

“Court of Cassation, therefore, means a Body that has the task not of assessing the evidence of facts, or the genuineness of titles, or the truthfulness of witnesses, nor more in general the grounds of credibility that have persuaded the judges; ... but of examining whether the judges, in carrying out the above activities, have infringed the law or not; and this is done in order not to amend their judgments, but to comply with them if the violation of the law is not strictly provable, or to repeal them if the error on which they are based can be denounced with indisputable proof.”

GIUSEPPE DE THOMASIS, Della Gran Corte di cassazione ultimamente denominata Suprema Corte di Giustizia, NAPLES, 1832

Mr. President of the Republic,

I wish to thank you for honoring with your presence this General Assembly of the Court of Cassation, convened for the inauguration of the 2019 judicial year.

I also thank all the authorities and guests present at this ceremony, which is intended to be a moment for discussion and debate on the state of Italian justice and, in particular, on the role that the Court of Cassation plays within it.

I would like to dedicate this day to all those who, within the judiciary and not, work in support of the Institutions, with commitment and competence, at times with sacrifice, but always with the pride of serving the community.

§ 1. At the very end of 2018 we celebrated the 70th anniversary of the proclamation of the Universal Declaration of Human Rights, approved on 10 December 1948 by the General Assembly of the United Nations. The Italian Constitution had been promulgated just one year before and had anticipated in quite similar terms the solemn affirmation contained in the first Article of the Declaration that "all human beings are born free and equal in dignity and rights", and had already given specific meaning to those rights. The concept of "dignity" is in fact at the very foundation of our entire Constitution, in which the individual is both the core and point of reference of all those rights.

Our modern States have the task of devising the proper instruments for satisfying the need of each individual - whether their citizen or not – to obtain protection of their rights. Modern constitutions provide that the institutional instrument for ensuring that specific protection is the judiciary, and more specifically the judicial structures in the various fields and instances of jurisdiction. And the international community has taken on the task of ensuring that there be no regression in the field of human rights, and reiterated explicitly this commitment at the recent G20 summit in Buenos Aires where, for the first time, were also present representatives of the Supreme courts of the participating countries.

Indeed, the function of the Supreme Courts is particularly important for the assertion and the safeguard of rights since they are required to establish, at national and supranational level, general principles for the interpretation of the law and to guide the decisions of all judges. Within the common European legal order, the courts of the Member States share this function with the Court of Justice of the European Union, as stated by our Constitutional Court: "With the accession to the Community Treaties, Italy has become part of a wider legal order of a supranational nature, surrendering part of its sovereignty - also with regard to its legislative power - in the matters covered by the Treaties, with the sole limit of the intangibility of the fundamental principles and rights guaranteed by the Constitution' (Judgment¹ No. 348 of 2007). Similar considerations, though slightly different, may be made with respect to the European Court of Human Rights and the European Convention on Human Rights, and the Italian State is bound by its Constitution to comply with their principles.

However, the function of the Courts and therefore of the judiciary - within their respective institutional fields - is not only that of asserting rights, but also of urging each individual to fulfill the duties that accompany in parallel those rights - in the meticulous implementation of the law - and also to remind public and private parties,

¹ Sentenza.

individuals and society, to perform the responsibilities assigned to them within the State's legal system and social setting. This is the sense of Article 29 of the Universal Declaration of Human Rights ("every individual has duties towards the community, in which only the free and full development of his personality is possible") and of Articles 2 and 4 of our Constitutional Charter which provide that "The Republic [...] requires the fulfilment of the mandatory duties of political, economic and social solidarity" (Article 2) and "every citizen has the duty to carry out [...] an activity or a function which contributes to the material or spiritual progress of the community" (Article 4).

§ 2. In 2018 the new High Council of the Judiciary² took office, and has now been in full operation since just over three months. As a member by right of the Council, I sincerely want to wish to it a successful and prosperous work.

Due to the political and parliamentary calendar, the Council was requested since its first meetings to give its opinion on a number of important draft laws under discussion before Parliament. The drafting of opinions on draft laws concerning the judicial system and the administration of justice actually constitutes one of the most delicate functions assigned to the Council by its founding law. This activity is the expression of the cooperation between the self-government body of the Judiciary and the Ministry of Justice requesting those opinions, as well as of the cooperation of it with Parliament given that the latter becomes cognizant of those opinions when it examines and formulates the text of the relevant law.

This consultative function constitutes a technical tool made up of the dialectical contribution of the diverse cultures and competences of the members of that collegiate body. Indeed, the Council's judicial and non-judicial members, as prescribed by the Constitution, are elected by the judiciary and Parliament, therefore they come from varied areas of legal expertise. The wish is that the formation of the Council's opinions will continue to be animated by the resolve to take into consideration different experiences and skills and be sincerely aimed at contributing to the quality of the legislative activity.

§ 3. With regard to the assessment of the activity of the judicial offices at national level the past year, this has shown an improvement in the functioning of the justice system.

The overall data indicate that the number of pending cases in the civil sector is diminishing, in line with a trend that has remained stable in recent years. They went

² Consiglio superiore della magistratura.

from about six million in 2009, to just over three million six hundred thousand as of 30 June 2018, and had a 4.85% reduction with respect to the same period in the previous year. Over the period July 2017 - June 2018, the number of new cases before the first instance courts³ diminished, while they remained substantially unchanged before the judges of the peace⁴ and the courts of appeal.

At local level, the number of pending cases and of completed ones is distributed differently due to the effects of local particularities. Data from some courts of appeal show an increase in labour lawsuits, particularly in public employment cases concerning the school sector. The extension of assisted negotiation⁵ also to consensual separation, divorce and the modification of the conditions of separation or divorce has instead had a positive influence on the workload of the courts, with a decrease - albeit limited - of the relevant procedures.

The data on bankruptcy proceedings are different because of the impact of the reforms of the prerequisites for being admitted to the arrangement with creditors procedure⁶. There has also been a significant increase in compulsory administrative liquidations⁷ and over-indebtedness⁸ procedures. However, it should be noted that the new code of corporate crisis and insolvency⁹ is in the process of being promulgated. It is contained in a legislative decree¹⁰ recently approved by the Council of Ministers, implementing the delegation conferred to it by Law No. 155 of 19 October 2017. This is a much-awaited code that operates a profound revision of the legislation on corporate crisis. It renovates bankruptcy law and insolvency remedies, not only having a more modern vision of the business world, but also considering the need to give a better-defined role to the intervention of the judge.

With reference to medical negligence, some concerns were expressed about the relevant proceedings since those are likely to become cumbersome due to the need to carry out the preventive technical investigations required by Law No. 24 of 8 March 2017, as well as to the need to revise the Register of Expert Witnesses¹¹.

Another source of concern comes from the introduction within the first instance courts – in compliance with Decree Law No. 13 of 17 February 2017, converted into Law No. 46 of 13 April 2017 – of the specialized Chambers dealing with international

³ Tribunali.

⁴ Giudici di pace.

⁵ Negoziazione assistita.

⁶ Procedura di concordato preventivo.

⁷ Liquidazione coatta amministrativa.

⁸ Sovraindebitamento.

⁹ Codice della crisi d'impresa e dell'insolvenza.

¹⁰ Decreto legislativo.

¹¹ Albo dei consulenti tecnici.

protection. These single instance jurisdictions will be composed of professional judges taken from the other Chambers of the court, which will consequently have less judges.

§ 4. Concerning the criminal field at national level, the number of criminal proceedings against known perpetrators pending as of 30 June 2018 decreased by 4.1% compared to the same period the previous year. A reduction was also recorded in the number of new proceedings (-2.6%) and of completed ones (-4.7%).

In the 2017-2018 judicial year, the average length of proceedings increased by 17.5% (i.e. from 369 to 396 days) at first instance, while at appellate instance there was a reduction by 3.4% of the time taken to complete the proceedings (from 906 to 861 days), although the percentage datum remained high in absolute terms. This probably explains the high percentage of cases becoming statute-barred at appellate level: around 25% (25.8% in 2017 and 24.8% in the first semester of 2018) of completed proceedings.

As regards the activity of the Judges of Preliminary Investigations/ Hearings¹², they adjudged only 9% of cases through alternative procedures (6% through plea bargaining¹³ and shortened proceedings¹⁴, 3% through irrevocable criminal decrees¹⁵) - which proves the unattractiveness of these simplified solutions -, while they sent to trial about 11% of cases- which confirms their active filtering function.

At appellate level, an appeal currently takes almost two and a half years, but much of this time is due to "travelling time" that has nothing to do with the actual celebration of the appeal trial. By "travelling time"¹⁶ I refer to the time taken to receive the appeal documents; collate them; prepare the files to be sent to the Court of Appeal; transmit them; and carry out other procedural tasks: all this uses up a large part of the procedural "time". Streamlining procedures, allocating more staff and technology as well as making a better use of them could dramatically reduce the average time taken at appellate instance.

There has been a steady reduction in the number of statute-barred cases, which mostly occur during the appeal and in the preliminary investigations stage. In this connection, given that the 18-month suspension of the time limit for each instance of judgement - introduced by the amendments to Article 159 of the Italian Criminal Code - applies only to offences committed after 3 August 2017, it has not had yet a significant effect. In any case, that reform has been valued positively since it can balance the need to inhibit dilatory appeals with the need to guarantee a reasonable length of the trial.

¹² Uffici dei giudici per le Indagini Preliminari – GIP/ Giudici dell'Udienza Preliminare – GUP.

¹³ Patteggiamento.

¹⁴ Giudizio abbreviato.

¹⁵ Decreto penale irrevocabile.

¹⁶ Tempi di attraversamento.

Moreover, Law No. 3 of 2019 has recently made further significant and radical changes to the statute of limitations, in particular concerning the suspension of the running of the statute of limitations after the first instance judgment. However, the Law's actual operation has been postponed until 1 January 2020, and so it is impossible to assess its impact now. In the meantime, it is necessary that the legislature modify the criminal procedure to accelerate the time taken by a court case.

§ 5. In Italy, there are 1,012 judicial offices throughout the country. Their distribution is based on the criteria established in recent years, aimed at making a better use of the human and structural resources available, and actually their configuration is itself an instrument of rationalization. Today, however, as pointed out by almost all the presidents of the Courts of Appeal in their reports, the administration of the judicial structure suffers, as a whole, from a persistent lack of staff, especially administrative staff.

The number of administrative staff actually employed is 21.38% below the official number¹⁷ (43,658 established staff against only 34,322 actually employed). Although the percentage is lower than in the previous year (when the figure was 23.04%) thanks to the recruitment of new staff by the Ministry, the vacancies in some districts are over 25%.

The average age of employed staff remains high (54.28 years), with a slight decrease against 2017 (55.34 years) thanks to the recruitment of 2,759 assistant court clerks¹⁸. However, despite the recent recruitments, everyone is pointing out that the situation will inevitably worsen with the expected retirement of staff currently in service that are increasingly approaching their retirement age, as well as due to the effects of the new regulations on pensions. Therefore, a great trust is placed in the almost certain recruitment of 3,000 new administrative court staff (at grade 2 and 3). This will take place over the three-year period 2019-2021 through simplified competitive examination procedures (Article 1, paragraph 307, of the 2019 Budget Law).

With regard to the judiciary, the provisions in Budget Law No. 145 of 30 December 2018, which authorized to recruit in 2019 the candidates who had passed the previous competitive examinations to enter the judiciary and to increase by 600 the official number of ordinary judiciary, are welcomed.

¹⁷ Pianta organica.

¹⁸ Assistenti giudiziari.

As a result, the official number of the judiciary is currently set by law at 10,751. Of these, 9,921 are assigned to judicial offices (7,430 adjudicating judges¹⁹ + 2,491 prosecuting judges²⁰, including judges in training), while the remaining part is made up of seconded judges (217) and 600 positions which are still to be filled.

At the end of 2018, the vacancies in the ordinary judiciary were 11.38%, equally distributed between adjudicating judges (-11.45%) and prosecuting judges (-11.16%). The recent increase in the official number of the judiciary will result in a further increase in the number of vacancies that - despite the expected recruitments from two competitive examinations that nearly concluded - will reasonably take at least three years to be filled.

It is worth pointing out that as far as gender balance, in the judiciary there is a slight preponderance of female judges (53%).

A great support to the functioning of justice comes from the contribution given by the 3,518 honorary judges (judges of the peace²¹, honorary judges at the court²², honorary deputy Counsels of the Republic²³, auxiliary judges at the Court of Appeal²⁴, auxiliary justices at the Court of Cassation²⁵) and also by the experts required by law to sit in court.

The fact that honorary judges carry out ordinary judicial work is certainly a help to the overall functioning of justice, although the reform of the honorary judiciary (contained in Legislative Decree No. 116 of 13 July 2017) has not yet enabled to make an efficient use of these professionals.

§ 6. Within the initiatives aimed at optimising the resources of the judicial structures, technological and electronic innovation is of primary importance. After having succeeded with the automation of the judicial services and computer training of staff, and also with the extension of the so-called code of the digital administration²⁶ to include civil and criminal proceedings, the initiatives are now focused on the exercise of jurisdiction.

The implementation of the electronic court case management system²⁷ has led to important achievements in first and second instance judicial offices, mostly in the civil sector. As a matter of fact, the conceptual differences typical of criminal proceedings create practical difficulties in the planning and slow down the implementation of the electronic court case management in the criminal field.

¹⁹ Magistrati giudicanti.

²⁰ Magistrati requirenti.

²¹ Giudice di pace.

²² Giudice onorario di tribunale.

²³ Vice procuratore onorario

²⁴ Giudice ausiliario di corte d'appello.

²⁵ Consigliere ausiliario della corte di cassazione

²⁶ Codice dell'amministrazione digitale – CAD.

²⁷ Processo telematico

Today's advanced automation process has to face various problems: the compatibility of the technical implementations that have been adopted; bridging the experiences of specific sectors; and ensuring the cultural training of the judges and other professionals in the justice system. In this sense, the Ministry of Justice, the High Council of the Judiciary²⁸ and the Higher School of the Judiciary²⁹ have started a fruitful institutional collaboration aimed at supporting the members of the judiciary in the challenging task of combining technological innovation with the autonomy, quality and transparency of their judicial activity.

The Court of Cassation, which has a long-standing tradition in the area of legal and judicial information technology, cooperates in this working group through its structures, most notably its Electronic Documentation Centre³⁰. Indeed, the Centre is experimenting at present innovative methods for the electronic filing of civil appeals to the Court of Cassation, and this procedure is due to be fully implemented in the course of this year.

However, the continuous progress of information technology involves that we must also be prepared for future (and in some cases forthcoming) actions. For example, many would like to see recognition of the legal validity of the so-called blockchain, i.e. the database distributed to a decentralized network of subjects authorized to access the data within it, given that its adoption could enable many useful uses. Others foresee the use of artificial intelligence in the judge's decision-making process, although this also raises quite a number of ethical and legal issues.

Without going too far and remaining within the technical solutions that can be used today, it is necessary to acknowledge that information technology has become part of the day-to-day life of the courts and that it must be seen as a precious tool. A tool that is even more precious if it can integrate itself into the work process of the judicial structures.

§ 7. Within this context of tradition but also of innovation, there is the Court of Cassation - the highest body of jurisdiction - which is required by the Constitution and legislation to carry out its irreplaceable nomophylactic function. In modern society, in fact, the interpretation of the law is made complex by the multiplicity of legal sources at national and supranational level, and by the complexity of legislation, which increasingly tends to be structured into sectoral and specialized domains.

²⁸ Consiglio superiore della magistratura.

²⁹ Scuola superiore della magistratura

³⁰ Centro elettronico di documentazione - CED

At European level, the interconnection of the various judicial systems is ensured not only by the legal instruments available under the European Treaties and the European Convention on Human Rights, but also by judicial networks. There are two organisational networks, one under the umbrella of the Court of Justice of the European Union³¹ and the other under that of the European Court of Human Rights³². Their purpose is to simplify contacts between the relevant European court and the highest national courts. The latter can access the networks by means of accession agreements. The Networks are devised as platforms for the exchange of information and dialogue between the European Courts and the participating courts; Italy initially joined with the Constitutional Court, the Court of Cassation, the Council of State and the Superior Council of the Judiciary.

The new dimension into which Italian law has entered requires that all the members of the judiciary - and in particular those at the Court of Cassation adjudicating on the compliance with the law by lower courts - be in line with their role and capable of increasing their expertise. This means that they have to cultivate not only traditional generalist legal studies, but also move into the new fields of the law and enhance their skills by continually acquiring new knowledge.

The ability to update constantly one's skills is now part of the deontology of judges and prosecutors who, in addition to the basic precepts of independence from public and private sectors, must add the additional one of having adequate professional competences so as to meet the new challenges.

The Court of Cassation has already begun its adjustment process, given that in the past five years it has engaged in a profound generational turnover, recruiting new and qualified staff, and at the same time has innovated its working systems and methods. In this context, it set up a special office for media relations – implementing the indications of the Superior Council of the Judiciary - aimed at the correct and immediate dissemination of the most important judicial decisions and at promoting their understanding.

§ 8. During the last few years, the Court of Cassation has pursued these objectives, especially in the civil sector, through a true organizational self-reform. As a result, last year, also thanks to the considerable effort of all its judicial and administrative staff, the number of completed civil appeals increased significantly, i.e. it had a 7.3% increase compared to 2017.

³¹ Network of the Presidents of the Supreme Judicial Courts of the European Union.

³² Superior Courts Network.

However, at the end of 2018 the situation reverted. The number of new civil appeals - that in previous years had become stable and was expected to gradually reduce the backlog - unexpectedly increased by 21.7%, due to the rise of tax matters cases (+ 9.8%) and international protection ones (+ 512.4%). The huge proportions of this phenomenon statistically nullified the significant improvement in the number of proceedings completed by all the ordinary civil Chambers in 2018, and so the proceedings pending at the end of the year were 111,353 (49% in tax matters), equal to a 4.1% increase.

Thanks to the generous dedication of its entire structure, in 2018 the Tax Chamber completed almost 10,000 appeals thus achieving an unprecedented result (an increase of 9.8% compared to 2017). However, also its backlog increased, due to the significant and unexpected number of appeals filed in 2018, diverging from the trend of the lower courts³³ where the number of appeals filed is falling significantly.

Moreover, in 2018 the Court of Cassation was also affected by the consequences of the entry into force of the Law converting Decree Law³⁴ No. 13 of 2017. This Law provides that the decisions given by the newly established Chambers of the courts specialized in the area of immigration, international protection and free movement of citizens of the European Union can be appealed against exclusively before the Court of Cassation. This provision led to a sudden increase in the number of appeals concerning international protection which, despite the efforts of the Chamber concerned (the First Civil Chamber), caused a considerable increase in the number of pending cases.

The number of new civil appeals concerning matters other than taxation and immigration instead remained stable, so that the Civil Chambers (Second, Third and Labour) succeeded in substantially reducing their backlog.

§ 9. In 2018, the criminal sector, also thanks to the trial reform brought in by Law No. 103 of 2017, the Court of Cassation saw an 8.3% reduction in the number of registered proceedings compared to the previous year (51,956 against 56,632 in 2017).

The constant dedication of the justices of the criminal chambers of the Court led to a significant increase of completed cases. Indeed, the replacement index is well above 100% also in 2018: every 100 appeals registered in the criminal register, 111 were completed (in 2017, the index was 100.2%). As a result, the number of pending cases decreased further, from 30,226 on 1 January 2018 to 24,609 on 31 December 2018 (a reduction of 18.6%).

³³ Uffici di merito.

³⁴ Decreto legge.

These positive results confirm the encouraging trend in recent years, in which the Criminal Chambers of the Court have constantly taken an increasingly shorter average time to complete the appeals before them (180 days in 2018, i.e. 20 days less than in 2017). Well below the one-year limit set by the Pinto Law.

The number of completed proceedings is 57,117. 63.3% are related to ordinary appeals against convictions or acquittals, 7% to plea-bargaining decisions and 9.8% to precautionary measures (7.6% affecting individuals and 2.2% affecting property). The proceedings concerned mainly offences against property other than thefts (17.8%), drug offences (11.5%) and thefts (7.4%). On the other hand, appeals related to crimes against the public administration in general, and those against the administration of justice in particular, accounted for 4.8% of the total of completed proceedings. Offences against the family were 2.8% of the total (more than in 2017), while road traffic offences accounted for 2.4% of the total (less than in the previous year).

The proceedings completed by declaring the crime to be statute-barred (1.1% of the total) were 646, i.e. 14 less than in the previous year.

Despite some enforcement problems due to the shortage of staff, the entry into force (provided for by Legislative Decree³⁵ No. 11 of 6 February 2018) of Article 165-bis of the implementing provisions of the Italian penal code was largely welcomed. Indeed, it sets out a particularly important organisational provision that the lower courts³⁶ and the courts of appeal must comply with when transmitting documents to the Appellate Court. This new provision gives great weight to the needs of the subsequent phase or instance of a case, and thus has an undoubtedly functional importance.

The first instance courts -at least the most efficient ones - are adjusting to this new provision. So the courts of appeal and the Court of Cassation will surely benefit from their compliance with this provision, which requires that the referring court will have to provide some specific information that is functional for a swift handling of the appeal, such as the indication of the time limits of the precautionary measures and the statute of limitations of the offence, the names of the defendants and the declaration, election or determination of domicile of the defendant, etc.

§ 10. Among the most important judgments delivered in 2018 by the Court of Cassation in the civil sector, there is the Judgment of the Joint Civil Chambers³⁷ No. 18287 on the divorce allowance³⁸, which settled the contrast between two different approaches in the previous jurisprudence of the Court. The Joint Civil Chambers stated in this judgment that the divorce allowance in favour of a divorced spouse is both a form of assistance and an equitable compensation,

³⁵ Decreto legislativo.

³⁶ Tribunali.

³⁷ Sezioni unite civili.

³⁸ Assegno divorzile.

in compliance with the constitutional principle of solidarity. Granting the allowance requires that the court has to assess – in conformity with the criteria of Article 5, paragraph 6, of Law No. 898 of 1970 - whether the resources available to the beneficiary are inadequate or if it is impossible for the beneficiary to obtain them. The court therefore has to examine the former spouses' financial and patrimonial conditions, taking into account the weaker spouse's contribution to family life and to the formation of the family's wealth, the duration of the marriage, the age of the beneficiary and the professional prospects that the beneficiary sacrificed for the benefit of the family.

There are also other four judgments (nos. 12564, 12565, 12566 and 12567) that should be mentioned, since they settled a jurisprudential contrast on the issue compensation of profits with damages³⁹. The Joint Civil Chambers ruled on four different cases in which, for the purposes of compensation, there was disagreement as to whether the sums received by an injured party, from a third party, for a claim connected with a damage were to be deducted (such as for example in the case of a survivor's pension⁴⁰; a compensation from a private insurer⁴¹; a life benefit paid by INAIL⁴² (Italian National Institute for Insurance against Accidents at Work) for an accident occurred on the way to and from work⁴³; an allowance for the totally disabled⁴⁴ paid by INPS⁴⁵ (National Institute of Social Security). These judgments ruled that: (a) the capital of the survivor's pension must not be deducted from the amount of the damages awarded to him/her; (b) the amount of the compensation received by the victim on the basis of a non-life insurance must be deducted from the amount of the damages awarded to him/her for the same event; (c) the life annuity paid by INAIL for permanent disability caused by an accident occurred on the way to or from work, and the capitalized value of the allowance for the totally disabled paid by INPS to the victim of the harmful event must be deducted from the total compensation.

The Joint Civil Chambers ruled again, in Judgment No. 22437, on the so-called “claims-made” clause in insurance contracts. The judgement, confirming the Court's previous case-law, acknowledged that the clause does not require to perform the worthiness check⁴⁶ provided by Article 1322, paragraph 2, of the Italian Civil Code, but solely to check the compliance of the relevant type of contract with the law (the so-called actual purpose of the contract⁴⁷). Therefore, each insurance contract must be evaluated taking into account the pre-contractual phase and the performance of the relevant information obligations and verifying whether the clause is not, for the specific contract, a source of an arbitrary imbalance between the risk insured and the insurance premium.

The Court's Joint Civil Chambers specified in their Judgment No. 898 on financial intermediation that the requirement of the written form for a framework contract - on penalty of its voidness as per Article 23 of Legislative Decree No. 58 of 1998 - is to be regarded as a functional one since it is aimed at protecting the investor. Therefore, that requirement is met if the contract is drawn up in writing, delivering a copy to the client, and is signed by the latter - and not also by the intermediary, whose consent can well be inferred from his actual conduct⁴⁸.

³⁹ *Compensatio lucri cum damno* (Latin).

⁴⁰ Pensione di reversibilità al superstite.

⁴¹ Indennizzo dell'assicuratore privato.

⁴² Istituto Nazionale di Assicurazione contro gli Infortuni sul Lavoro.

⁴³ Rendita da infortunio in itinere.

⁴⁴ Indennità di accompagnamento.

⁴⁵ Istituto Nazionale della Previdenza Sociale.

⁴⁶ Controllo di meritevolezza.

⁴⁷ Causa concreta del contratto.

⁴⁸ *Facta concludentia* (Latin).

On the subject of same-sex marriages celebrated abroad, the Joint Civil Chambers, in Ordinance⁴⁹ No. 16957, stated that the decision whether it can be transcribed in the civil records of births, marriages and deaths⁵⁰ belongs to the jurisdiction of the ordinary judge and not of the administrative judge, since it requires to examine the validity in our legal system of the marriage celebrated abroad. Given that this matter concerns the status of the couple, pursuant to Article 8, paragraph 2, of the Code on Administrative Proceedings, it cannot be considered as an incidental ascertainment, and consequently the case is exclusively a matter for the ordinary judge.

With respect to the filiation of same-sex parents, the Court examined a number of cases involving various legal provisions (adoption, adoption in special cases, artificial insemination). The solutions embraced by the First Civil Chamber comply with the constitutional principle that an individual's sexual orientation, as such, does not prejudice his or her suitability to take on parental responsibility. At the hearing of 6 November 2018, the Joint Civil Chambers discussed in public hearing a case raising the issue of whether it could be possible to transcribe in the civil records a foreign judgment which recognized to the non-genetically related member of a homosexual couple the fatherhood of the children born from a surrogate pregnancy carried out abroad.

With regard to liability in the area of health care, the Third Civil Chamber in Judgment No. 3704 (and subsequent judgements No. 20812 and No. 26700) - which concerned cases to which Law No. 24 of 8 March 2017 on the safety of health treatment does not apply - ruled that, when a patient is suing a healthcare facility - and the doctor working for it - for breach of contract and claims damages, that patient has the burden of proving the causal link with the damage caused otherwise the claim must be dismissed.

Judgment No. 5641 assessed the constituent requirements of a damage from loss of opportunity⁵¹, both with regard to the structural differences between this specific damage and an ordinary one, and with regard to the distinction between material and non-material opportunities.

On the professional liability of doctors, in Ordinance No. 20885 the Court stated that the failure to comply with the obligation to provide due information to patients may become relevant for compensation purposes. This would occur also if there is no damage to the patient's health or if the damage cannot be ascribed to the infringement of the right of information – but the plaintiff is required to submit and prove the presence of adverse effects resulting from the infringement of the right to self-determination which are beyond the minimum threshold of tolerability imposed by the duties of social solidarity.

In its Judgment No. 24198, the Third Civil Chamber stated that the discretionary power of a Public Administration cannot extend as far as to review the appropriateness of judicial measures, especially those relating to the protection of the right to property, affirmed by Article 41 of the Constitution and by Articles 6 of the ECHR and Article 1 of the First Additional Protocol to the ECHR. Therefore, the inaction of the Ministry of the Interior that neglected for six years to enforce the seizure, and the contextual clearing, of an illegally occupied property that had been ordered by the Public Prosecutor's Office, amounts to a culpable conduct and is a source of liability.

Particularly remarkable are also some decisions of the Second Civil Chamber concerning penalties imposed by CONSOB⁵² (National Commission for Companies and the Stock Exchange).

⁴⁹ Ordinanza.

⁵⁰ Registri dello stato civile.

⁵¹ Danno da perdita di *chance*.

⁵² Commissione nazionale per le società e la borsa.

In Interlocutory Ordinance No. 3831, the constitutional conformity issues of Article 187-sexies of the TUF⁵³ (Consolidated Law on Financial Intermediation) were declared to be substantial and not manifestly unfounded in the part in which the profit of the offence is subjected to confiscation; the same was declared for the following Article 187-quinquiesdecies in the part in which it punished the delay caused to the CONSOB's investigation of the person suspected of abuse of privileged information. This Ordinance reiterated the indications of the Constitutional Court No. 269 of 2017 and recognized that those Articles are in contrast with the provisions of the Italian Constitution, and also with those of the EDU Convention (ECHR) and the Charter of Fundamental Rights of the European Union (CFREU) (double jeopardy issue), and thus raised the question of the constitutional legality of the internal law provisions in relation to Articles 24, 111 and 117 of the Constitution as well as to Article 6 of the ECHR and Article 47 of the CFREU.

Judgments Nos 31632 and 31633 settled cases in respect of which the Chamber had referred the question for a preliminary ruling to the European Court of Justice (ECJ) over the possibility of taking administrative action (on the initiative of CONSOB) for acts in respect of which the offender had already been acquitted by an irrevocable criminal judgment. The Court, on the basis of the CJEU's reply, decided that it is not compatible with the *ne bis in idem* principle to initiate administrative sanctioning proceedings (or to continue them) if the accused has been fully acquitted of the crime set forth in Article 184 of the TUF. In this case, the Court excluded the need to refer the matter to the Constitutional Court on the grounds that it was not necessary to revoke the application of any domestic legal provision.

§ 11. The Joint Criminal Chambers⁵⁴, in judgment No. 36072 of 19 April 2018, examined the issue of the chronological scope of previous binding decisions and stated that the compulsory referral provided for in Article 618, paragraph 1-bis, of the code of criminal procedure also applies to the decisions of the Joint Chambers taken before the entry into force of that provision. In fact, it was held that, in the absence of an interim discipline, the value of "binding precedent" can be identified with the specific source of the decision, regardless of its temporal collocation.

The Joint Criminal Chambers dealt once again with cases related with prevention measures, as a follow-up to judgments No. 40076 of 27 April 2017 and No. 111 of 30 November 2017. In compliance with judgment No. 291 of 2013 of the Constitutional Court and the case-law of the European Court of Human Rights concerning the fact that the conditions justifying the application of a measure of prevention must continue to be present also while that measure is enforced, they affirmed the need to reassess the topicality and persistence of the social dangerousness when the enforcement of a special measure of surveillance is suspended as a result of a long term detention.

The Joint Criminal Chambers, in judgment No. 51407 of 2018, highlighted the need to assess the topicality of the social dangerousness as a condition for the effectiveness of the prevention measure when there is a time gap between its application and its enforcement: the lack of such an assessment precludes the possibility of claiming a violation of the obligations pertaining to special surveillance laid down in Article 75 of Legislative Decree No. 159 of 2011, given that the measure which originated the prevention measure is not effective.

⁵³ Testo unico in materia di intermediazione finanziaria.

⁵⁴ Sezioni unite penali

Following the new wording of Articles 571 and 613 of the Code of Criminal Procedure - implemented by Law No. 103 of 2017 - and specifically regarding personal appeals by the accused and inadmissible appeals that have to be decided "with no formalities"⁵⁵ (Article 610, paragraph 5-bis, of the Code of Criminal Procedure), the Joint Criminal Chambers, by judgment No. 8914 of 21 December 2017, filed in 2018, established that an appeal for cassation concerning any type of measure - even a precautionary measure - cannot be brought by the party personally. Indeed, as a consequence of the amendment of the said Articles 571 and 613, any appeal must be signed - under penalty of inadmissibility - by a defence lawyer registered in the special register of the Court of Cassation.

On the substantive level, it is important to mention the judgment of the Joint Criminal Chambers No. 8770 of 21 December 2017, filed in 2018, on culpable liability⁵⁶ of health professionals and the new criminal status of medical culpability⁵⁷, as defined in Law No. 24 of 8 March 2017. That judgment states that the ground for non-punishability, set out in Article 590-sexies of the Italian Criminal Code, may be applied only to acts that can fall either under Article 589 or Article 590 of the Italian Criminal Code, and operates only when the health professional has identified and adopted guidelines that are appropriate to the specific case and is guilty of minor malpractice⁵⁸ in the implementation of the recommendations provided in those guidelines. On the other hand, it is not applicable to cases of culpable malpractice and negligence⁵⁹, nor when the health activity is not governed by guidelines or good practices, nor when the latter are identified by the operator in an inadequate manner in the specific case; nor, finally, in the case of serious malpractice⁶⁰ in the implementation of the recommendations provided for in the guidelines. Furthermore, it was specified that the guidelines, defined and published pursuant to Article 5 of Law No. 24 of 8 March 2017, do not constitute truly binding precautionary requirements, capable of constituting - if violated - a case of specific negligence⁶¹, given that they are necessarily flexible to adapt to the specific cases; it follows that, if such recommendations are not adequate to achieve the ultimate goal of providing the best care for the specific case of the patient, the healthcare professional has a duty to depart from them.

§ 12. As regards appeals to the Court of Cassation relevant to judgments of the Council of State and the Court of Auditors concerning jurisdiction issues, the Constitutional Court judgment No. 6 of 2018 stated that there is an excess of judicial power only in cases of absolute lack of jurisdiction (in the form of an encroachment on the domain reserved to legislators or administrations, and of a denial of judicial competence), and thus followed the prevailing case-law of the Joint Civil Chambers. Effective protection and due process must therefore be guaranteed by the courts entrusted with this task by the Constitution, and by the Court when assessing jurisdiction.

Although that judgment is currently being debated by the doctrine, the Joint Civil Chambers followed its indications in their subsequent decisions and consequently

⁵⁵ Senza formalità.

⁵⁶ Responsabilità colposa.

⁵⁷ Colpa medica.

⁵⁸ Colpa lieve da imperizia.

⁵⁹ Colpa da imprudenza e da negligenza

⁶⁰ Colpa grave.

⁶¹ Colpa specifica.

reiterated that failure to rule on a question of constitutional legitimacy or on an exception of non-conformity of internal legislation with European Union law does not constitute a violation of the external limits of jurisdiction (judgment No. 20168 of 2018). The Joint Chambers also reiterated that a violation by the Council of State of the obligation to refer a matter to the Court of Justice for a preliminary ruling (judgment No. 29391 of 2018) does not constitute an issue concerning jurisdiction; thus the qualitative element of the seriousness of the infringement (ruling No. 16973 of 2018) has no relevance for the purposes of checking the jurisdiction.

The dialogue between the Court of Cassation and the Council of State and the Court of Auditors in this field is continuing in the usual forums for discussion. The Court of Cassation does not limit itself to exercising judicial control over judicial decisions, but interacts and collaborates with other jurisdictions on a scientific level and, where necessary, also on the more strictly administrative level. Their respective Chairs and General Secretariats interact effectively, sharing experiences, exchanging information and defining, if necessary, uniform lines of action.

§ 13. Article 65 of the Court System Rules⁶² gives the Court of Cassation the task of ensuring the exact observance of the law, its uniform interpretation and the unity of objective national law. The Court of Cassation is therefore called upon to systemize the interpretations emerging from the fast-flowing contemporary law. This is a task aimed at providing stability and an orderly evolution, so as to guarantee the equality of all citizens before the law as interpreted and applied by the courts.

These prerogatives, considered in practical and not abstract terms, constitute the keystone of the jurisdictional function in modern society, where the need for legal certainty of legal relations is greater than ever, and constant and shared case-law is a prerequisite for the orderly development of the community's social, economic and institutional relations.

This objective can be attained through credible and convincing legal rulings, adopted with transparency, at the outcome of an open consultation with the parties to the proceedings and their defence counsels, who, with their professional expertise and knowledge, provide the necessary assistance to the courts.

§ 14. I would like to conclude my speech, Mr President, by recalling the words you spoke last July at the meeting with the trainee magistrates taking up their first post: "The transparency and understandability of justice are values which derive from the

⁶² Ordinamento giudiziario.

democratic nature of the judicial system and which are connected with the principles of the independence and autonomy of the judiciary and with a modern idea of responsibility of the judiciary."

The entire judiciary is aware of these principles and is strongly committed to them.

This booklet contains the Executive Summary of the Report on the Administration of Justice in 2018, which was presented at the opening ceremony of the judicial year, on 25 January 2019.