Essays

The Civil Responsibility of the Italian Judiciary: A Double Speed System

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Abstract

This work illustrates the critical issues regarding the civil responsibility of Italian judges as regulated by legge 27 February 2015 no 18,[1] modified by legge 13 April 1988 no 117 on compensation for damage arising in the execution of judicial office and the civil liability of judges.

I. The Issues at Hand

This paper aims to examine the system regulating the civil responsibility of the Italian judiciary in order to ascertain whether the reform of 27 February 2015 makes substantial changes and, if so, whether they achieve a balance between the need for accountability on the one hand, and judicial independence on the other.[2] The paper also provides a brief overview of other major European legal systems on the matter, and aims to outline the orientation of the case law of the European Court of Justice in order to establish whether, and to what extent, this has had a bearing on the choices facing Italian legislation. A State which is subject to the rule of law must always ensure a balance between the interests of independence and liability[3] as, naturally, 'being independent does not make judges irresponsible'.[4] Such a delicate issue has always sparked passionate debate, as it has always been an inherent element in political conflict and affects the relationships among the State powers.[5] These are currently showing signs of increased tension,[6] in light of the sensitive nature of their

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[2] J. Eelkar, 'Judges and Citizens: Two Conceptions of Law' *Oxford Journal of Legal Studies*, 497-508 (2002); Id, 'Civil Responsibility of Judges for Official Acts' *The Yale Law Journal*, 309-312 (1925).

[3] G.F. Ricci, 'Il «travisamento» del fatto e della prova nella responsabilità del giudice' *Rivista trimestrale di diritto e procedura civile*, 1154 (2015).

[4] European network of councils for the judiciary, *Report ENCJ working group on Liability 2007-2008*, available at https://tinyurl.com/y87nvx6k (last visited 15 June 2017).

[5] N. Picardi, 'La responsabilità del giudice: la storia continua' *Rivista di diritto e procedura civile*, 283 (2007); G. Giacobbe, *Ordine giudiziario e comunità democratica* (Milano: Giuffrè, 1973); A. Giuliani and N. Picardi, *La responsabilità del giudice* (Milano: Giuffrè, 1995).

[6] D. Woodhouse, 'Politicians and the Judges: A Conflict of Interest' *Parliamentary Affairs*,

respective functions.[7]

The problem takes on particular relevance today with the increased acceptance of the concept of justice as a public service – which as such, must be assessed in terms of the quality of the service rendered to consumers.[8] Consequently, State authorities become accountable for the damage caused by magistrates in the exercise of their judicial function, now that the principle of the non-answerability of the 'State as judge' has lost some ground.[9] From a theoretical point of view, a comparison may be made between two models of judicial liability depending on whether one considers a judge to be a State official or a professional:[10] in the first case, a judge's liability would be a disciplinary matter, so internal monitoring would prevail over any liability for damage caused to third parties. In the second instance, liability for third-party damage exists in parallel to the emancipation of the role of the judiciary from other powers, and thus in relation to the principle of judicial independence.

In terms of implementation, the division described here hardly appears representative of reality, which tends to reflect intersections between the two models. Art 28 of the Italian Constitution envisages the State liability for violations committed by State officials and employees.[11] Historically, the Italian Constitutional Court has linked the legitimacy of conditions and limitations on the liability of its exercise to the peculiarities of the judicial function.[12]

Moreover, when ruling on the articles of the law of civil procedure, which were submitted to referendum in 1987,[13] the Italian Constitutional Court stated

423-440 (1996).

[7] J. Waldron, 'Judges as Moral Reasoners' *The International Journal of Costitutional Law*, 5 (2009): 'neither judges nor legislators are deciding what to do as individuals. When they deliberate and vote in their respective institutions, they are deciding what is to be done in the name of the whole society'.

[8] For an interesting analysis of the performance of the Italian civil justice system, see R. Caponi, 'The Performance of the Italian Civil Justice System: An Empirical Assessment' 2 *The Italian Law Journal*, 15-31 (2016).

[9] G.C. Hazard and A. Dondi, 'Responsibilities of Judges and Advocates in Civil and Common Law: Some Lingering Misconceptions Concerning Civil Lawsuits' *Cornell International Law Journal*, 58 (2006).

[10] A detailed reconstruction of the evolution of judicial liability involving the different views of their role within the regulations is found in N. Picardi, n 5 above, 288.

[11] G. Zagrebelsky, 'La responsabilità del magistrato nell'attuale ordinamento. Prospettive di riforma' *Giurisprudenza Costituzionale*, 784 (1982).

[12] Corte Costituzionale 14 March 1968 no 2, *Giurisprudenza costituzionale*, 288 (1968): 'the independence of the judiciary and the individual judge do not place the former beyond the State, as though *legibus soluti*, nor the latter outside the organisation of government. Judges are, and must be, independent of powers and interests not concerned with jurisdiction; but theirs is an office of government and the judges exercising it provide a service' (my translation). The judgment went on to add, however, that 'the peculiarity of judicial office, the nature of court orders, and the judge's impartial position may lead, and have led ahead of their time, to conditions and limitations regarding their liability'.

[13] Arts 55 (the civil liability of judges), 74 (the liability of public prosecutors), 56 (authorisation) Code of civil procedure.

that the question regarded

> 'a coherent system of tutelage of the judicial office, both in respect of the restriction of the areas of the liability of judges – wilful misconduct, fraud or extortion, nonfeasance or delays in responding to applications or requests by the parties or in the exercise of their functions – and the discretionary assessment of the political authority with power to grant authorisation'.[14]

The Court affirmed that 'the State's liability for the acts and the omissions performed by judges in the exercise of their office is to be deemed' within the remit of these articles.

II. The Pre-Existing Framework

The reform on judicial responsibility enacted after an abrogative referendum,[15] concerned legge 13 April 1988 no 117 (the so-called *legge Vassalli*),[16] and in particular Art 55 of the code of civil procedure.[17] The legislator deemed it

[14] Corte Costituzionale 22 October 1990 no 468, *Responsabilità civile e previdenza*, 1003 (1990).

[15] The referendum of 1987 concerned the repeal of various articles of the code of civil procedure: namely Art 55, whereby 'Judges may be held liable solely: 1) when they are culpable of wilful misconduct, fraud or extortion in the execution of their duties; 2) when they refuse, omit or delay to act on applications from parties and, in general, in the execution of their duties without good reason. The premises for the second case subsist only when a party has submitted an application to the judge in the official registry in order to obtain a ruling or an act, and ten days have passed since registration with no result'; Art 56 reads: 'Application for a ruling on judicial liability shall not be submitted without authorisation from the Ministry of Justice. Upon petition by the authorised party, the Italian Supreme Court shall appoint the judge required to pronounce on the question by decree in Chambers. The provisions of this and the previous article shall not be enforced when a party in a criminal hearing seeks compensation or brings a civil action following a conviction' (my translation). Art 74 stated: 'The rules concerning the liability of judges and any legal action pertaining thereto shall also be applied to public prosecutors participating in a civil hearing if, during the execution of their duties, they are culpable of wilful misconduct, fraud or extortion' (my translation).

[16] A. Proto Pisani, 'La nuova legge sulla responsabilità civile dei magistrati' *Foro italiano*, 409 (1988); V. Scotti, *La responsabilità civile dei magistrati* (Milano: Giuffrè, 1988); E. Fazzalari, 'Nuovi profili della responsabilità civile del giudice' *Rivista trimestrale di diritto e procedura civile*, 1026-1035 (1988); P. Dellachà, 'La responsabilità civile del magistrato per dolo, colpa grave e violazione del diritto comunitario: equilibrio del sistema e possibili elementi di rottura' *Danno e responsabilità*, 1129 (2008); F. Bonaccorsi, 'C'è, ma non si vede: la responsabilità civile per fatto del magistrato' *Danno e responsabilità*, 1119 (2008); G. Scarselli, 'Note *de iure condendo* sulla responsabilità civile del giudice' *Il Giusto processo civile*, 1058 (2013); G. Giacobbe, 'Appunti e spunti in tema di responsabilità civile del giudice' *Giustizia civile*, 244 (1987).

[17] On this point, the best scholarship had long felt that a correction was required: 'it is legitimate to harbour doubts concerning the impossibility of seeking legal redress. It is clearly necessary to modify article 55 of the code of civil procedure; but apart from this, it appears that the relationship between citizens, and that between citizens and the State is in need of reformulation: in the event of liability, wilful misconduct, or gross negligence, it is unclear why judges must not also answer to the State to which they are bound by a relationship centred on

necessary to fill the normative void existing up to that time, introducing the principle of compensation for unfair damage resulting from conduct, acts or orders of judges whose actions constituted wilful misconduct or gross negligence in the execution of their duties, or resulted from a denial of justice.[18] The elements constituting gross negligence on which the reform has repercussions are listed as follows in the Vassalli law:

a) gross infringement of the law due to inexcusable negligence;

b) the statement, due to inexcusable negligence, of a fact whose existence is indisputably excepted from the proceedings;

c) the denial, due to inexcusable negligence, of a fact whose existence results indisputably from the acts of the proceedings;

d) the issuance of a provision regarding the personal freedom of an individual, beyond the cases permitted by law or without due justification.

As a safeguard to the legislative framework, the second clause of Art 2 establishes that

> 'during the execution of judicial office, neither the interpretation of the regulations nor the judgement of facts and evidence shall give rise to liability' (the so-called safeguarding clause).[19]

The practical application of the regulation rests on a very restrictive interpretation by the Italian Supreme Court, such that

> 'the execution of the judicial office concerning the discernment of the content of a particular law and the verification of a fact, with the corollaries of the enforceability or otherwise of one or the other, cannot give rise to liability, and this is also true of uncertainty concerning the solution adopted, the inadequacy of the argumentation, the absence of an explicit and convincing rebuttal of opposing hypotheses, with the obligation to subject a declaration of liability, also in such cases, to a non-permitted review of an interpretative or evaluative judgment. On the other hand, liability may arise

public service; similarly, it is unclear why the State should not compensate citizens for damage due to judicial error' (my translation); P. Perlingieri, 'Il controllo del giudice e il controllo sul giudice' originally published in *Atti del X Convegno in ricordo di Girolamo Minervini*, Senigallia 14-16 October 1983, *Giustizia e Cosituzione*, 124 (1984), now in Id, *L'ordinamento giuridico e i suoi valori. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2006), 205.

[18] There has, however, been some debate regarding the accuracy of stating that the subject matter of the referendum was the liability of judges rather than government. N. Picardi, n 5 above, 299; A.R. Briguglio and A. Siracusano, 'Responsabilità per dolo e colpa grave', in N. Picardi and R. Vaccarella eds, *La responsabilità civile dello Stato giudice* (Padova: Cedam, 1990), 216; G.M. Berruti, 'Sulla responsabilità civile dei magistrati (le fattispecie della legge n. 117 del 1988)' *Giurisprudenza italiana*, 235 (1988).

[19] The clause thus formulated creates a substantial degree of immunity, according to E. Navarretta, 'Il danno *non iure* e la responsabilità civile dello Stato', in N. Lipari and P. Rescigno eds, coordinated by A. Zoppini, *La responsabilità e il danno, Diritto civile* (Milano: Giuffré, 2009), 287.

> from failure to hand down a judgment, if this concerns decisive issues, also during the current phase of proceedings, and may be ascribed to inexcusable negligence'.[20]

According to the Supreme Court, liability cannot arise from the action of a judge in interpreting the law or in assessing the facts or evidence, as it must be borne in mind that the safeguarding clause

> 'cannot be subject to a reductive interpretation, as it is justified by the highly evaluatory nature of judicial activity and (...) ensures the constitutional protection of the independence of the judge, and at the same time, the judgment itself'.[21]

The Italian Supreme Court also underlines that

> 'concerning damages payable arising from the wrongful action of a judge, gross negligence, under Art 2, para 3 of legge 13 April 1988 no 117, exists when a judge's behaviour becomes a gross and glaring violation, or a wholly illogical interpretation, of the law, leading to the adoption of aberrant choices in reconstructing the will of the legislator, and the utterly arbitrary manipulation of the text of the law itself'.[22]

Concerning the notion of inexcusable negligence,[23] the Court defines it as a '*quid pluris*' compared with the gross negligence provided for under Art 2236 of the Italian Civil code, insofar as the negligence must be 'inexplicable'.[24]

In addition to the substantial limitations mentioned here, the system of liability set out in legge 13 April 1988 no 117 also contains a procedural element: once the claim has been made, it is subject to a 'filter' consisting of a close examination of admissibility by the court (Art 5).[25]

In order to evaluate the scope of legge 27 September 2015 no 18, it is necessary to consider how the 'filter' amounts to the establishment of a three-stage procedure[26] leading to further complication of the liability mechanism and a loss of efficacy in terms of protection.[27]

[20] Corte di Cassazione 5 December 2002 no 17259, *Giustizia civile-Massimario*, 2123 (2002).

[21] Corte di Cassazione 27 November 2006 no 25123, *Giustizia civile*, 360 (2007).

[22] Corte di Cassazione 18 March 2008 no 7272, *Foro italiano*, 2496 (2009).

[23] C.M. Bianca, 'Negligenza (diritto privato)' *Novissismo Digesto italiano* (Torino: Utet, 1965), 596; G. D'Amico, 'Negligenza' *Digesto delle discipline privatistiche* (Torino: Utet, 1995), 24.

[24] Corte di Cassazione 26 July 1994 no 6950, *Giustizia civile-Massimario*, 1007 (1994); Corte di Cassazione 5 July 2007 no 15227, *CED Cassazione* (2007).

[25] G. Amato, 'Responsabilità dei magistrati: la valutazione di ammissibilità della domanda di risarcimento' *Danno e responsabilità*, 332 (1996).

[26] Corte di Cassazione 9 September 1995 no 9511, *Giurisprudenza Italiana*, 841 (1997); Corte di Cassazione 19 June 2003 no 9811, *Diritto e giustizia*, 99 (2003).

[27] Since the Vassalli law came into force and until January 2014, four hundred and ten liability claims have been submitted; thirty-five have been heard and seven have been upheld.

III. The European Union Position: The Rulings of the Court of Justice and the Infringement Procedure

The European Court of Justice has twice ruled on the incompatibility between the Italian liability system regarding the execution of judicial office and European Union (EU) law.[28] The first judgment, dated 13 June 2006, case C-173/03,[29] *Traghetti del Mediterraneo* (Ferries of the Mediterranean Sea), was handed down after a preliminary adjournment by the Court of Genoa. The case concerned a claim for damages against the Italian State by a shipping company which denounced the erroneousness of a decision handed down by the Italian Supreme Court where a previous verdict on the dispute between *Traghetti del Mediterraneo* (TDM) and a company known as *Tirrenia* had been recorded. This verdict regarded the existence of state aid granted to *Tirrenia* which had allowed it to implement a pricing policy detrimental to TDM. TDM's claim was rejected by the Court of Naples, as well as the Court of Appeal and the Supreme Court. The Supreme Court specifically affirmed the legitimacy of the state aid to *Tirrenia*, as it had been granted to promote the general interest of the development of southern Italy.

TDM, claiming that the judgment contained a misinterpretation of the Treaty regulations on state aid, and objecting that the Court of Appeal, as the court of last resort, had violated the obligation to make a prejudicial referral to the European Court of Justice, brought a case before the Genoa Court, requesting a second national hearing based on the civil liability of the State for judges under Italian law. The Genoa Court noted that the errors reported by the TDM were to be attributed to interpretation. The question then arose of whether the Vassalli law, which excludes State liability, creates compatibility in the Italian system of judicial liability with the provisions of European Union law.[30]

[28] For an interesting analysis reconstructing the responsibility of the State-as-judge from the standpoint of a possible 'euro offence', V. Sciarrino, *La responsabilità civile dello Stato per violazione del diritto dell'Unione* (Milano: Ipsoa, 2012), 159. Moreover, G. Afferni, 'La disciplina italiana della responsabilità civile dello Stato per violazione del diritto comunitario imputabile ad un organo giurisdizionale di ultima istanza' *La nuova giurisprudenza civile commentata*, 267 (2007); A. Palmieri, 'Corti di ultima istanza, diritto comunitario e responsabilità dello Stato: luci ed ombre di una tendenza irreversibile' *Foro italiano*, 420 (2006); V. Roppo, 'Responsabilità dello Stato per fatto della giurisdizione e diritto europeo: una *case story* in attesa del finale' *Rivista di diritto privato*, 347 (2006).

[29] Case C-173/03 *Traghetti del Mediterraneo SpA* v *Repubblica italiana*, [2006] ECR I-05177.

[30] The European Court of Justice asked the Court the following questions: '1) whether a member State is to be accountable outside the terms of a contract towards individual citizens for the errors of its judges in the application or the non-enforcement of EU law, and in particular, the failure by the court of last resort to refer for prejudicial assessmet to the Court of Justice according to Art 234, para 3, of the Treaty. 2) in the event that a member State is accountable for the errors of its judges in the enforcement of EU law and in particular for the omission of the prejudicial referral to the Court of Justice by a court of last resort in compliance with Art 234, para 3, of the Treaty, whether there is a conflict regarding the affirmation of such liability – and thus incompatibility with the principles of EU law – in the case of domestic

Commenting on the referral, the Court of Justice affirmed that the EU law was at odds with domestic law which does not provide for the liability of member States for damage caused to individuals resulting from an infringement of the EU law by a court of last resort. This is because the infringement is due to interpretation of the regulations or a judgment of evidence carried out by that court. Moreover, EU law is also at odds with domestic law which limits the existence of such liability solely to cases of wilful misconduct or gross negligence by a judge. The caveats applied to such liability also include where such a limitation would lead to the exclusion of the liability of the State concerned in other cases and in which a manifest infringement of the laws in force has been committed.

Concerning *Traghetti del Mediterraneo*, the Court of Justice naturally took into consideration its own precedents concerning the liability of member States in relation to the infringement of EU law (the wellknown cases of *Francovich*, *Brasserie dupêcheur* and *Factortame*), in particular where the point at issue is attributable to the judicial authority.[31]

On this question, in *Köbler*,[32] the Court affirmed that State liability may be subject to a less restrictive system than that governing liability for matters attributable to legislative power or to executive power, where the decision had been taken by a court of last resort. Nevertheless, such liability cannot be excluded in cases where a judge manifestly infringes existing EU law. In order to carry out such an evaluation, it is necessary to take into consideration a number of factors. These include the degree of clarity and precision of the rules infringed, the intentional nature of the infringement, the position adopted by an EU institution, and the possible infringement by the court of last resort of the obligation to make a prejudicial referral to the Court of Justice.

Moreover, a manifest infringement exists whenever a decision clearly ignores the jurisprudence of the Court of Justice.

legislation concerning State liability for errors made by judges that exclude liability in relation to the activity of interpretation of the law and evaluation of the facts and evidence, limiting State liability to cases of wilful misconduct or gross negligence by the judge' (my translation).

[31] See the results of an interesting research project on the application of Francovich State liability by national courts in R. Condon and B. van Leeuwen, 'Bottom Up or Rock Bottom Harmonization? Francovich State Liability in National Courts' *Yearbook of European Law*, 1 (2016).

[32] Case C-224/01, *Gerhard Köbler* v *Republik Österreich*, [2003] ECR 10239, with commentary by R. Conti, 'Giudici supremi e responsabilità per violazione del diritto comunitario' *Danno e responsabilità*, 23 (2004). See also G. Alpa, 'La responsabilità dello Stato per «atti giudiziari». A proposito del caso Köbler c. Repubblica d'Austria' *La nuova giurisprudenza civile commentata*, 1 (2005).

The *Köbler* case stems from a prejudicial referral by an Austrian Judge, who had asked the Court to explain whether the case law by which the development of the State liability due to a violation of EU law concerns every governing body committing a violation (*Brasserie dupêcheur* and *Factortame*), was also enforceable in cases where conduct contrary to EU law was established by a supreme court ruling in a member State.

After the TDM ruling, the European Commission observed that Italy had not adapted its internal system to the principles expressed in the aforementioned ruling. The Commission thus initiated infringement proceedings for the violation of EU law (procedure no 2009/2230).[33] The Italian Republic sustained in its defence that the Vassalli law could be interpreted in a way that was compliant with the decision of the Court of Justice of the EU in the TDM case, ruling out the need for a regulatory policy. Considering this justification unacceptable,[34] the European Commission referred the Italian Republic to the Court of Justice which, through its decision of 24 November 2011 (case C-379/10, *Commission* v *Italy*), upheld the Commission's appeal. It deemed that the Italian Republic's reliance on the Vassalli law led it to violate EU law because it excludes the Italian State from any kind of liability for damage caused to individuals due to an infringement of EU law ascribable to a court of last resort. Specifically, liability is excluded if such an infringement is the result of an interpretation of the regulations or a judgement of facts and evidence carried out by the court itself. Another aspect whereby Italian law infringed EU law highlighted by the Court was the limitation of liability solely to cases of wilful misconduct or gross negligence.

Given this persistent non-compliance, the risk of a referral to the Court of Justice by the Commission undoubtedly contributed to inducing the Italian legislator to enact and approve the reform, to avoid heavy fines. After the Treaty of Lisbon came into force, infringement proceedings, as regulated by the Treaty on the Functioning of the European Union (TFEU), Art 260 para 2, are very swift: if a member State does not comply with a judgment handed down for failure to perform obligations issued in accordance with Art 258 TFEU, the Commission can refer it to the Court of Justice without starting a new 'pre-litigation' phase.

IV. The Existing Framework

The Italian legislator seized the opportunity to reorganize the legal framework on this matter, going beyond what was strictly necessary to meet EU compatibility requirements. The political will incorporated into legge no 18 of 2015 seems to indicate will to comply with European guidelines, than the need to reform the Vassalli law. On this question, there is clearly a degree of inconguity between the subject matter of the judgments of the Court of Justice and that which is regulated

[33] Infringement procedure no 2009/2230, begun by the European Commission regarding the non-conformity to the EU law of legge 13 April 1988 no 117, concerning compensation for damage arising from the execution of judicial office and the liability of judges, has been notified under Art 260 TFEU. With its letter of formal notice dated 26 September 2013 moreover, the Commission challenged Italy for not having complied with the ruling.

[34] R. Conti, 'Dove va la responsabilità dello Stato-giudice dopo la Corte di Giustizia?' *Corriere giuridico*, 184 (2012).

by legge 117 of 1988: the former concerns the direct liability of the State as the holder of judicial power, to which is attributed an erroneous interpretation and incorrect application of EU law, whereas

> 'the Vassalli law disciplines the vicarious liability of the State (…), which is accountable for the wrongful acts of its judges in the exercise of the judicial function'.[35]

The so-called liability of the State-as-judge by analogy with the EU law is quite a different matter – where the allocation of competencies within a single member State is a matter of indifference – and yet another a wrongful act commited by ancilliaries being attributed to the State. As a sort of compromise solution, the prevailing interpretation of the subject-matter of the Vassalli law, which states that claims for compensation must be brought against the State, represents a logic where the liability of the State-as-judge is a specification of the liability of the State for the activity of its employees.[36]

In the light of the observations of the Court of Justice, orientated towards the deletion of the safeguarding clause and the expectation of State liability for the infringement of EU law attributable to the court of last resort, the model of liability as it stands – in cases of a manifest infringement of the law not only by courts of last resort – regards both EU law and domestic law. From this standpoint, the exclusion of the regulation of infringements of domestic law would have implied a different treatment of acts which constitute offences against the very same good, involving obvious risks of unconstitutionality.[37]

The current legislative framework preserves the mixed system of the Vassalli law, constructed around the direct liability of the State (in its compensatory, remediary funtion) and that of the judge during hearings (preventive-punitive function). The aim is to create a means of effective tutelage for those who have been damaged by a miscarriage of justice: those who have been damaged as a consequence of the conduct, acts or orders of a judge, including honorary magistrates, with malice aforethought or gross negligence in the execution of

[35] C. Castronovo, 'La commedia degli errori nella responsabilità dello Stato italiano per violazione del diritto europeo ad opera del potere giudiziario' *Europa e diritto privato*, 945 (2012). The author states that the principles established by the Court of Justice concerning the inadequacy of the Italian legislation to regulate State liability for violation of EU law, are 'off target' (my translation).

[36] N. Picardi, n 5 above, 300; V. Scotti, n 16 above, 83.

[37] A. Pace, 'Le ricadute sull'ordinamento italiano della sentenza della Corte di giustizia dell'UE del 24 novembre 2011 sulla responsabilità dello Stato giudice' *Giurisprudenza costituzionale*, 4726 (2011): 'the differing positions of EU law and domestic law on the activity of judges must be considered unacceptable not only in terms of rationality/soundness (Art 3 of the Italian Constitution), but also – and most of all – because our legislator, in imposing a firmer discipline in order to safeguard EU regulations, manifests greater anxiety over the possible violations of EU law than violation of domestic law. And this infringes Art 54 of the Italian Constitution that imposes, at the highest level, the observance of the Constitution and the laws'.

their duties. From a systematic point of view, what is significant is that a 'double speed' liability system emerges, where the speed depends on whether the State is sued for damage resulting from the exercise of judicial power – as understood from the European perspective – or from the personal liability of the magistrate during the proceedings, based on the presumption of inexcusably negligent conduct. More precisely, while the range of the subject broadens and the definition of the seriously wrongful act expands, no longer being limited to inexcusable negligence, this remains the means by which an action against a judge is brought.

In fact, the redefinition of gross negligence represents one of the most innovative aspects of legge no 18 of 2015. According to Art 2, para 3 of the Vassalli law, gross negligence may encompass:

- serious infringement of the law caused by inexcusable negligence;
- assertion and/or denial, through inexcusable negligence, of a fact whose existence is evidently to be excluded from/included in the acts of the proceedings;
- the issuance of a measure concerning the freedom of the individual beyond the cases envisaged by the law or without providing an explanation.

Following a recent judgment by the Italian Supreme Court,[38] the traditional notion of inexcusable negligence has been re-examined, and the possibility of bringing an action for gross negligence has thus been reworked:

- manifest infringement of the law as well EU law, now replaces the previous test of 'serious infringement of the law';
- misrepresentation of the facts and evidence, or the affirmation of a fact whose existence is evidently to be excluded from the acts of the legal proceedings or the denial of a fact that evidently exists;
- the issuance of a precautionary measure against a persona or property beyond the circumstances envisaged by the law or without providing an explanation.

In particular, the concept of misrepresentation has been the object of widespread and heated debate. Firstly, one can affirm that the conjunction 'or' has the meaning of 'that is', which precedes the meaning of misrepresentation. This follows a constitution-oriented interpretation wherein misrepresentation is 'the affirmation of a fact whose existence is evidently to be excluded from the acts of legal proceedings' or the 'denial of a fact whose existence is evidently to be excluded from the acts of the legal proceedings', possibilities already envisaged by Art 3, para 2, point b) and c) of the existing rule.

According to this definition, misrepresentation must be obvious, requiring

[38] Corte di Cassazione 18 March 2008 no 7272, *Foro italiano*, 2496 (2008): 'The assumptions of State liability for serious infringement of the law due to inexcusable negligence during the execution of judicial functions, according to Art 2, para 3, point a), legge 13 April 1988 no 117, must be considered valid when, in the course of the exercise of judicial office, often characterised by options allowing different interpretations of a law, a clear, gross, and glaring infringement of the rule itself or an interpretation in conflict with any logical criterion, or the adoption of aberrant choices in construing the will of the legislator, or the absolutely arbitrary manipulation of the law, or any purely arbitrary interpretation thereof, occurs' (my translation).

no interpretative or evalutative effort, as affirmed by the Italian Constitutional Court. In particular, the Italian Constitutional Court stated that the constitutional guarantee of judicial independence also serves to defend 'the autonomous evaluation of facts and evidence and the impartial interpretation of the rules of law'.[39] Misrepresentation must therefore lead to abnormal interpretations of a specific law and huge distortions of the facts being examined, bringing about an activity which cannot be fully equated to interpretative or evaluative performance.[40]

In connection with the misrepresentation of evidence, the Supreme Court has already clarified that, according to the new regulations, this

> 'does not imply an evaluation of the facts, but an ascertainment or a verification that the evidence relied upon in reaching a decision is contradicted by a specific pleading'.

The evidence reported and used by the judge as the ground for his or her decision must be 'different and incompatible with that contained in the pleading and documented in the claim' or possibly not exist in the pleading at all. The Court underlines, moreover, that the evidence

> 'resulting from the misrepresented evidence must appear to be decisive, that is to say capable in itself of inducing the trial judge, upon adjournment, to completely or partly reverse the outcome of the decision'.

This is because

> 'only the evidence regarding a key point that has been presented but not evaluated, creates irreversible difficulties in the structure of the line of argument of the designated judge'.[41]

The so-called 'safeguarding clause' remains insofar as judges still cannot be called to answer for their interpretation of the law and the way they assess the facts and evidence. In this same vein, there is an accurate reassessment of the range of application of the clause pertaining to interpretation, to exclude only wilful misconduct and gross negligence from the cases where a judge is not responsible, where the gross negligence consists in a manifest infringement of the law and the other cases envisaged.[42] This aims to offset any idea of interference

[39] Corte Costituzionale 18 January 1989 no 18, *Giuisprudenza costituzionale*, 86 (1989).

[40] From a general point of view, it is necessary to find that both the legislator and the judge 'must exercise their independence and find solutions – in full obedience to the principle of legality – suited not to the single norm, but to the hierarchy of principles and normative values' (my translation): G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 29.

[41] Corte di Cassazione 25 May 2015 no 10749, available at https://tinyurl.com/ycpz67rw (last visited 15 June 2017).

[42] On this point, the Supreme Court asserted that 'concerning the civil responsibility of

in judicial independence and the free expression of their rational interpretative power.

The law sets out the criteria which should be used to verify the existence of a manifest infringement of domestic and EU law: the degree of clarity and precision of the rules infringed, and the inexcusability and the gravity of non-observance. Where EU law is infringed, it is necessary to take into consideration the degree to which the act or the measure comes into conflict with the interpretation of the Court of Justice and the non-observance of the obligation to bring the case before the Court (under TFEU Art 267, para 3). The denial of justice due to delay, refusal or nonfeasance by judges in the execution of one or more official acts remains as a ground for bringing a liability claim.

A State compensation action for the recovery of money paid to the magistrate who carried out the wrongdoing through inexcusable negligence is explicitly compulsory and reinforced, increasing the sanction from a third to a half of the magistrate's annual salary and increasing the time to submit the application from one to three years from the moment of the compensation hearing.

V. The Barring of Direct Liability

The possibility of suing a judge directly has been completely ruled out, despite several government attempts in recent years to introduce it. Such a system would not be in line with the aim of the reform, which tends to represent a harmonious point of contact between the compensatory-remediary function and the preventive-punitive function of the institution of the civil liability of judges. Such an approach seems to be supported by the first judgements of the Italian Supreme Court concerning legge no 18 of 2015, with reference to the fact that only the State can be called as defendant.[43]

judges, Art 21 of legge 13 April 1988 no 117, establishing the conditions for submitting an application for compensation against the State due to an act carried out in the course of the execution of judicial office – excludes the possibility that the interpretation of the law or the examination of facts and evidence may give rise to liability. This is in contrast with the Union obligations of the Italian State in the light of the provisions contained in the judgment handed down by the EU Court of Justice concerning domestic courts of last resort' (my translation); Corte di Cassazione 22 February 2012 no 2560, *Danno e responsabilità*, 983 (2012).

[43] Corte di Cassazione 23 April 2015 no 16924, *Giurisprudenza italiana*, 992 (2015): 'Magistrates whose professional conduct is the object of a claim for compensation under legge 13 April 1988 no 117 do not become debtors in respect of those who bring the claim. This is because such a claim (albeit after legge no 18 of 2015) can only be brought against the State (except for cases of wrongful conduct under Art 13). Neither does a subsequent action by the State against a judge, in the event that the original judgment found against the Administration, change the conclusion since the assumptions and the substance of such a suit are partially different from those of direct action by a private individual against the State (Art 7; Arts 2, 3). This means that in the event of the involvement of a judge in a civil case brought under legge 13 April 1988 no 117 (Art 6), no direct relationship between the claimant and the judge arises such as to lead to the latter becoming a potential debtor towards the former' (my translation).

It is important to underline that the Constitutional Court stated that, even if there is ample leeway for the legislator to modify the system regulating liability, any variation to the institution totally lacking in additional protections with respect to those in the existing system, would be anti-constitutional, given the special character of the judicial office[44] (identified as 'terms and limits' which would be reduced in the event of direct liability). On this point, the recently adopted law is grounded in a coherent framework abolishing, on the one hand, the 'filter' of admissibility (as a possible limit or condition for legal action), and on the other hand, guaranteeing independence in the exercise of judicial office, excluding judges from any form of direct responsibility. In fact, it had long been erroneously argued[45] that the filter of admissibility was a constitutional necessity, attributing to the Constitutional Court positions that it had never held. In reality, it would be a normative framework, completely disengaged from any terms and limits such as direct liability, which would prove to be unconstitutional.

VI. Civil Liability of Magistrates in Other European Legal Systems

From a comparative point of view, the direct liability of judges is unknown in almost all the other European legal orders. For example, in France, liability claims may be made against the State and direct action against judges is not permitted, notwithstanding the right of the State to act against them.[46]

In France, the specific nature of the judicial office has historically suggested a tempering of the general principle of responsibility with the need to avoid the proliferation of specious compensation suits against judges.[47] The system (like the Belgian and Portuguese system) is very similar to the Italian one, and Art

[44] Corte Costituzionale 16 January 1987 no 26, *Giurisprudenza italiana*, 1316 (1987): it is the decision establishing the admissibility of the abrogative referendum. See P. Perlingieri, *Funzione giurisdizionale e Costituzione italiana* (Napoli: Edizioni Scientifiche Italiane, 2010).

[45] N. Zanon, 'Profili costituzionali della legge sulla responsabilità civile del magistrato (L. 17/1988, Artt. 1-8), con particolare riferimento alla tutela dell'indipendenza funzionale dei magistrati' *Persona e danno* (2010), available at https://tinyurl.com/ydgq99uo (last visited 15 June 2017).

[46] Dossier by the Italian Chamber of Deputies, *The Civil Liability of Judges. National Legislation and the Case Law of the European Court of Justice* no 306, 16 December 2011, 17: 'the following three systems regarding the liability of judges are envisaged (*Code de l'organisation judiciaire*, articles L 141-1 et seq): the first concerns liability for the malfunctioning of the judicial service (*fonctionnement défectueux du service de la justice*), which is limited to two circumstances: gross negligence (*faute lourde*) and the denial of justice (*déni de justice*) (article L 141-1); and liability arising from the personal negligence (*faute personnelle*) of an ordinary judge (members of the judiciary) subject to the rules and regulations contained in the *Statut de la Magistrature* (article L 141-2). The third concerns liability for personal negligence by other judges (eg administrative judges or those in special jurisdictions) and is governed by special laws or, in the absence of such, follows the procedure of the so-called "*prise à partie*" (article L 141-3)'.

[47] E. Righetti, 'La responsabilità civile del giudice nel diritto francese' *Rivista di diritto processuale*, 178 (1991); G. Canivet Joly and J. Hurard, 'La responsabilité des juges, ici et ailleurs' *Revue internationale de droit comparé*, 1049 (2006).

141 of the *Code de l'organisation judiciaire,* allows legal action to be brought against the State only in cases of particular gravity and in the event of wilful misconduct.[48]

The German system, evoking the principle of the independence of the judiciary, allows State liability (Federal or Regional) in the event of the dereliction of duty pertaining to judicial office. Liability is thus indirect, due to the fact that the claimant cannot directly sue the judge whose liability is called into question.[49] In accordance with Art 839 of the BGB, a judge is liable for damages as a public official in cases of wilful misconduct or negligence but direct action against the State does not provide for any compensation.

Judicial immunity is a historical characteristic of the legal system of the United Kingdom, intended to safeguard the independence of the judicial office; magistrates are subjected to 'internal' accountability (in respect of the public powers and the association to which they belong), and 'external' accountability, in areas such as the court of public opinion, to which their actions are subject.[50] The applicability of the rules of civil responsibility against judges for acts executed in the exercise of their office, with the sole exception of cases of unlawful detention, is disregarded.[51] The Spanish regime on the question of the civil liability of judges and magistrates is enshrined in the *Ley Orgánica* 1 July 1985 no 6 del *Poder Judicial* (LOPJ) 12, that envisages concurrent dual action against both the State and the magistrate. An action for compensation may be brought if, in the execution of their office, judges commit acts of wilful misconduct or negligence. Eligibility to bring an action is subject to a system of admissibility filters regarding the existence of grave negligence.[52]

VII. The Pitfalls of 'Defensive Jurisprudence' Between Civil and Disciplinary Liability

[48] V. Fon and H.B. Shafer, 'State Liability for Wrongful Conviction: Incentive Effects on Crime Levels' *Journal of Institutional and Theoretical Economics*, 269 (2007).

[49] Dossier by the Chamber of Deputies n 46 above, 19: 'Art 34 of the German Fundamental Law (*Grundgesetz* – GG), affirms the liability of the State (Federal or Land) in the event of the dereliction of duties by judges in office. Liability for damages is therefore indirect, as the claimant cannot directly involve the judge he/she wishes to sue for damages'.

The form of liability is set out in Art 839 of the German civil code (*Burgerliches Gesetzbuch* – BGB), the criterion for bringing an action (against the State) are regulated by Art 34 GG' (my translation).

[50] J. Goldring, 'The Accountability of Judges' *The Australian Quarterly*, 147 (1987); V.R. Krishna Iyer, 'Judicial Accountability to the Community: A Democratic Necessity' *Economic and Political Weekly*, 1808 (1991).

[51] M. Marandi, R.E. Shaglan and H.G. Asl, 'Civil Liability of Judges in Comparative Law and Legal System of Common Law' *International Journal of Basic Sciences & Applied Research*, 193 (2014).

[52] L. Bairati, *La responsabilità per fatto del giudice in Italia, Francia e Spagna, fra discipline nazionali e modello europeo* (Napoli: Edizioni Scientifiche Italiane, 2013).

The introduction of the regime has led some to discuss the risks connected with so-called defensive jurisprudence. The naming of the field as such alludes to the now well-established tendency in the field of medicine to reduce the risk of infringing a rule of conduct rather than to safeguard the health of the patient.[53] A further important consideration is that while a doctor has a duty to save a patient, the decisions of a judge nevertheless entail consequences impinging on the personal freedom of the accused or on the certainty of justice for the victims of crimes, ie those harmed by wrongful conduct.[54]

In particular, there is the risk of a rupture in the characteristic and 'closed' State civil responsibility of a judge through the removal of the autonomous nature of the evaluation of facts and evidence, resulting from the possible introduction of the duty to give reasons for the choices judges make. Judges could, from a defensive perspective, be intimidated in the exercise of their judicial office and be induced to adopt unnecessary and redundant reasoning, not envisaged by the legal system itself. However, on the one hand, analysis of the case law relating to the Vassalli law, and on the other, the exclusion of the form of direct liability envisaged by the reform, lead us to consider the fears described to be totally unfounded, short of considering any form of judicial liability to be punitive. To verify the reasonableness of the above-mentioned risks, it may be useful to relate the issue of the liability of the 'State-Judge' in the forms and within the limits specified in the reform to the disciplinary liability of judges, which is far more 'fearsome' in the abstract, and which has already existed for some time in the Italian legal system.[55] Disciplinary liability follows a dereliction of the functional duties that a judge has towards the State and which are relevant to the relationship between judges and the legal system to which they belong. Civil responsibility, on the other hand, arises in respect of litigants or other subjects, due to any errors or failures in the exercise of their office and concerning the relationships between judges and the 'users' of the judicial office.

The system of disciplinary liability is characterised by a typified system of offences with explicit interests, which may be upheld before the disciplinary section of the Superior Council of Magistrates: impartiality, fairness, diligence, industriousness, discretion, balance and respect for human dignity. Disciplinary offences are divided into three categories: i) those committed in the exercise of the judicial office (for example, conduct which leads to unfair damage or an unfair advantage to one of the parties; failure to inform the Superior Council of Magistrates of the existence of one of the situations of incompatibility arising

[53] A. Lepre, 'Responsabilità civile dei magistrati e giurisprudenza difensiva' (2016) available at https://tinyurl.com/ydy8evn5 (last visited 15 June 2017); G. Altieri, 'Contro la "giurisprudenza difensiva" ' (2016), available at https://tinyurl.com/y872gec4 (last visited 15 June 2017).

[54] C. Commandatore, 'La responsabilità civile dello Stato per omissione del pubblico ministero. I pericoli di una giurisprudenza difensiva' *Responsabilità civile e previdenza*, 1890 (2015).

[55] The system of disciplinary liability is regulated by legge 23 February 2006 no 109, legge 30 March 2006 no 150, and legge 24 October 2006 no 269.

from family ties), ii) those committed outside the exercise of office (for example: the use of the judicial role in order to gain unfair advantages for themselves or others; association with persons subjected to penal or preventive proceedings by the same judge), and iii) those resulting from an offence.[56]

These then are cases that may theoretically bring about similarly defensive conduct: it follows that only the concrete application of the law on civil responsibility can reveal the actual risk of an increase in defensive sentencing, which is in any case difficult to detect, and which seems, in the abstract, to be averted by the presence of parameters hinging on the manifest infringement of the law and the doubling of the paradigm (in the action for redress).

VIII. Concluding Remarks

The discussion thus far confirms that the existing rules and regulations do not essentially change the basic criteria upon which the judicial liability in the Vassalli law is based. It is founded on wilful misconduct and gross negligence, formulating the latter in terms of a manifest infringement of the law: the manifest infringement of domestic (and EU law) law thus becomes a conduct characterised by gross negligence. Consequently, one of the chief causes of contention, namely that gross misconduct is said to derive from inexcusable negligence, is overcome. The peculiarity of the new framework, as mentioned before, lies in the creation of a 'misalignment' between the paradigm of State liability, linked to damage stemming from the exercise of judicial office, and that of a judge during a compensation hearing.

On the one hand, liability for manifest infringement of the law has been extended to both domestic and EU law, and the misrepresentation of facts and evidence are now grounds for serious misconduct, with the exclusion of any kind of reference to inexcusable negligence on the part of judges.

On the other hand, the State's now compulsory action to obtain redress (of a higher monetary value than previously permitted) from members of the judiciary can be undertaken only in the event of liability arising from wilful misconduct, or gross negligence stemming from inexcusable negligence.

A 'double speed' system like this shows the search for a fair balance guaranteeing the broadest and most effective protection of citizens by the State. At the same time, it allows legal action against members of the judiciary only in situations of inexcusable negligence or wilful misconduct. The new rules may be applied only to wrongful acts committed by magistrates subsequent to the entry into force of the law. Concerning Art 2 of the 'Vassalli' law – which establishes that anyone who has been subjected to unfair damage due to the conduct,

[56] B. Giangiacomo, 'Le interferenze tra vicende disciplinari e valutazioni di professionalità dei magistrati: ragioni e utilità di una maggiore autonomia delle decisioni' *Rivista trimestrale di diritto e procedura civile*, 1085 (2015).

action or order of a judge, may proceed against the State in order to obtain compensation for pecuniary and non-pecuniary loss – the reform extends this right which previously existed only in relation to damage caused 'by the deprivation of individual freedom'.

'Damage' is to be understood as the effect of conduct or an act or order of judges acting in bad faith or with 'gross negligence' during the execution of their duties or as a consequence of a 'denial of justice'.

Initial implementation has revealed some interesting aspects of inter-temporal law: in the current normative framework, a division between the substantive and the procedural sides of the issue seems to arise.[57] In fact, in relation to wrongful acts committed in the past, the Vassalli law has been applied in its original formulation, albeit observing the general principle of the new law. Conversely, legge no 18 of 2015 incorporates no rule which permits the application of the abrogated procedural norms, on the other hand, in the case of the filter of admissibility under the old Art 5. A liability case brought today, under the new law, can only be brought following the procedural norms in force, and thus without the matter first being assessed for admissibility as in the original framework (the so-called 'filter'). One could envisage the extended enforcement of the entire statute concerning judicial liability as set out in the original Vassalli law. This would include the procedural rules, when an application to establish liability is filed in relation to a wrongful act occurring prior to the coming into force of the new law. This, however, would seem to be a somewhat forced interpretation.

It should be noted, in conclusion, that legge no 18 of 2015 has already been referred to the Constitutional Court.[58] Within the context of different kinds of proceedings that do not regard the liability of the judiciary[59] doubt can be cast on the constitutional legitimacy of the foundations of the new provisions, based on the assumption that the rules being challenged would be important in specific judgments, and giving grounds for judicial liability for the misrepresentation of facts and evidence. The first challenge is the notion of misrepresentation of facts and evidence, which conflicts with Arts 101, para 2, and 111, para 2, of the Italian Constitution; as well as Art 2, para 1 (b) of the new law, which conflicts with Art 3 of Constitution. The Court denounces the equivocal nature and the indefinability of the ideas, questioning the effectiveness of the safeguard clause in its new

[57] Concerning the retroactive effect of the new rules and regulations, see F. Bonaccorsi, 'La nuova legge sulla responsabilità civile dello Stato per illecito del magistrato' *Danno e responsabilità*, 445 (2015).

[58] Tribunale di Treviso 8 May 2015, *Danno e responsabilità*, 931 (2015). See F. Machina Grifeo, 'Responsabilità civile magistrati, processi indiziari ad alto rischio' *Il Sole 24 ore*, 21 May 2015; Tribunale di Verona 12 May 2015, *www.dejure.it*.

[59] The Verona case is a trial for the illegal possession of tobacco manufactured abroad; the Treviso case is an appeal against an injunction concerning payment for some agricultural supplies.

formulation. Moreover, a review of the effectiveness of the safeguard clause brings to light a violation of the constitutional protection of the independence of the judiciary. In particular, during proceedings where the evidence is merely circumstantial, the ability of judges to exercise discretion would be compromised due to the new rules and regulations.

The abolition of the filter of admissibility appears to violate Arts 101, para 2, 111, para 2, and 25, para 1 of the Italian Constitution, paving the way for possible influence over judges' opinions or leading them to abstain.

Another question mark regarding constitutionality concerns the fact that recourse is now compulsory, in contrast with Art 24, para 1, of the Italian Constitution, stating the 'recognizing the right to be defended, implicitly recognises also the right not to be sued'. Obviously, the decision on these matters lies with the Italian Constitutional Court.[60] Regardless the new rules on liability do, in fact, seem to find a satisfactory balance between the need to innovate, stemming from the scant application of the pre-existing rules and pressure from the Court of Justice of the EU, along with the need to improve the system.

[60] On this point, the doubts raised in G. Verde, 'Una questione di legittimità dalle basi fragili' *Guida al diritto*, 26 (6 June 2015) do not appear unfounded. Giovanni Verde remarks the groundlessness of the assumption of the need to refer the matter to the Court. In fact, the reasons why the referring judge considers the new rules on the judicial liability do not allow him to act are not clear: he 'should have specified what had disturbed him to such an extent that she/he was unable to act on the application for the injunction he was examining' (my translation).