Ana Ionita v. Romania* of March 21st, 2017, Notaries enjoy a role that could be defined as that of “out-of-court magistrates”: an expression in inverted commas, but explicit and completely reflecting their hybrid nature as independent professionals and public officers, closely linked with the requirements of the preservation of the public confidence in their functions.

Now, specifically referred to as “out-of-court magistrate,” by the European human rights judge, the Notary has a different status from that of the lawyer and of the bailiff. Unlike Notaries, lawyers are not public officers, they do not have official powers as a public authority received from the State and no jurists would declare them judge of anything. The bailiffs are indeed public officers, but they only take action to enforce the judgment of the Courts in general and the notarial deeds in particular (both are enforceable titles).

Also the Court of Justice of the European Union (CJEU) has underlined, in its *Leopoldine Gertraud Piringer* judgment of 9th March 2017, that Notaries constitute “a particular category of professionals in which there is public confidence and over which the State exercises particular control.” The CJEU does not state notaries are judges, nor “out-of-court magistrates,” because it thinks in terms of activities much more than status. But, by characterizing their activities from the point of view of public confidence, which it linked before to the impartiality of the Notary, and the preventive administration of justice, which is not conceivable without a guarantee of its authenticity, the CJEU used the main components which permitted the ECtHR to qualify notaries as “out-of-court magistrates.”

Therefore, I think that, having in mind the highlights of those above-mentioned international principles, we could try to benefit from the experience of those legal systems in which qualified, objective and effective selection of legal professionals has been successfully developed for many years.

Actually, we know very well that recruitment of legal professionals differs enormously in Common Law countries, when compared to Civil Law ones.

In this framework I would like particularly to emphasize the German experience of a common initial training based on two phases (*zweiphasige Ausbildung*): one more theoretical and the other one more practical, marked by two severe and very selective examinations (*erste Juristische Staatsprüfung*, *zweite Juristische Staatsprüfung*), between which a “Preparatory Service” (*Vorbereitungsdienst*) helps prospective Judges, Notaries and Lawyers with getting acquainted with the specific issues of each legal profession.

Another worth considering option is the experience of the French *Ecole Nationale de la Magistrature*, which since 1958 has been preparing young French law graduated to become Judges and Prosecutors. A model which helped during these decades training thousands and thousands of judges of the French speaking world and which was successfully exported in many other countries of Europe and of other continents. Other positive experiences are those of Spain, Portugal and of the Netherlands.

I am personally convinced that, as far as the judicial side is concerned, we should try to start a comparison among such systems in order to see what kind of “input” we can find for a prospective new system of selection and training of Judges and Notaries in a perspective which emphasises common aspects.

Let me also point out that, as already said, international bodies have been developing in these last years several legal instruments which could serve as a guide for singling out common denominators for judicial and notarial selection and training, so many are the aspect of our professions we share.

Both our professions need people who are not only legal experts, but who are able to cope with the awkward challenges of present times. Rather than people who know by heart thousands of legal provisions, which very often are bound to stay in force for a period no longer than… *l’espace d’un matin*, we need young men and women who are able to find solutions to—on one side—unexpected problems raised by the dazzling and increasingly complex legal framework resulting from internal, international, supra-national, transnational and foreign legal provisions and—on the other side—the huge practical problems very often uselessly created by a class of lawyers every day more and more aggressive (and many times also incompetent).

We also need honest, independent minded and courageous people, who are able to defend and protect day by day their own autonomy vis-à-vis possible external undue influences of any kind. New ways of selection and training must encourage and foster such spirits among young jurists. At this level too a co-operation among Judges and Notaries is nowadays more and more needed. I am sure both our organisations will be able to find out common denominators for Judges and Notaries of the 21st century.