

**FUNDAMENTAL TASKS OF THE *CORTE DI CASSAZIONE*, HETEROGENEOUS OBJECTIVES
ARISEN FROM THE CONSTITUTIONAL RIGHT TO APPEAL AND RECENT REFORMS***

(ABRIDGED VERSION)

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1.- An inquiry into the problems affecting the Italian Supreme Court needs to start from article 111 of the 1948 Constitution. Its seventh paragraph introduces the guarantee of the right of appeal to the *Corte di Cassazione* for violation of the law, against every judgement.

On the other hand, article 65 of the judicial regulations says that “the Supreme Court of Cassation, as the highest organ of justice, must assure the exact observance and uniform interpretation of the law”.

We can leave aside the task concerning the exact observance of the law, which reminds us of earlier times when strict positivism was dominant in law studies. Today we are all convinced that there is no difference between exact and uniform interpretation, especially when the latter is consolidated. This is the reason why we speak today of judge made law or living law also in civil law countries.

2.- The “nomofilattic” function of the *Corte di cassazione* – as well as the other supreme courts - is thus reduced to this: “to ensure the uniform interpretation of the law”. But this is no easy task. We can appreciate its importance if we reflect on the values implied in it. Predictability of decisions, authoritativeness of a supreme court, efficiency of its work has been individuated. And, most importantly, equality before the law. This fundamental principle, declared by article 3 of our Constitution, is seriously impaired if the law is interpreted in conflicting ways, depending on the citizen who demands its application. Most probably it was a reflection of the importance of this last value that induced the authors of the Constitution to pursue it by introducing the seventh paragraph of article 111.

They must have reasoned that equality of treatment must be ensured through the intervention of a supreme, centralized organ of justice in the case of conflicting interpretations by judges of the merits dispersed throughout the territory.

We find ourselves confronted with one of the most important cases of heterogenesis of the aims intended by a norm of procedure. It is precisely the guarantee of appeal to the *Cassazione* against all judgments which has determined the impossibility for the *Corte di Cassazione* to guarantee the uniformity of the interpretation and application of the law. The reason is simple and can be contained in proverbial wisdom saying: *tot capita tot sententiae*. Appeals are progressively increasing, as they have been for too many years, to the point that they have now almost multiplied tenfold in comparison to those in the 1950s, so that an excessive and progressively increasing number of judges are called to decide upon them.

3.- The consequence is clear in everyone’s eyes. By adding case law disorder to legislative disorder, the Italian Supreme Court presents a panorama of conflicting judgments from section to section, between simple sections and Sezioni Unite and often even within the same section, including Sezioni Unite, in the line of (quasi) contemporaneous situations, that have nothing to do with the needs of conscious maturation and of a natural evolution of case

* English text by the author.

law, also because they frequently involve conflicts regarding the interpretation and application of laws that are not recent. It will be enough to remember at this point the collection of conflicts, realized first in articles and then also in large volumes by a noteworthy researcher.

We find ourselves in a vicious circle. The more the appeals increase, the more the conflicts increase, due both to the difficulty faced by the judges coming to terms with the most recent precedents due to the elephantiasis of the court and its internal organizational disorder, and to the irreducible divergences on the values submitted for juridical interpretation, which take place in the evaluation of the different judicial benches rotating within the sections. But the more the case law of the court resembles a supermarket where the losing party in the trial on the merits finds favourable precedents, the more the appeals increase.

In short, if one wants to recover the nomofilatic function of the *Corte di Cassazione*, the only route is by the drastic reduction of the number of appeals, just as it is done in other common and civil law countries.

4.- This means that the only way to get durable results is the abolition of the constitutional guarantee of the appeal to the Supreme Court. This was proposed in 2002 but not enacted, and left aside in the more recent attempt to modify the Italian constitution, which was, at any rate, reversed by a referendum.

Reforms via the ordinary legislature are only palliative when they can obtain small improvements.

The recent reform of the judgement of the *cassazione* does not correspond to a unified pattern so far as affects the recovery of the nomofilatic function and thus the restriction of the review of legitimacy with the aim of obtaining the synchronous uniformity of precedents.

Certainly, in the report proposing the legislative decree which reformed the *cassazione* proceedings, we find recognition of the traditional point of view of the nomofilatic function. This is good. It states that in the correct and efficient exercise of this function, the primary objective of the delegating legislator presumes, as an absolutely necessary condition for operation, the reduction in the number of appeals presented to the *Corte di Cassazione*.

5.- Now, as rightly already pointed out by article 32 of the draft plan for delegation approved by the Vaccarella Commission for a new Civil Procedure Code, one of the instruments to obtain this result without modifying the Constitution consists of introducing a right of appeal for a second review on the merits for decisions which are currently directly subject to the right of appeal to the Supreme Court.

Legislative decree no. 40 of 2006 adopts only part of this suggestion. It introduces the right to appeal judgments of the *Giudice di Pace* pronounced in equity, modifying article 339 of the Civil Procedure Code, and judgments pronounced relating to opposition to injunction orders, modifying article 23 of Law 689 of 1981. But it leaves out a series of judicial measures which continue to have no right of appeal on the merits. One thinks, for example, of judgments on objections to orders of execution for the purposes of article 618, subsection 2, of the Civil Procedure Code; of judgments under article 152, subsection 13, of the so-called *privacy* code in regard to proceedings for rights to privacy of personal data; of measures decided in chambers in the bankruptcy regime.

There is worse: we are witnesses of a demonstration of astonishing inconsistencies, found within the context of amendments to the Code made almost at the same time. The legislator abolishes a right of appeal on the merits for judgments which were appealable until yesterday. This concerns judgments relating to objections against execution, as in the new text

of article 616 of the Civil Procedure Code, and judgments with respect to disputes on the distribution of proceeds, as in the combined provision of subsection 1 of article 512 and articles 617.2 and 618.2.

There is a lack of itemised statistical data to draw a balance on the crowding of recourses in cassation by weighing up the proportion between no right of appeal on the merits and the rights of appeal introduced *ex novo*. It is probably a balance close to zero.

6.- Let us see then if there are other measures aimed at reducing the number of proceedings in the Supreme Court. The new subsection 3 of article 360 certainly goes in this direction as it excludes the immediate appeal of the provisional judgments, from now only appealable together with a definitive judgment according to article 361. Even so, the impact of this will not be very significant, as the issue of provisional judgments by appeal judges is not very frequent.

7.- But we find ourselves thereafter confronted with four other new measures, which together will end by determining an increase in the number of appeals to the Court far larger than the reduction induced by the prohibition of the right to immediate challenge of provisional judgments.

I refer to article 360, no. 3, modified, introducing the right to challenge for breach or false application of contracts and national collective labour agreements (which, moreover, will tend to make the Supreme Court degenerate towards a judgment of fact); to article 420 *bis*, which obliges the First Instance Labour Tribunal to decide with an immediate judgment, challengeable only in cassation on preliminary issues concerning the effectiveness, validity and interpretation of contracts and collective agreements; to the last subsection of article 360, which extends the grounds for extraordinary appeal to the *Corte di Cassazione* according to subsection 7 of article 111 of the Constitution; to article 363, which extends the right to challenge in the interest of the law by the *procuratore generale* in cases where the decision he contests is not challengeable in cassation by the parties and is in no other way contestable and allows the court to articulate the relative principle of law, even when it has been erroneously contested by the parties and is consequently declared inadmissible.

The inflationary effect of these novelties can be measured on a scale. It begins from a minimum, which involves the principle of law in the interest of the regulation. The appeals by the *procuratore generale* can so far be counted on the fingers of one hand and it is difficult to think of a party (or its lawyer) ready to indulge in the masochistic mockery of having a challenge declared inadmissible on which he had won the merits of the argument in the phase of abstract declaration of the principle of law. Save for those few cases in which a test case challenge is desired, thus hoping to obtain a persuasive effect over any judge of the merits for future disputes. At the middle of the scale I would place the extension of availability of all grounds for extraordinary appeal, a novelty which is actually desirable, as it was unreasonable in my judgment (and maybe not even necessary for purposes of interpretation of the constitutional norm) to have the previous limitation which restricted the right to appeal for errors *in procedendo* to cases of so-called *errores in iudicando de jure procedendi* and for those arising from lack of reasoning on the face of the record.¹

From there, we arrive at the maximum inflationary effect on the scale, represented by the amendment of n.3 of article 360 and by article 420 *bis* of the Civil Procedure Code. A notable increase in the number of challenges assigned to the labour section is to be expected, especially following the introduction of the latter article of the law. Here we have the

¹ Compare in this respect the analysis by TISCINI, *Il ricorso straordinario in cassazione*, Torino, 2005, p. 376 ss.

obligation on the first instance judge to decide preliminary issues immediately, with only the right of challenge in cassation and (surprise) the automatic suspension of trial proceedings once the challenge has been deposited. The experience of automatic suspension for proceedings to determine jurisdiction, fortunately removed with the “urgent provisions” Law of 1990, has not proved a sufficient warning for an overhasty legislator. Here we have a potent instrument of delay put imprudently in the hands of the party (usually the defendant) who wants to postpone the judgment for a few years!

8.- With the new third subsection of article 374, the legislator sets the goal of obtaining the synchronous unity of the case law of the Supreme Court, independently of establishing filters on the flow of appeals.

This is a norm that will certainly meet the approval of lawyers. A professional class which, owing to the numerical size it has reached (the counsel in *Cassazione* alone number tens of thousands), is maybe not disposed to view positively the hypothesis of reduction in the quantity of litigation, but is certainly tendentially in favour of rationalization.

A sort of bond has been created between the simple sections and the precedents of the full bench. If the simple section does not wish to adhere to the precedent of the joint sections, it must remit it with motivated grounds. Influential academics have long since advanced suggestions in that sense. From Andrea Proto Pisani, who even held that the bond was already available in the interpretation of the positive law², to a late and great judge of the Supreme Court, Giuseppe Borrè³. These are suggestions with which, as a supporter of *nomofilachia* in a traditional sense, I had agreed⁴.

I have to confess that further considerations today make me hesitate. I fear a conflict between the new norm and article 102 of the Constitution which, by establishing that the judge is subject only to the law, has constitutionalised, following the more reliable interpretations, the internal independence of what could be called the minimum jurisdictional unity. Of course, one must recognize that we do not have here a true and actual binding precedent, because we are not dealing with relationships between different jurisdictional organs. Here this is a matter of the organization of work within the same office.

However, it seems to me that the issue of independence remains extant, and is quite serious. The problem of ensuring uniformity of case law exists also within tribunals divided into sections, and the legislator has recently addressed this, but without creating any ties. An article, 47 *quater*, has been inserted in the Judicial Regulation, which requires as one of the tasks of the president of each section that of “taking care of the exchange of information on case law experiences”. So, I believe that a rule would be perceived as harmful to independence if it were to set a duty on individual judges to conform to the precedents of a body formed by presidents or components of the single sections, or to remit the decision if they want to depart from it.

I realize that the comparison is for many reasons a little strained. All the same, discussions could start regarding the relationship between discharge of the task of *nomofilachia* and the guarantee of internal independence of the individual benches of judges in the *Cassazione*. The arguments adopted by Francesco Luiso are not enough to satisfy the

2 Cf: Su alcuni problemi organizzativi della Corte di Cassazione: contrasti di giurisprudenza e tecniche di redazione della motivazione, in *Foro it.*, 1988, V, c. 28-29.

3 Cf: La Corte di cassazione oggi in *Diritto giurisprudenziale* edited by Bessone, Torino, 1996, p. 180

4 In Ruolo della giurisprudenza e attività creative di nuovo diritto, in *Riv. Trim. Dir. Proc. Civ.*, 2002, p. 16.

doubter⁵. The reference to the bond between judge and *res judicata* proves nothing, and is actually little more than a joke, since the lawmaker is, in principle, also bound by decided cases. Nor does the bond existing between the transferee judge and the principle of law run dictated by the Supreme Court counter to the principle that the judge is subject only to the law. We have here a phenomenon of progressive creation of the final judgment typical of the discipline of challenge, which also verifies itself in other hypotheses (just think of the obligation for the appeal judge to restrict the area of cognizance within the scope drawn by the grounds pursuant to article 342 of the Civil Procedure Code and from the re-proposal of the claims and objections not admitted under article 346). This is a phenomenon which has nothing to do with the very different phenomenon of subjecting the judge to ties derived from what has been decided by other judges, not in the same, but in other cases.

Nor must it be forgotten that the law proposal of linking the simple sections to the precedent of *Sezioni Unite* was already contained for the *Cassazione* criminal division in the definitive project of the Criminal Procedure Code of 1988 in article 610 *bis*, but it did not pass the scrutiny of the Parliamentary commission, so that the current article 618, which substituted it, now foresees the power and not the duty of the simple section to remit the challenge to the joint sections, when it finds that “the issue of law subjected to its examination has given rise to, or may give rise to, a case law conflict”.

Let us now ask whether the proposed innovation would actually be effective in ensuring the discharge of the task of *nomofilachia*. Only partially, I would say. Meanwhile it must be remembered that the conflicts between simple sections may remain alive for a long time before the full bench intervenes. And one must also mention the fact that conflicts of case law within the same *Sezioni Unite* are not unknown, and are, I believe, due to the swapping of members of the panels which make them up.

Again, let us take into account that having tried to transform the simple sections into bodies of lower status, subject to the awkward alternative of either excluding themselves or rendering homage to the precedent of the full bench, can easily incite them to rebellion. They could simply disobey the directions of the legislature, since the relevant prescription lacks any sanction⁶. Or, more reasonably, they could try to indulge in the art of *distinguishing*, and thus in those incredible acrobatics of which Anglo-Saxon judges are masters in avoiding the binding effect, by seeking differences in the case before them compared with that already decided, contraband intended to influence the *ratio decidendi*. This is not to mention the danger that, by creating two bodies of magistrates of the *Corte di Cassazione* with different functions, one obtains the professional humiliation of many and a power excessively concentrated in a few.

Lastly, the proposal does not satisfy the principle of economy of proceedings. It loses on one side what it proposes to gain on the other in terms of reasonable duration⁷. In order to establish whether or not to pay homage to precedent, the simple section will obviously have to study and discuss in depth the case before it. If the decision then goes in favour of a reasoned ordinance of remission to the joint sections, an analogous use of time and intellectual effort

5 Cf, Il vincolo delle sezioni semplici al precedente delle sezioni unite, in *Giur.it.*, 2003, p. 824.

6 Cf, in this sense, TARUFFO, Una riforma della cassazione civile?, in *Riv. trim. dir. proc. civ.*, 2006, p. 773, who thinks that, as a consequence of the legitimization of the simple sections not to follow the precedent of the joint sections, that it would contain only (as before the amendment to the legislation) persuasive efficacy.

7 This profile is pointed out by TOMMASEO, La riforma del ricorso per cassazione: quali i costi della nuova nomofilachia?, in *Giur. it.*, 2003, p. 826, even if in a less drastic manner.

will have to be spent by the higher bench in order to decide whether to comply with its own precedent or diverge from it, by accepting the submissions developed during the ordinance of remission.