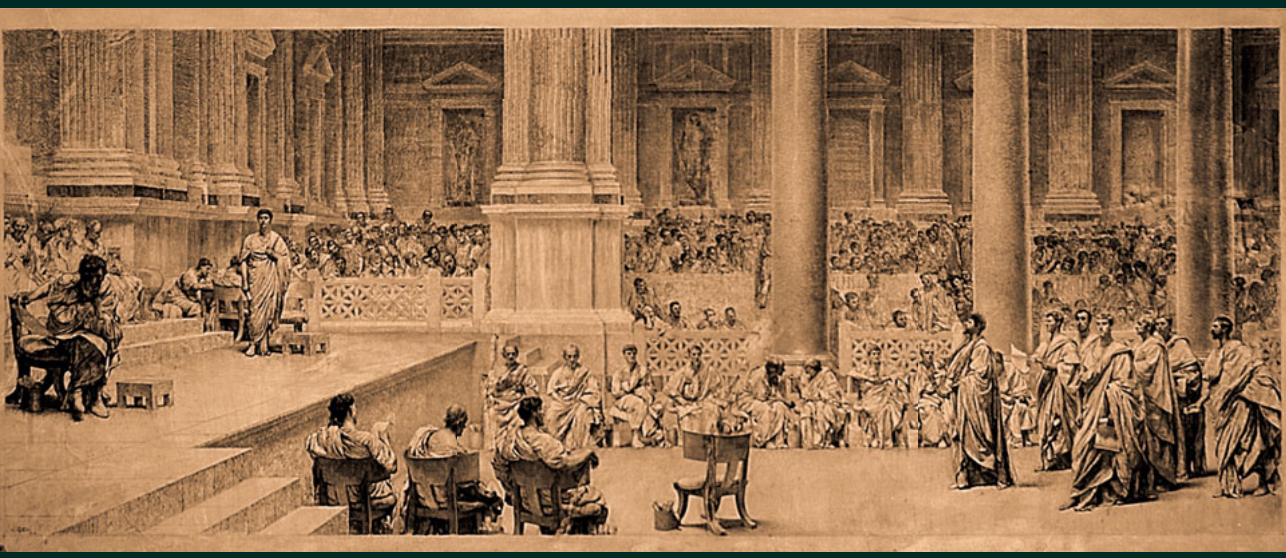
SUPREME COURT OF CASSATION

PIETRO CURZIO

REPORT

on the administration of justice in the year 2020

FINAL REMARKS



Rome, 29 January 2021

"He was that rare type of mind which, through master of a subject, and seeing it, as it were, from within (from a point of view inaccessible to the uninitiated), nevertheless retains a sense of its merely relative value in the general order of things, and measures it in human terms."

M. Yourcenar, Memoirs of Hadrian

On the cover and frontispiece:

C. Maccari, *Trial of Gaius Verres*, sketch of the fresco for the Court's Great Hall (the fresco was never made)

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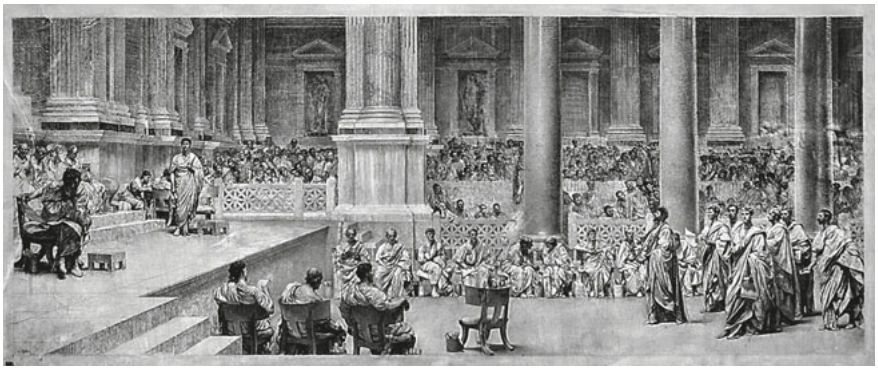

Rome, 29 january 2021

Mister President of the Republic, Excellencies, Ladies and Gentlemen

The picture on the cover of this report is the sketch of the painting of the trial of Gaius Verres, who was charged with serious crimes of corruption and extortion defrauding the region of Sicily, of which he had been the governor for three years. His prosecutor was a young Cicero, and his defence advocate was Hortensius, the finest orator of his day in Rome.

The fresco, for which the sketch was made, was never painted. The wall here on my right has remained white: the fresco is missing.

We chose this beautiful drawing to represent the unusual situation of 2020, a year in which the administration of justice – as any other sector of our society – has been marked by the pandemic. This caused the substantial stop of the courts' activities for some time, a difficult and laborious recovery for the rest of the year, and now the need to re-think the whole system over. And thus to take part in the construction of something that we do not have yet.

Over the last few years, there have been many reforms of the justice system and, within it, of the proceedings before our Court of cassation. There has been a continuous, even whirling, succession of legal and organisational changes, which at times, instead of solving problems, ended up complicating them. Yet we have long been aware that a justice system that is adequate to the complexity of the problems is indispensable for guaranteeing the rights and duties of citizens, for the life of businesses and administrations, and for the reasonable certainty of economic, civil and social relations.

The pandemic has further demonstrated the inadequacy of the system, the weakness and obsolescence of many of its mechanisms, and strongly highlights the need for a deep and incisive change, first and foremost a cultural change.

In order to face the crisis, it has been decided to mobilise an amount of economic resources that was unthinkable a year ago. However, obtaining the relevant funding from Europe requires to define a framework of reforms - and above all that of the justice system - that can provide adequate guarantees of achieving the targets set.

And even if all the funds were received, a substantial amount of them will have to be given back. The debt will have to be repaid mainly by those who are young today. "For years a form of collective selfishness

has led governments to divert human capacities and other resources towards objectives with a more certain and immediate political return: this is no longer acceptable today. Depriving a young person of their future is one of the most serious forms of inequality" (Mario Draghi).

To reach this goal, we have to get back to work, each one respecting their competences and fulfilling their duties.

1. The Constitution and the Court of Cassation

Our Constitution confers on the Court of Cassation a fundamental role by recognising the right of citizens to obtain a scrutiny of possible "violations of the law" made by "judgments or measures affecting personal liberty, pronounced by ordinary or special courts" (art. 111 Constitution, paragraph 7). This scrutiny is performed through an assessment "of legality", which, like any other trial, must be fair, i.e. it must be conducted "with adversary proceedings and with the parties being heard, on equal terms, before an impartial judge in third party position", have a "reasonable length" (first and second paragraphs), adopting "reasoned" court decisions (sixth paragraph).

In the Constitution, the principle enshrined in Article 65 of the Rules governing the Judiciary [ordinamento giudiziario] has not been included. According to it, the Court of Cassation, being the supreme organ of justice, "ensures the exact observance and uniform interpretation of the law and the unity of national law". This is what, citing Pietro Calamandrei, we call nomofilacy, the custody of the law: a task that today has become even more complex due to the multidimensional nature of legal norms and the need to interact with the European judges.

However, the Constitution, stating in Article 3 and throughout, the formal and substantive equality of citizens "before the law", imposes to respect this fundamental right also in the "interpretation and application of the law". Nomofilacy therefore responds to a cardinal principle of our constitutional order.

And as Mr. President of the Republic reminded us, it responds to a request for trustworthiness that comes from society, because "the consistency of the courts' interpretation of the rules strengthens the citizens' trust in the judicial system".

2. *Quantity, quality and length of proceedings before the Court of Cassation*

In its demanding activity, however, our Court has been facing three major problems for some time: the quantity of cases before it, the quality of its decisions and the length of the relevant proceedings.

The Court of Cassation receives every year more than 30,000 civil petitions and 50,000 criminal ones. These figures are unique compared to other courts in the world.

The quality of its decisions is imposed by the role the Supreme Court of Cassation has. Being at the apex of the court system, it must necessarily express itself through decisions of the highest quality, which respond to the task of unifying the hermeneutics.

The length of its proceedings must ensure that the overall duration of a case is 'reasonable', as required by the Constitution. Indeed, the ECtHR has repeatedly pointed out that timely and foreseeable court decisions contribute to making justice comply with the principles of the rule of law and democracy.

It is very complex to reconcile these three elements and our current situation is extremely problematic. Today, more than ever before, the numbers are constantly increasing and this reflects on the other elements; the length of civil proceedings exceeds the level of reasonableness; the quality of the measures is not always up to the standards of the Court's role; there are widespread and recurrent - though very often unintentional - contrasting decisions.

All this is due to structural rather than contingent factors, which can be read according to a series of equations: the higher the number of petitions, the higher the number of justices needed by the Court; the higher the number of justices, the higher the risk of inconsistent or conflicting decisions by the Court. This leads to a vicious circle, since the farther away decisions are from nomophylacy, the more the number of petitions tends to increase: fluctuations and contradictions in the jurisprudence generate an inflation of petitions.

Finding solutions cannot be the result of a solitary consideration, but must be the result of a debate within and outside the Court. Truly this will be one of our duties in 2021.

The terrible year that we have just left behind has engaged us essentially in limiting the damages, and overall the balance is positive. Thanks to a

sharp recovery in the second half of the year, we managed to complete more than 30,000 civil cases, and in criminal matters we managed to keep the time taken to complete cases within less than one year. If you look at the digest of the most important judgments of the Court in the report, you will realise the extent of the Court's commitment, also in qualitative terms.

But this cannot be enough. We must take on the responsibility of contributing to outlining the framework of the necessary proposals to improve a situation that remains critical, thus of cooperating with the various partners involved, starting with the lawmakers.

3. The Court and the Lawmakers

In perspective, the lawmakers will have to solve the ancestral ambiguity of our legislation that places our Court "in an intermediate position between two very different models (Court of legality and third instance court) which does not coincide with any of them, but draws contradictory elements from each one of them" (Michele Taruffo). This is a Gordian knot that weighs on the Court, overloading it with functions and attracting a disproportionate number of petitions.

In the immediate future, the lawmaker should take into consideration at least two aspects: that of what judicial decisions can be challenged before the Court and that of a possible simplification of Cassation proceedings.

3.1 Relationship between appeal and cassation proceedings

With regard to which judicial decisions can be challenged, in recent years there has been a tendency to leapfrog appeal and use only the remedy of cassation proceedings against first instance judgments. It is a shortcut which probably takes into account the delays caused by the bottleneck of the appeal phase, and which is made possible by the fact that the appeal is not provided by the Constitution. However, this leads to an impoverishment of the quality of the first instance judgment on the merits, since it is deprived of a second assessment, and has serious consequences for the Court of Cassation, because the number of petitions is growing disproportionately and the attempt to introduce surreptitiously questions of merit in the proceedings assessing legality is becoming widespread.

The various recent reforms of the Court of Cassation's proceedings tried to introduce various filters to the cases brought before it, but always with poor results. The reason is that the most correct filter for raising the

overall quality of the Court of Cassation proceedings is a properly conducted appeal, which is something that is currently lacking in many areas of the procedural system.

The most recent problem in the activity of the Court of Cassation is the enormous increase in the number of petitions concerning international protection matters, which is closely related to the elimination of the appellate instance for these cases introduced by Decree-Law [decreto legge] No. 13 of 2017 (the number of petitions, which in 2016 were 374, rose to 1,089 in 2017; 6,026 in 2018; 10,366 in 2019; and 6,935 in 2020). This modification has had a heavy impact on the Court of Cassation's workload, at the very time when the first positive results of the enormous amount of effort made in the previous decade were starting to be seen.

Similar considerations can be made about proceedings in tax matters, which have formed for a long time the largest portion of civil proceedings at the Court of Cassation and therefore have a significant impact on the overall workload. The number of cassation annulments of appeal decisions from Regional Tax Commissions [Commissioni tributarie regionali] is considerably higher than that of annulments of appeal decisions from other second instance civil courts. This fact should lead to consider reforming appeal in tax matters, so as to allow the judges of those courts to carry out their work full-time and in an exclusive manner - in the same way as other specialised judges do - given that tax law has become one of the most complex and challenging areas of law and the relevant proceedings raise issues of considerable economic significance and special sensitivity for citizens, businesses and the Treasury.

I have intentionally mentioned these two areas, since they are the ones where the overload of petitions causes the Court a great distress. Suffice it to say that, at the end of 2020, the proceedings pending in these two areas accounted for more than half (55.3%) of the Court's total number of pending civil cases. If the flows were brought back to a physiological trend, the quality and overall length of proceedings would improve markedly.

3.2 In-camera hearings and the irreplaceable role of open court hearings

Another problem that must be solved concerns the modalities and organisation of the cassation proceedings. The underlying idea on which the law-maker has been working in recent years - after having acknowledged the abnormal number of petitions to the Court and the need to curb them - is to

distinguish them according to whether they raise questions of nomophylactic importance or not. This is a sensible choice.

However, this distinction has been organised differently in the criminal and civil fields. In the criminal field, a petition arrives at one of the six simple Chambers and it is the Chamber competent and specialised in the subject-matter of the case that makes such a choice and, where a petitions is likely to be found inadmissible for various reasons, it sends it to the Seventh Chamber.

In the civil field, the solution adopted has been different and more complicated, extending the length of the proceedings. Such extension is not due so much to the fact that a petition goes directly to the Sixth Chamber, which assesses in camera the admissibility and grounds of it, but rather because once a petition passes through that filter and reaches one of the ordinary Chambers, it is subsequently further assessed as to whether it raises issues of particular nomophylactic importance – thus requiring to be heard in open court - or it does not have such importance - and thus is to be heard in camera following a procedure which, however, is different from that of the Sixth Chamber. The coexistence of two different in camera procedures, with different rules, makes civil proceedings in the Court of Cassation unnecessarily complicated.

Preserving the positive part of this reform, it would be advisable to reduce to two the tracks of civil proceedings in Cassation, making only one distinction: open court / in camera hearings. The in camera one should be held by the simple Chamber competent in the subject-matter of the case and, above all, it should follow a single procedure and have a single set of rules. The duplication and diversity of procedures gives rise to a variety of complications that create disorientation among defence lawyers and have a very negative impact on the Court's functioning.

A unified in camera procedure would allow to complete more rapidly and with very concise decisions all the petitions which fall outside the typical area of cassation proceedings, either because they raise questions concerning the merits of the decision challenged, or because they are in conflict with the jurisprudence of the Court and do not provide appropriate grounds for a justified change of orientation.

Such a selection would allow the Court to make a broad filtering and focus its efforts on examining petitions that pose real questions of nomophylactic importance and that require to be dealt with in full respect of the traditional canons of a hearing in open court.

For this category of petitions, purely written proceedings are and will be very useful while the pandemic emergency lasts. However, once we return to normality, proceedings before the Court of Cassation of cases raising important issues of interpretation of the law must be held in an open court hearing, where the parties discuss in confrontation with each other before the Court panel and all the parties - justices, public attorney and defence lawyers - are present in the courtroom. In the same way, any decision in-camera must be reached at the outcome of a discussion between the members of the panel, in the presence of all of them.

4. The Court and the Government

Another important counterpart of the Court is the Minister of Justice since he is responsible for the organisation and functioning of judicial-related services, including those of the Court of Cassation. Their interaction is multi-fold, but one area of it is crucial: the electronic trial.

The electronic trial is operative in all the areas of the civil jurisdiction, except in the Court of Cassation and offices of the Justice of the Peace. This current deficiency is an enormous obstacle to the functionality of proceedings before the Court of Cassation which must absolutely be removed, not only as regards civil but also criminal proceedings. This is all the more so because the distinctive features of cassation proceedings make this operation not only easy but also particularly valuable. It is easy because proceedings in cassation have no preliminary activities, and consist of a few fundamental steps (the petition, the counter petition, the contested decision, the pleadings) which are easily digitalised. It is particularly valuable because the justices sitting at the Court and the lawyers practising at the Court come from all over Italy. In this way, they would be able to consult the case files in real time and not necessarily in the Court premises. This would also benefit considerably the quality of their work, as well as reduce significantly the workload of the Court's Registry offices which could consequently be reorganised, with a substantial increase in their productivity and reduction of processing times.

A few weeks ago, the Court signed a protocol with the Ministry of Justice and other institutional partners that will lead to the introduction of the electronic trial in the civil field. The testing phase started on 26 October. We are therefore at the beginning of a far from simple task, which must be completed by 2021 dealing with the inevitable problems and respecting the

deadlines and commitments made. And after it will have to be extended to the criminal field.

The Government must also be asked to continue enlarging the Court's administrative staff, which urgently needs to be increased both in terms of their number and professional skills.

The pandemic has confronted us with the need to implement ''agile working'', but there have been many difficulties due to the inability to access the Court's electronic system from places other than the on-site workplace. These problems need to be solved introducing mechanisms that allow to switch easily from one working environment to another when this is necessary or useful for the good functioning of the administration.

In the future, the organisation of the Court should be modified, focusing not so much on increasing the number of its justices but on strengthening the support structures for their work; this could be done by setting up an office made up of young jurists who would be entrusted with the preparatory study of cases and with jurisprudential and doctrinal research aimed at forming the basis of the Court's decisions. This is the organisational structure of other supreme courts, which we should import into our system.

On all these topics (digitisation, simplification, new human and equipment resources, the so-called "office of the courts" [ufficio del processo]), there are precise commitments in the "National Plan for Recovery and Resilience" [Piano nazionale di ripresa e resilienza –PNRR]. We hope that 2021 will be the year of "the Italian turning point" within a European turning point, as envisaged in the plan, and that the project will be transformed into an articulated and effective operational process.

5. The Court and the Independent Governance of the Judiciary

The last few years have been difficult for the Superior Council of the Judiciary [Consiglio Superiore della Magistratura] and also for judges' associationism. However, the Italian judiciary has the resources to overcome this troubled period, even if it is not easy. To achieve this, we must have the humility to listen to what the best among us have taught us.

Rosario Livatino wrote in his diary of a person of faith "we will not be asked whether we were believers, but how believable we were". Perhaps the secret, for every choice we make, is simply to ask ourselves how believable we are.

The Supreme Court of Cassation has a privileged relationship with the Superior Council of the Judiciary laid down in the Constitution, where it indicates that the First President and the Procurator General of the Court are members by right of the Council, thereby creating a direct link between the autonomous governing body of the judiciary and the top justices of the Court.

The Court also participates in the activities of the independent governing body with its Executive Council [Consiglio direttivo], which is composed of judicial and lay members. The indispensable judicial members are elected by the Court's justices and express the pluralism of ideas of the variety of associations of judges. The lay members, who are academics and lawyers, have the right to be present also at the restricted meetings, in compliance with a transparency policy that has become assimilated as absolutely natural.

In the last few months, the cooperation with the Superior Council of the Judiciary has enabled to make important steps forward in strengthening the Court so as to make it carry out its role properly: not only the numbers of its staff and the Lists of the Court's judicial organisation [regole tabellari] have been revsed, but after years of standstill there have also been Calls for the appointment of new presidents of Chamber, and of Justices and magistrates for the Office for the Extraction of Legal Maxims [Ufficio del Massimario e del Ruolo].

6. Promoting a culture of dialogue

The arrival soon of such a large number of new justices will stimulate the Court's generational renewal and will probably reinforce the renewal of its gender composition, also at top management level, which has already brought many benefits to the Court.

The pandemic has strongly conditioned the working sessions in the properly collective sense. As soon as possible, the training programme will have to multiply the number of meetings between long-standing and new justices of the Court. This will provide an opportunity to update the debate on the fundamental features of the Court, the principles that must guide it, the limits and potential of its intervention, its relations with other Courts, and the style that must characterise its measures: in brief, the legal culture that must permeate it.

A specific effort shall be devoted to the pursuit of clarity and essentiality in the exposition of the grounds of its judicial decisions, which is a duty for who has the task of untangling the knots and ambiguities of legal provisions. Being clear is part of the ethics of the Cassation justices.

However, the dialogue shall not be only within the Court. Indeed, one of the "professional risks" for judges is that of being self-referential, and this is even more so in the Court of Cassation.

For this reason, as well as for many other reasons, the dialogue with the Bar is important, since it plays a fundamental role in contributing to the jurisdictional process, even before this Court of legality. The relationship with the Bar has led to the signing of many protocols, to the collaboration in the Executive Council [Consiglio direttivo], to consultations for the preparation of the lists [tabelle] of the Court's judicial organisation and to sharing other important moments in the life of the Court, not least the inauguration ceremony of the judicial year. Today there are the best conditions for intensifying this dialogue.

More broadly, the Court shall resume and intensify its ties with legal scholars from their many different fields. Supreme Court justices need to interact with those who reconstruct the legal system, its history, its function and the interconnections of its institutions. The Supreme Court of Cassation, in order to perform its function adequately, must breed on culture.

The opportunities to discuss with other colleagues shall multiply: with the constitutional justices, with whom we share, although with different powers, a continuous reinterpretation of the Constitution so as to make it increasingly permeate the system; and with administrative, accounting and tax judges, with whom we share the commitment to act so as to ensure that the pluralism of jurisdictions does not cause non-communication but instead contributes to enriching a shared legal culture.

The Court of Cassation has a well-established tradition of dialogue with the other national supreme courts – which has become constant thanks to our participation in the Network of the Presidents of the Supreme Judicial Courts of the European Union - and also with the Luxembourg and Strasbourg Courts. The Charter of Fundamental Rights of the European Union, signed at Nice on the night of 7-8 December 2000, is now 20 years old. The last few decades of the European Union have been marked by disenchantment with the European institutions, the expression of forms of national egoism, Brexit, and the development of situations described as 'suspended democracy' (Fritz W. Scharpf).

Yet, this disenchantment has not seriously upset the spirit of dialogue and cooperation between the European judiciaries. This is a sign that the work done by the courts and the networks of jurists has created a common and definitely "European" feeling and culture. And in these difficult months,

Europe seems to be rediscovering the sense of its project, the guiding thread of a shared commitment.

Today, more than ever, it is necessary to engage in giving effect to the principles of the Charter: respect for the dignity of the person, equality and solidarity are the way through which we can overcome the pandemic crisis and open a new season.

Perhaps Jean Monnet's prophecy will come true along this pathway and Europe will be "the sum of the solutions adopted for those crises".

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