CORTE SUPREMA DI CASSAZIONE

GIOVANNI MAMMONE

RELAZIONE

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On the 70th anniversary of the adoption of the Constitution of the Italian Republic

"Obeying the law… means obeying the profound rationale that each one holds within himself as being the law of his life and intimate being."

(F. López De Onate, La certezza della diritto, [1950] Gismondi, Rome, p. 80)

GIOVANNI MAMMONE
First President of the Court of Cassation
Report on the Administration of Justice
26 January 2018

Mister President of the Republic,

Thank you for having honoured with Your presence here today the General Assembly of the Court of Cassation, meeting for the 2018 Inaugural Ceremony of the Judicial Year.

I also thank all the distinguished Authorities and Guests present at this ceremony which aims to be an opportunity for reflection and institutional discussion on the state of justice in Italy and, in particular, the role currently played by the Court of Cassation.

Today, among the guests - for the first time in the history of the inaugural ceremonies of the judicial year - there are some students from a Rome high school. Their presence wishes to show that this Palace is not only opening its doors to young people, but is also showing them how the various Institutions of the State form together a common asset to which all of us - each one for their part - are called to contribute.

This ceremony is an opportunity to recall that the Constitution of the Italian Republic - to which this report is dedicated – celebrates this year its seventieth anniversary, and to demonstrate how the feeling of moral rebirth that accompanied its introduction is still fully alive.

At the same time, we should also recall that in that same year, 1938, the racial laws were introduced and thus we must not forget that they caused divisions and hatred from which, today more than ever in the past, our community wants to depart.

It is with these intentions, Mr. President, that I shall deliver my report on the administration of justice.

Foreword

1. – The Constitution has accompanied the life of the Italian people and their institutions since 1948 and has been a safe guide for consolidating democracy and progress in our country. Also the administration of justice and the judiciary have relied on it for setting the governing principles of their functioning and institutional role.

The Constitution and the Administration of Justice. The Rule of Law

2. – Title IV of our Constitution states that the judiciary is a branch that is autonomous and independent of all other powers. This solemn statement constitutes the institutional basis of the impartiality of the judiciary and at the same time the acknowledgment of its role as guarantor of citizens' rights. Indeed, the principles laid down in the Constitution would be mere words without guaranteeing an effective judicial protection if those rights are violated, as well as appropriate prerogatives of impartiality for the judges that have to ensure such protection.

Actually, the judiciary's autonomy and independence is guaranteed and perfected by its self-governing body, i.e. the Higher Council of the Judiciary [*Consiglio Superiore della Magistratura*]. This collegiate and elective body - provided for by the Constitution and presided over by the President of the Republic - governs the operation of justice and the activity of the judiciary.

The judiciary should feel their constitutional prerogatives not only as the foundations of their institutional role, but also as their rules of conduct. The judiciary must therefore ensure that those prerogatives are never tainted by affiliations or bias. Its members are required to comply with precise ethical duties of reasonableness and moderation in their lives, so as to preserve their aura of impartiality, not only at institutional level, but also in their private lives and relations with the media. It is necessary to affirm clearly that their autonomy and independence are assets that in the first place belong to the entire community and only secondly to the individual-member of the judiciary.

3. – These principles have also been included in the Treaty on European Union, declaring that the European Union Courts (Court of Justice, the General Court and specialised courts) "shall ensure that in the interpretation and application of the Treaties the law is observed." (Article 19). Moreover, the Charter of Fundamental Rights of the European Union states that everyone has the right to an "effective" remedy before a court if the rights and freedoms guaranteed by the law of the Union are violated (Article 47).

Mr President, last year also marked the 60th anniversary of the signing of the Treaties of Rome. On that occasion, the Court of Cassation met members of the European judicial institutions and reaffirmed the principle that, as provided for by Article 2 of the founding Treaty, the judicial protection of rights is at the basis of the Rule of law.

The Role of the Court of Cassation

4. – Within such an articulated set of principles, the Court of Cassation – being at the apex of the Italian court system - has the task of interpreting the law in line with its Constitution and in compliance with the European sources of law. The Court, through the interpretation and enforcement of the principles laid down in the Constitution, can delineate the legal positions of individuals and give concrete expression to the fundamental rights of the persons.

The interpretation and structuring of constitutional rules is enhanced and even increased by enforcing national law in the context of European Union legislation. The Court of Cassation and the European Court of Justice have developed a fruitful dialogue in this direction, aimed at transposing correctly EU law into national law as well as interpreting regulations and directives while taking into account the independency of the individual Member States' legal background.

5. – The dialogue between the Court of Cassation and the Court of Justice of the European Convention on Human Rights is of a different nature.

The direct and immediate enforcement in the domestic legal system of the principles contained in the ECtHR rulings requires specific legislative instruments. In addition, when such instruments are lacking, the role of a judge is that of making the interpretation of domestic law the closest possible to the principles of the ECHR. Therefore, the dialogue between the Courts is made on the basis of legal principles and giving great importance to the creation of a proper and true case law.

6. - The dialogue with the European Courts represents the most sophisticated instrument of the Court of Cassation for performing its function. Indeed, its institutional task is to ensure the uniformity of the *interpretation of the laws* and to make available to the community principles that ensure legal certainty. This function of the Court of Cassation - which is traditionally tied to its historical origin and has justified the very birth of its jurisdiction at national level - undoubtedly responds to our contemporary society's imperative need for legal certainty.

7. - The legal system must seek certainty in the interpretation of legal norms so as to give actual effect to the constitutional principle of the equality of every individual before the law. The predictability of decisions is a key component of the proper functioning of market economy and its relevant laws. The multiplication and overlapping of normative sources, together with their poor coordination and the variability in the interpretations of the judges, constitute in turn a disvalue that undermines certainty and hinders not only economic relations, but also the legal relations between members of society in general.

The interpretation of the law given by the Court of Cassation and the principles of law deriving from it have a unifying function and constitute a point of reference for all legal practitioners. Therefore, a ruling of the Court is addressed not only to the parties to the relevant proceedings, but also to the entire society. Indeed, the public will be able to draw from a given ruling the underlying general rule that is meant to govern similar cases and thus prevent new disputes over the same issue.

8. – As regards fundamental rights, I shall mention the ruling (ordinance No. 5059 of 28 February 2017) given by the Court's Joined Civil Chambers stating that appeals by

foreign citizens against measures by local Commissions [*Commissioni territoriali*] concerning permits of stay in the country must be brought before an ordinary court, on the basis of the fact that the legal condition of a foreigner applying for the status of refugee falls within the category of a subjective right [*diritto soggettivo*] and therefore within the fundamental human rights guaranteed by Article 2 of our Constitution and Article 3 of the European Convention on Human Rights.

In the area of the protection of personal data there have been important rulings aimed at finding a balance between the need of society to store particularly sensitive data (e.g. data on the health of individuals in the interest of public safety or health) and the right of individuals not to have those data disclosed more than what is necessary.

Among those rulings, the following ones are to be recalled:

- ordinance No. 19761 of 9 August 2017, declaring that the storage in a public register of data prejudicial to an individual is legal if required by the law, and constitutes a measure necessary for national security, public security, the economic well-being of the country, the defence of public order and the prevention of crime, as well as the protection of public health, morals or the rights and freedoms of other persons; and
- Judgment No. 30981 of 27 December 2017 defines the category of *supersensitive data* concerning the health of persons, and states that those data must be processed using ciphering or anonymizing encryption techniques so that any public or private party pursuing a public interest or fulfilling a contractual obligation must adopt those techniques.

As regards *family relations*, there has been a very lively debate over the judgments of the Court of Cassation that - adopting a different approach from the past - ruled that the pre-condition for being entitled to divorce maintenance is that the spouse requesting it must lack economic self-sufficiency and not - as in the past - to preserve the same standard of living as during the marriage.

The relevant judgments - No. 11504 of 10 May 2017 and No. 15481 of 22 June 2017 - held that, when deciding whether to award divorce maintenance, the court must: (a) check, in the phase described with the Latin expression *an debeatur*, if the spouse applying for it fulfills the conditions set by the law (lack of adequate economic means or, in any case,

objective impossibility to obtain them autonomously), not on the basis of a living standard similar to the one during marriage, but considering only the applicant's "economic independence or self-sufficiency; (b) take into account only in the subsequent phase, called in Latin *quantum debeatur,* the elements contained in the relevant law provisions (conditions of the spouses; grounds for the decision; personal and economic contribution of each spouse to the running of the household and their personal or family assets; income of both spouses) and consider «all those elements also in relation to the length of the marriage» in order to assess in practice the amount of the divorce allowance through submissions, counter-submissions and evidence in accordance with the normal criteria governing the distribution of the burden of proof.

Another important ruling (Joined Civil Chambers No. 24675 of 19 October 2017) on *loan agreements* regulated the cases where – in the course of time - the usury threshold set in Law No. 108 of 1996 is exceeded, by setting the limits to its enforceability on ongoing agreements.

Judgment No. 24675 held that if the interest rate agreed between the lender and the borrower, while the agreement is in force, exceeds the threshold set in compliance with Law No. 108 of 1996, the clause setting the interest rate is not invalid or ineffective if it was agreed either before the entry into force of that Law, or subsequently if the rate did not exceed the legal threshold; at the same time the lender's claim to receive interests according to the validly agreed interest rate cannot be qualified as contrary to the duty of good faith in the performance of the agreement solely because such rate exceeds the legal threshold.

As regards *civil liability,* we shall recall the ruling (Judgment No. 16508 of 5 July 2017) setting the limits of the State's liability for failure to adopt adequate security measures inside law courts buildings.

Judgment No. 16508, outlining the civil law consequences of a very serious incident that caused distress to the public, ruled that the Ministry of Justice has the obligation to ensure, inside law courts buildings, the security of anyone in whatever capacity present inside them, otherwise it is liable for a culpable general non-compliance with such an obligation.

As regards *environmental damage,* Judgment No. 8662 of 4 April 2017 wisely defined it as a fact that does not necessarily derive from the commission of a specific crime against the environment, given that it can consist in the infringement of any provision governing human activities, as inferred from the system of legal rules that include those on non-contractual torts and on liability for the exercise of dangerous activities.

Judgment No. 8662 also stated some important principles on the liability of public officials found guilty of corrupt conducts toward their institution, ruling that the non-material damage caused by their conduct amounts to a damage to the legality, proper running, transparency and impartiality of the institution's administrative activity (Article 97 Constitution) and that such damage is distinct from that caused to the institution's image and credibility by creating discredit and loss of confidence in it. Since the legal interests damaged are different, consequently both damages have to be compensated separately, not through a double settlement for a single damage.

Finally, it should be highlighted that the Simple Civil Chamber (ordinances Nos 15334, 15335 and 15337 of 2017) referred again to the Joined Civil Chambers the legal issue whether in awarding damages account should be taken of any benefit obtained by the victim irrespective of the will of the party causing the damage – e.g. receiving payments from private or social insurances or social security companies, or even from third parties – . This issue also entails the question whether the rule defined with the Latin expression *compensatio lucri cum damno* is a general rule of civil law or instead applies only to some specific cases.

9. - Article 111 of the Constitution establishes the principle that "against decisions of the Council of State and of the Court of Accounts, appeals to the Court of Cassation are only admissible for reasons of jurisdiction" (paragraph 8). Indeed, this is the highest level of jurisdiction in which the Court of Cassation is required to ascertain if a judicial decision of the administrative or accounting court falls within the limits of their sphere of competence.

The various jurisdictional systems - whether ordinary, administrative or accounting -

rely on well-established case law that forms the nomophylactic background for the public. However, it has been underlined that the various nomophylactic approaches do not coincide in absolute terms, since they may differ on issues of procedural or substantive law specific to their field of competence.

If the divergence concerns legal concepts common to those three jurisdictions, this could impair the concept itself of *nomophylacy,* in the sense of uniform interpretation of the law, given that their judicial decisions could give contrasting indications to the public.

In order to overcome these obstacles, the Court of Cassation, the Council of State and the Court of Accounts have entered into fruitful dialogue aimed at creating common training centres and seminars, through the cooperation of their internal staff, i.e. the *Ufficio del Massimario* of the Court of Cassation [the office charged with extracting legal principles from case law] and the Research Offices of the other two courts.

10. – The Court of Cassation's central and apical position enables it - thanks to the cooperation of the courts of appeal - to select from the courts of appeal actual practice the legal issues that deserve to be brought to the attention of the public.

For example, an increasingly worrying phenomenon is the misuse of the media and social media on the web. Indeed, such misuse infringes the right of society to correct information and at the same time triggers the dissemination to the public of news that can harm people, even involuntarily.

Such a phenomenon can be fought not only through the traditional measures of judicial protection, but also through measures of prevention to contrast misuses before any harm is caused. Consequently, it is necessary to increase the users' awareness of the dangers caused by misinformation or lack of information and their knowledge of the sources of such misuses, through adequate forms of monitoring.

Another problem that needs to be solved is that of computer frauds carried out through unauthorised access to the network systems of credit institutions. In order to avoid that the victim of an unauthorised withdrawal or payment gets to know about it only after it has been made, it is imperative to encourage the development of appropriate control

technologies.

Another issue which raises serious social concern is *femicide*. In fact, it demonstrates that women are still vulnerable and that there is a tendency to solve critical interpersonal relationships through violence.

We are also experiencing an increase in the number of criminal proceedings for offences against sexual freedom and for partner stalking, as well as the growth of the alarming phenomenon of unjustified violence by youth against other youth.

Not only do these issues concern the police and the judiciary, but they also affect families, social services and the institutions involved in the protection of crime victims. Given the multiplication of uncontrolled explosions of aggressiveness, an exclusively repressive response proves unsuccessful. The matter as a whole, due to its worrying expansion, requires a unified legislative approach to avoid that a single criminal behavior is fragmented into separate crimes, given that fragmentation often amounts to objectively minor offences that are punished with small penalties.

Another critical issue is the number of criminal proceedings related to illegal immigration – and often linked to transnational organised crime - that remains high.

In this field, it is necessary to adopt specific criminal law provisions and to assess the effects of the legislative measures to expedite proceedings concerning the international protection of persons and to combat illegal immigration (Decree Law No. 13 of 17 February 2017, converted into law by Law No. 46 of 13 April 2017), when their application will be fully operational.

Organization and Innovation at the Court of Cassation

11. Between 2013 and 2017, the Court of Cassation renewed two thirds of its members, with a drastic reduction in their average age due to retirements - consequent to the abolition of the right of justices to stay in service after the age of 70 - and also to the possibility for judges and prosecutors of second and third seniority level to become justices

of the Court. There was also a radical transformation of the Office of the *Massimario*. First of all the Office staff was increased to 67 units, then its judicial members were enabled to sit - under certain conditions – on the panels of justices of the Court. In addition, several lawyers and university professors were also appointed as justices of the Court of Cassation, in compliance with Article 106 of the Constitution and Law No. 303 of 5 August 1998.

The Court's self-reorganization, which was started a few years ago by the former First Presidents Giorgio Santacroce and Giovanni Canzio and many other justices who recently retired due to age, is a legacy of experience and knowledge that those who are now in their place must preserve and develop, so as to direct in the best possible way new resources to accomplish the Court of Cassation's assignments.

The Court also collaborated successfully with the Higher Council of the Judiciary participating in joint initiatives aimed at improving judicial organisation; in particular, the Higher Council of the Judiciary contributed actively to the functionality of the Court by enabling it to fill all its judicial posts.

12. The number of new appeals - civil and criminal - filed every year remains critically high; it is a truly huge volume for a Court which is responsible for ensuring "the correct observance and uniform interpretation of the Law" (Article 65, Rules on the organization of courts – *ordinamento giudiziario*), and the activity of which should be characterized by the importance of the issues dealt with and the nomophylactic rigour of its rulings, and not by the need to clear up massive amounts of routine cases. In the civil sector, the high number of pending cases is due to the quantity and subject-matter of new appeals, which predominantly concern the Tax Chamber [*Sezione Tributaria*] (11,378 in 2017, i.e. 37.55% of the total). This situation has been going on for several years, but has become particularly serious over the last three years, with a steady increase in the Tax Chamber backlog that, at the end of 2017, accounted for 49% of all pending appeals. In order to address those problems through targeted organizational strategies, separate statistical analyses on the Civil Chambers and on the Tax Chamber were carried out. It was found that, while the total number of cases remained substantially unchanged (106,862

appeals at the end of 2016; 106,920 at the end of 2017), the Civil Chambers (First, Second and Third Chambers and Labour Chamber) reduced the number of their pending cases, eliminating a far greater number of pending appeals (21,176) than that of incoming appeals (19,020) and achieving a satisfactory turnover index (111) ([1]). The result obtained proves the effectiveness of the organisational reforms that have involved the whole Court, and the passionate commitment of its justices who have increased by 10.60 % the number of their judicial decisions. In addition, there has been a reduction in the average length of proceedings that for the first time fell below three years.

With respect to the Tax area, the decisive involvement of the judicial and administrative staff of the Fifth Civil Chamber led to an increase in its performance. The measures adopted by the First Presidency Office have generated organisational improvements and a growth in the number of closed cases. There has also been a significant progress in the number of final measures issued by the Chamber in 2017 (9,162 compared to 8,547 in 2016), i.e. plus 7.19% and a more appropriate turnover index (81 closed appeals against 100 new ones, compared to 74 in 2016). The reduction in the civil sector backlog (which is permanently above 100,000 appeals) will only be possible if the Tax Chamber succeeds in eliminating every year a number of appeals equal or close to that of new appeals. If this is achieved, the positive situation of the other Civil Chambers will enable to reduce the backlog due to the amount of appeals of the Tax Chamber. Having said this, in statistical terms the reduction in the backlog requires that the annual turnover index of the Civil Court of Cassation must permanently be over 100 and that the reduction will be all the greater if the Tax Chamber is able to approach the index of 100.

A further support will certainly come from the 2018 Budget Law, which allows for the appointment of fifty auxiliary justices to provide honorary service in the Tax Chamber. Pending the full implementation of this innovation, the measures already adopted for the reorganisation of the Chamber will be further increased (e.g. through the co-assignment of

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1 The *turnover index* [*indice di ricambio*] measures the percentage ration between the new proceedings in a given year and those closed over the same period, and is indicated with the number of closed proceedings for every 100 new ones.

justices of other Chambers; the creation of a structure to support the Chamber's "sorting" activity composed of personnel from the Finance Police [*Guardia di Finanza*]; the compulsory appointment to the Chamber of personnel to fill the posts vacant due to lack of applications).

On a more general level, the innovations - in the civil and criminal sectors – introduced between the end of 2016 with Decree Law No. 168 of 31 August 2016 (converted into law by Law No. 197 of 25 October 2016) laying down urgent provisions for the final adjudication of cases by the Court of Cassation and for the efficiency of judicial offices, and the summer of 2017 with Law No. 103 of June 23 2017, amending the Criminal Code, the Code of Criminal Procedure and the Prison Regulations, are valuable legal instruments for an effective and long lasting improvement of the Court of Cassation's activity.

13. - In the criminal field, in 2017 the number of new cases increased (56,642, +8.13%) compared to 2016 (52,384). The higher number of new cases was however counterbalanced by the number of closed cases (56,760, an unparalleled number in Europe), so that the turnover index was positive (100.2%). The average length of criminal proceedings at the Court of Cassation, which is already very short, further diminished from 240 days in 2016 to 200 in 2017, thus staying well below the maximum time limit (365 days) set by the European Court of Human Rights for a fair hearing in the highest court.

These positive results were supported not only by the high productivity rate of the justices working in the criminal sector, but also by the flexibility of the working instrument provided for in Articles 610 and 611 of the Italian Code of Criminal Procedure, which allows an easier handling of the backlog. The key element to this is the possibility to apply more frequently the procedure in chambers by selecting in the preliminary assessment phase the cases deemed to be not admissible by the "filter" Chamber and thus assign them to the Seventh Chamber (the "appropriate Chamber" under Article 610) that can therefore rule in chambers by ordinance. The wide recourse to the Seventh Chamber (which accounted for 48.6% of closed cases in 2017); the scheduling of single-theme hearings or extraordinary

hearings; the adoption of a simplified statement of reasons, all contributed significantly to reducing decision-making time.

14. - IT innovations lead to new and more effective organizational solutions. The electronic transmission of notices of hearings and chamber meetings, which was already used in the civil sector, enabled the Registry Offices of the various Court Chambers to allocate to other services the staff previously working for the preparation of the hearings. Since October 2017, this electronic communication system has been in operation also in the criminal sector and has resulted in an even greater reallocation benefit, given that the criminal Registry handles almost twice the number of notices of hearing of the civil one. A further improvement will come from the electronic processing of civil and criminal files, through the transfer of data directly to the internal repository of pending appeals, thus eliminating the intermediate phase of their paper reproduction.

The other actors.

15. – The Court of Cassation is not only embodied by the rules of law governing it and the individual justices composing it, but also by all the persons who contribute to its operation performing the various functions provided by the relevant procedure. The justices sitting in the Court, those of the Office of the Advocate General [*Procura Generale*] and the lawyers each contribute for their part in the life of the Supreme Court, so that No. major change in the Court's way of being and functioning can disregard the contribution of the Office of the Advocate General and of the Legal Profession.

16. - The lack of administrative staff - which is however common to the whole country – is a critical problem at the Court of Cassation given that over 20% of the overall posts are actually unfilled, mainly because of retirements due to having reached mandatory retirement age. This drawback causes a slowing down of services, especially in the areas directly related with the exercise of the judicial activity (central registry, civil and criminal registries).

In this state of affairs, the measures taken by the Ministry of Justice to remedy the

generalised shortage have been appreciated. On 14 November 2017, the Minister approved the final results of the competitive exam for employment of 800 assistant court clerks: announced on 22 November 2016 the whole exam procedure was completed in a particularly short time. The 800 successful candidates are currently being assigned to their posts and, thanks to an increase in the number of posts, they will be followed by another 600 successful candidates Other positive developments, also for the Supreme Court of Cassation, will come from the retraining procedures of administrative staff that were started at the end of 2017 (Ministerial Decree of 13 December 2017).

Concluding remarks

17. Mr President, the year 2018 has a younger Court of Cassation, open to the new technologies and to the debate with Europe, and more than ever ready to address the responsibilities imposed on it by its institutional position.

The interpretation of the Law and its adaptation to the needs of economic and social relations are condensed in the concept of "*nomofilacy*", a term taken from the Classics to define the function performed by a court of justice to ensure the stability of the State's law. The same concept is conveyed, in modern terms, in Article 111 of our Constitution, which states that the judgments of ordinary or special courts "may always be contested before the Court of Cassation for breach of the Law".

The role of the Court of Cassation, therefore, originates from the juridical tradition; however, in its current and concrete shape, it is extraordinarily modern, since it forms the basis of legal certainty and, hence, of the constitutional guarantees of citizens.