A) The "snail judgments": between private and public negligence

a) The three snail judgments.

On June 13th, 2009 the Italian Supreme Court confirmed the sentences of more than ninety years of imprisonment imposed upon the members of the clan headed by the Caltanissetta born leader Giuseppe "Piddu" Madonia for *mafia*-type unlawful association, drug trafficking, falsification and use of false coins. The defendants were proven guilty during the so called "Great Orient" trial, which had been celebrating ten years earlier before the Court of First Instance of Gela, presided over by a young judge destined, unwillingly, to be famous.

Why a judgment, that was issued in 2000, became irrevocable[1] only in 2009, leading to the late imprisonment, among the others, of two more than seventy-year-old defendants? The reason lies in the late issue of the reason for judgment[2] by the presiding judge: indeed it was released ten years after the conviction and this caused the defendants a late knowledge and thus a late chance to appellate the verdict[3].

Was it an isolated episode of negligence on behalf of the presiding judge? To which consequences did this behavior lead?

Actually the Great Orient trial was not the only one to be dragged out for years by that presiding judge: when he left the Court of First Instance of Gela to be posted to Milan as criminal prosecutor the unmotivated judgments amounted to nine. Therefore the Italian self regulation body for the judiciary (CSM) brought against him a disciplinary action and on March 24th, 2006 sanctioned him with the loss of six months of seniority. This was supposed to induce him to finish off his commitment, but on June 15th, 2007 three reasons for judgment were still pending: consequently the CSM launched a second disciplinary action, that was concluded with the loss of six more months of seniority on charge of the judge. After eighty four days following the conclusion of the second disciplinary proceeding, on September 7th, 2007 the presiding judge issued the reason for judgments no. 103 and 105, that had been proclaimed respectively on July 5th, and 8th, 1999; nevertheless this did not suffice to complete his job, therefore on January 11th, 2008 the CSM brought against him the third disciplinary proceeding for the gross

[1] A judgment is deemed irrevocable under the Italian legislation when it is no longer subject to the ordinary means of appeal due either to denial of the appeal or to failure to apply for appeal within the time limits according to paragraph 648 of the Italian code of criminal procedure and paragraph 324 of the Italian code of civil prcedure; therefore the assessment expressed in the judgment is deemed conclusive and cannot be attacked by the parties (*res iudicata pro veritate habetur*).

[2] Notably according to paragraph 544 of the Italian code of criminal procedure the judgment is pronounced immediately after the decision is taken by the judges who gathered the evidence; nevertheless they are allowed a term up to ninety days to draft the reason for judgment, when it cannot be issued together with the verdict.

[3] Since the sentence is subject to appeal only after the parties have been made aware of the reason for judgment by means of its publication.

negligence in the issue of the reason behind the last judgment no. 488 proclaimed on May 22nd, 2000, that concluded the Great Orient trial. Therefore the judge tried desperately to catch up on his duties, thus issuing, after just two months, on March 18th, 2008, a massive judgment made of 775 pages; still this did not prevent him from being charged with the heaviest sanction the CSM can impose. He was ousted from the judiciary because of his "*moral and professional decay, irreversible and irrecoverable*"[4], that had spoiled his own and the whole judiciary's image and proved an absolute incompatibility with the exercise of the judicial function.

The pernicious behaviour of the aforementioned judge caused severe inefficiencies on the justice machine indeed: since during the trial some defendants had been subjected to pre-trial custody, the late issue of the reason for judgment caused them to be freed because of the expiry of the maximum time of pre-trial detention[5]. Dangerous individuals, charged with severe *mafia* indictments, were therefore allowed to freedom again and this caused a relevant prejudice to the community that, already used to a code of silence, was subjected once again to the intimidating pressure of the clan, strengthened by the apparent defeat of the State due to the inefficiencies it suffered in its judiciary articulation.

Moreover the judge's inertia risked of seriously compromising the investigation hardly carried out by the joint forces of Sicily four districts prosecution offices: the reasons for judgments no. 103 and 105 were in fact issued when the time for issuing a final verdict had already expired[6] and the Court of Appeal was forced to declared the time elapse for exercising the criminal action, thus launching a message of defeat of the State power of punishment with regard to serious criminal offences that affected a territory already wasted by the *mafia* phenomenon. By contrast the reason for judgment no. 488 was issued when the time was about to elapse and this caused the Court of Appeal to work hard to sustain a verdict that, although substantially right, looked formally rough, rather comparable to a "*massive essay*", with contributions coming, among the others, from lectures and study seminars.

In addition the presiding judge's behaviour caused serious consequences in terms of violation of human rights: the considerable delay in the issue of the reason for judgment breached the principle of the due process indeed, that requires a reasonable time for ascertaining the defendant's criminal responsibilities. On the contrary, the defendants

[4] According to the Italian Supreme Court, judgment no. 8615 published on April 8th, 2009.

[5] According to paragraph 303 of the Italian code of criminal procedure, pre-trial detention is permitted in Italy, provided it is limited within a maximum period of time, varying according to the seriousness of the offence.

[6] According to paragraph 157 of the Italian criminal code the defendant criminal responsibility must be ascertained through a final verdict within certain time limits, exceeding which the punishment is no longer admitted.

convicted according to judgments no. 103, 105 and 488 were left for about ten years without knowing the rationale followed by the Court to assess their responsibility and, consequently, without being able to appellate them on any base. Moreover, when they were allowed to appellate the judgment, many years had passes not only since the hearing, but also since the facts: therefore they were prejudiced in their right to defense, irreversibly compromised by the time elapse and by the following diminution of historical and procedural memory, especially with regard to a criminal proceeding that stands out for being mainly oral.

Nevertheless the chief justice's negligence had a last, paradoxical consequence: since some defendants had been put into pre-trial custody before the process was stopped for maximum time elapse, or for a period exceeding the maximum detention time, although they were actually guilty of the offences they were charged with, they were entitled to sue the State for the restoration of damages for the unlawful detention they had suffered.

Afterwards the State tried to make up by suing the judge before the *Corte dei Conti* for the financial damages it suffered because of his misconduct[7]; therefore in 2013 the Court condemned the judge to refund the State 10.000 Euros, instead of the amount of 20.000 Euros requested by the public plaintiff.

Why this concession? What excuses emerge from the *Corte dei Conti* judgment?

b) A heroic judge?

Flicking through the judgments affirming the presiding judge's disciplinary and financial responsibility a very different scenario emerges from the one that could arise from a first description of the story: That judge is doubtlessly accountable for gross negligence, since through his behaviour he committed the most serious offence that a judge can be charged with, *i.e.* justice denial (although he was acquitted from this charge since his misconduct was proved not to be willful during the criminal proceeding). Still which reasons led that young judge to such a gross negligence?

In order to understand them it is necessary to deepen the judicial environment in which he worked, that is the same in which unfortunately many young magistrates pop in after their appointment: He had no experience indeed, still he was first posted to the Court of Gela, one of the toughest under both an environment and a judicial viewpoint.

Remarkably, he was posted there since that position had been left vacant after the previous call for interest, because of the reluctance of the senior magistrates to move to that uncomfortable destination. As pointed out by the Parliamentary reports drafted for

[7] According to paragraph 28 of the Italian Constitution the State is accountable for the damages caused to natural and legal persons by its civil servants; nevertheless it has the right to sue the latter for the restoration of the damages it was forced to refund for the violation of individual rights.

the incorporation of that Court in January 1990[8], during the first eight months of 1989 32 violent deaths, almost one per week, had been reported in Gela, that today counts about 76.000 inhabitants, regardless several terrorist attacks to its prosecution office; at the end of 1990 44 murders had been committed, all of them within the city territory. Moreover the strategic location of the city and the availability of an harbor had caused throughout the years an uncontrolled demographic growth (from 20.000 to 30.000 units per year), a disordered development of the economic and building activities (also due to the presence of the National Oil Company plant, that ran a very polluting business), with the following increase of the illegal activities linked to the world of drug addiction and organized crime. It was a microcosm in which the persuasion had settled that the criminal phenomenon was "*ineluctable, to live with forever*", moreover triggered by the presence of two different illegal networks: beside the *mafia*, rooted in the regional area, the *stidda* stood out, linked to the local peculiarity and comparable, because of its strong family liens, to the association structure of the *'ndrangheta* rather than to the one of *cosa nostra*. After a fight among rival clans, the *mafia* agreement concluded between the two criminal associations allowed them full control of the territory, with the following dominion over the population, especially over its most vulnerable members; the recruitment of young men as blackmailer or street thugs, available to commit serious bloody crimes in exchange of a reward often not exceeding 250 Euros, led to a decimation of the juvenile population of that territory, involved, both as a executioner and as a victim, in organized crime offences, committed by fire armed gangs of teens. This lead, as pointed out by the CSM in its resolution of February 10th, 2000[9], to a true paralysis of the Juvenile Court, that even lacked a hearing room. Similarly the Criminal Court offices were stuck, so that at the end of 1997 60% of the trials were concluded with a judgment acknowledging the maximum time elapse for the decision; this was partly due to the secondment of several judges to the nearby Court of Caltanissetta, engaged in the trials for the murder of several Palermo judges killed during those years by the *mafia* killers[10]. The lack of judicial clerks was remarkable both in the administration of the Judge for the Preliminary Investigation Office, where the 4345 pending proceedings were assigned only to two judges, and in the fast pace imposed on

[8] *Senate 2nd Permanent Commission (Justice), 69th Report*, Meeting of January 17th, 1990, pages 1-20, available at http://www.senato.it/service/PDF/PDFServer/DF/255374.pdf.

[9] *CSM Report on the issue of organized crime coped by the justice administration in the judicial offices of Caltanissetta and Gela*, Resolution adopted on February 10th, 2000, pages 1-10, available at http://www.csm.it/circolari/0210_10.pdf.

[10] According to paragraph 11 of the Italian code of criminal procedure, in order to grant the impartiality of the judgment when prosecuting a criminal offence committed against a magistrate the trial cannot be celebrated before a tribunal belonging to the same district where the victim served as a judge. Therefore the trials for the murder of the Palermo judges were celebrated before the Caltanissetta court.

the only available Criminal Court, forced to hold public hearings five days per week, afternoons included.

What supervision of individual rights of the accused person could be granted under these conditions? By contrast, what sort of collective defense against the crime could be provided pending this emergency state?

Unfortunately the situation was not expected to improve: the judges destined to compose a second panel would have been subjected to the same pace, although they were less experienced and consequently less familiar with the planning of the judicial activity, since they had been appointed just the year before. Moreover they would have not been able to count on the support of their predecessors, since the strong turn over, induced by the environment and work difficulties, caused the "*disintegration of the historical memory of a judicial reality with particularly complex peculiarities.*"[11] The CSM itself, during the same biennium when the presiding judge issued his three "snail judgments", underlined the urgency of putting special efforts on the "*professional training of young magistrates, forced to cope daily, under uncomfortable conditions, with tough issues, confined into judicial realities where the cultural and professional exchange with senior magistrates is not conceivable*"[12].

The conclusion that can be drawn by the analysis of these figures is that the Gela presiding judge found himself unprepared to preside a very complex office; moreover, when he asked to postpone for six months his appointment in the Milan prosecution office, in order to complete the reason for the pending judgments, his request was refused. So he kept on working even during his holidays on two sides: the new trials, as prosecutor, and the old ones, as relating judge. Nevertheless this did not suffice to prevent him from being charged with the heaviest sanction of the removal from the judiciary, that hit him ten years later.

c*) Efficiency and strictness*

The story of the Gela presiding judge shows the importance of disposing of an efficient organization of the judicial offices in order to guarantee their effectiveness; according to the statistics regarding the Court of First Instance included in the Caltanissetta district between 2009 and 2012[13] neither the number of pending proceedings or that of the new

[11] See *CSM Report on the issue of organized crime coped by the justice administration in the judicial offices of Caltanissetta and Gela,* op. cit., p. 7.

[12] See *CSM Report on the issue of organized crime coped by the justice administration in the judicial offices of Caltanissetta and Gela,* op. cit., p. 8.

[13] Available on the Ministry of Justice website at https://www.giustizia.it/giustizia/it/mg_1_14_1.wp;jsessionid=82E013691A4253F6F82E05424956589A.ajpAL03?facetNode_1=1_5_29&facetNode_3=0_10_38&facetNode_2=0_10&previsiousPage=mg_1_14&contentId=SST988046.

ones diminished. The situation of the juvenile courts did not improve either. Moreover, scrolling down the statistics supplied by the Ministry of Justice, a strong difference emerges between territorial areas, consisting of a disproportionate distribution of the judicial affairs with regard to the different Court of Appeal districts. Nevertheless this does not necessarily mean that the heaviest load is carried by the courts located in the south of Italy: there are indeed some southern realities, for example Marsala Civil and Criminal Court, that stand out for their efficiency, measured in terms of percentage of proceedings pending for more than three years, of average length of the trials, of number of vacancies of judges and judicial clerks, of proportion between number of judges, inhabitants and pending lawsuits[14].

Such an experience show that, even within needy areas, an efficient justice service can be granted by developing the available sources through an influential regency in support of the junior judges and public prosecutors and through a wise use of the incentives.

In particular, an incentive that has proved very useful in recent years is the resort to non-professional judges for deciding indictments of minor offences: since they do not belong to the judiciary their appointment is not assisted by all the guarantees that characterize the appointment of professional judges so they can be recruited more frequently and through a faster procedure. Non-professional judges were allowed to exercise civil and criminal jurisdiction in Italy respectively since 1995 and 2001 and it is esteemed that every year they absorb about 50% of the civil proceedings and 25% of the criminal ones[15], so reducing the load carried by professional judges.

A further advantage of the institution of non-professional judges lies in the rules they abide by: for example in deciding civil matter they are entitled to resort to equity and to promote alternative dispute resolutions, in order to reach any possible agreement between the parties, while in criminal matters they are assisted by the police and this allows the prosecutors to focus only on major offences.

It would therefore be advisable to make the resort to alternative dispute resolution (e.g. arbitration, mediation), encouraged by applying fiscal incentives, eligible for judges too and particularly to increase the use of mediation even in the criminal field: the European Directive 52/2008/EC of the European Parliament and the Council of 21 May 2008 envisaged the resort to amicable dispute resolution in civil and commercial matters in order to build a mutual trust in the process of mediation. According to a recent study

[14] A complete series of statistical data on the Marsala Tribunal form 2011 to 2015 is available on the Tribunal website at http://www.tribunalemarsala.it/pb_statistiche.aspx.

[15] According to Crasto, V. *Giudici di pace: un tavolo tecnico per un settore che merita attenzione*, Quotidiano del Diritto Il Sole 24Ore, available at http://www.quotidianodiritto.ilsole24ore.com/art/civile/2013-12-06/giudici-pace-tavolo-tecnicoper-161523.php?uuid=ABDwYiB.

funded by the European Union the efficiency of mediation procedures can be counted in terms of an average between 331 and 446 days saved for deciding and between 12.471 and 13.738 Euros of cut costs[16]; moreover it has a positive long term effect, as an agreement reached by the parties themselves is more likeable to be spontaneously implemented. Therefore it is recommendable that a similar endorsement of the mediation procedure be extended by the European legislator with regards to criminal matters: terms and conditions for promoting an agreement between the offender and the victim under the supervision of a third impartial party could be settled through a directive pursuing the objective of reducing the impact of minor offences on the judiciary. The resort to a directive would grant that the long tradition of the common law countries, where judges are aware of their creative role in the settlement of the controversy, could be beneficial for judges trained in civil law systems, where the promoting role of the judge is limited by the ties of the codes and statute. Subsequently, a new model of barrister should be drafted: lawyers should be educated to be conciliator before litigators and this would imply to strengthen their powers with regards to the victim protection, rather than to the accused defense. In order to overcome the opposition of the bar association, that could exploit for commercial purpose the maintenance of strong litigation departments within the law firms, fiscal incentives could be granted to parties choosing mediation; not only they would render more captivating the resort to alternative dispute resolution, they would also envisage the effectiveness of the individual rights to access the justice.

The greatest advantage of promoting mediation in the criminal matters at a European level however lies in the possibility to harmonize the conditions under which the resort to alternative dispute resolution can be considered legal under article 6 of the European Convention of Human Rights: the Court of Strasbourg has recognized that the safeguards of the due process can also be guaranteed by a non jurisdictional body, provided its decision is subjected to appeal to the judiciary and parties give free and informed consent to waive the procedural rights granted before the courts[17]. Assessing by means of a directive the forms and limits of such a disclaimer as well as the case and conditions of the appeal would grant uniform protection of human rights throughout the whole European territory and would prevent accuse of limiting access to court with regards to single country legislators.

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[16] Data reported in Attree, R. *EU: The impact of the EU mediation directive 2008/52/EC. A United Kingdom Perspetive*, ATTREE & CO. Publications, available at http://www.berkeleysquaremediation.com/the-european-directive-by-rebecca-attree/.

[17] See Lhuillier, J. *The quality of penal mediation in Europe*, European Commission for the Efficiency of Justice, Working Group on Mediation, available at http://www.mediationworld.net/council-of-europe/publications/full/91.html.

A valid contribution to the improvement of judicial efficiency could also come from an increase in the number of judicial clerks assisting the judge in their daily job: the lack of personal assistants charged with administrative duties is remarkable in Italy, where every single judge has to cope with commitments that exceed the judicial activity and require certain amount of time, like the settlement of the court advisors' fees. The last recruitment of judicial clerks in Italy dates back to 1998: this caused gross inconveniences, *e.g*. the delay in the issue of some judgments due to the lack of administrative staff available for completing the procedure for the publication and registration of the verdict. To this extent standards of office management, including assessment of an efficient proportion between judges and judicial clerks, could be set out by impartial bodies at a European level, taking into account the average experience of the judicial offices spread among the European countries. It is worth pointing out indeed that in Italy personal assistants are shared among several judges and public prosecutors and this slows down the organization of the whole office; to this extent a valid contribution could come from the academia, where young graduates are educated through a method that, differently from the common law system, does not contemplate enough links between universities and employers. Recruiting young graduates as judge assistants could give them the opportunity to gain a work experience with a national exposure, at the same time renewing the judiciary office through the contribution of newly educated professionals ready to invest their energies and efforts in a highly motivating job.

The availability of administrative staff could also contribute to time saving and quality improving: the settlement of a judge office, composed of young experts on data screening and search engines managing, could supply the judge with the needed information on laws and precedents and this could contribute to a better motivated decision. A European initiative in this direction would be much appreciated in Italy, where judges cannot count on a staff recruited on a permanent basis to this purpose.

Similarly, apart from the availability of IT experts the flow of jurisprudence should be improved throughout the national judicial offices: although in Italy a website gathering all the judgments released by the Supreme Court and the highest courts is provided[18], a general information technology system allowing judges and barrister to access on line all the official documentation relating to pending trials is remarkably lacking, thus leading to an old-fashioned resort to piles of paper and hours of queuing behind the judge's door, triggered by the lack of an assistant per each judge.

[18] Namely, the ItalgiureWeb search engine, available at http://www.italgiure.giustizia.it/.

Therefore only by strengthening the whole efficiency of the judicial system it will be possible to correctly assess the level of accountability of the judges sued either for disciplinary offences and for damages, in order to adequately ascertain the willfulness of their misconduct.

To this extent which regime of accountability is provided in Italy for those judges who, by breaching the law, violate individual rights?

B) The Development of the Civil Liability of Judges and Public Prosecutors in Italy

a) Italian first discipline[19].

The original legislation on the civil liability of judges and public prosecutors' was contained in paragraphs 55, 56 and 74 of the Italian Code of Civil Procedure (C.C.P.). According to these provisions, judges and public prosecutors (the latter except for denial of justice) were liable only for acting fraudulently, with malice, or for denial of justice (*i.e.*, a refusal, a neglect or a delay, without reason, in taking a decision or completing a compulsory duty).

The need of intent in the first two cases was unambiguous, while a scholars' debate arose concerning the relevance of gross negligence liability with regard to the third one. The preliminary condition for the claimant to issue a warning before proceeding (paragraph 55.2 C.C.P.) was the main hint in favour of the option that a fraudulent liability was to be proved also in this case. Indeed the Ministry of Justice was entitled to assess not only the compliance with the law but also the merits of the action, thus being able to sanction a misuse of it by the plaintiff (paragraph 56 C.C.P.). Such a philter was intended to prevented those lawsuits intentionally filed by the parties simply disagreeing with the judgment.

Nevertheless the Italian Constitution itself, enacted in 1948, rooted a civil liability for judges and public prosecutors: its paragraph 28 provides that "*every civil servant is directly liable, in compliance with the civil, criminal and administrative laws and statutes, for the breach of rights*". According to the Italian Constitutional Court such a provision covers also judges and public prosecutors, although the need to protect their peculiar independence led to the provision of specific forms of liability with regard to them, described as follows.

b) Enzo Tortora's affair and 1987 referendum[20].

The issue of the judges and public prosecutors' civil liability came to widespread attention in the early Eighties, when Enzo Tortora, one of the most famous Italian

19 AA. VV. (2011) *Responsabilità civile dei magistrati. La normativa nazionale e la giurisprudenza della Corte di Giustizia dell'Unione europea.* Report issued by Camera dei Deputati, Rome.

20 AA. VV. (2004) *Storia d'Italia-XXIII*, Torino 2004, page 627 and following.

journalists and TV presenter, was arrested during an inquiry led by the Naples Public Prosecutor's office about the *Nuova Camorra Organizzata* – the Neapolitan *mafia*. The anchor man was accused of drug trafficking and unlawful association with *Camorra*, but the charge was based only on unverified clues and statements of former gangsters.

Enzo Tortora spent seven months in jail; he was sentenced to ten-year imprisonment by the Court of of First Instance, but then acquitted by the Court of Appeal and, subsequently, by the Italian Supreme Court. Enzo Tortora affair – a little Dreyfus case – had an enormous impact on the Italian society and, as a Trojan horse , led to the 1987 *referendum*, where the vast majority of electors voted for the abrogation of the then existing civil liability regulation for judges and public prosecutors'.

c) The Vassalli Act[21].

However, the law that followed the referendum outcome[22] did not meet the hopes of those who had advocated a more stringent legislation on the isssue during the *referendum* debate.

As a matter of fact the so called *Vassalli* Act (as named after the Ministry of Justice who promoted the law), applied to all judges and public prosecutors, irrespective of whether they exercise civil, criminal or administrative jurisdiction. It entitled everyone who suffered a damage because of a judge behavior or because of a decision taken with intent, gross negligence or denial of justice to an indemnity, including a compensation. In addition to reintroducing the notions of intent and denial of justice, previously set out in paragraph 55 C.C.P., the new law introduced the notion of *gross negligence liability* and provided a complete black list. Cases of gross negligence included: i) a serious breach of law induced by negligence; ii) claiming the occurrence of an event in spite of available evidence, as recorded in the trial proceedings, that proved the event did not occur; iii) claiming the non-occurrence of an event in spite of available evidence, as recorded in the trial proceedings, that proved the event did occur; iv) a decision about personal freedom with no legal support or with no appropriate evidence. In order to ensure the judges and public prosecutors' independence the law introduced a covenant (paragraph. 2.2) that dropped civil liability with regards to activities concerning the interpretation of the law or the evaluation of facts and proofs.

It must be pointed pout that the law introduced only an *indirect* civil liability, by

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21 AA. VV. (2011) *Responsabilità civile dei magistrati, op. cit., page 66 and following;* N. Zanon (2007), *Nozioni di diritto costituzionale*, Torino page 175 and following.; Mandrioli, C., Caratta, A., (2012) *Corso di diritto processuale civile I*, Torino, page 178 and following.

22 Legislative act no. 117 of April 13th, 1988, "*Compensation of damages caused in the exercise of the jurisdictional functions and judges and public prosecutors' civil liability*", issued on the Official Gazette no. 88 of April 14th, 1988, available at http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1988-04-13;117.

allowing the plaintiff to file the lawsuit only against the State (represented by the Prime Minister), which then had the option to seize up to 33% of the judge or prosecutor's yearly salary. Supporters of the 1987 referendum widely believed that the indirect liability betrayed the spirit of the campaign, which was aimed at introducing direct liability, similarly to other professional categories.

In addition, the action against the judge could be carried out only once all the other judicial remedies, such as appeal, had been exhausted, and, in the event that no remedy were available, only after the conclusion of the proceeding in which the damage occurred. In addition, the law required the action for damages to be started within two years from the conclusion of the proceeding, though the limit did not apply to the parties who were not aware of the proceedings due to inquiry secret.

Therefore the law considered the multiple stages of the trial as the appropriate venue to remedy any judges or public prosecutors' mistake. The *Vassalli* Act, moreover, was aimed at getting rid of the so called *parallel proceedings,* in which two concurrent trials take place: one concerning the judge or public prosecutor acting according to their role in order to prove whether the defendant is guilty or not guilty; the other concerning the civil liability of the judge or public prosecutor himself. The main purpose of the system was to avoid that the threat of an action for damages could weaken the strength of the judicial power.

In addition, as a prerequisite for the proposition of the civil action, the Court of First Instance was entitled to run a recognition proceeding that assessed not only the compliance with the law but also the merits of the action.

Such a proceeding has often represented an insuperable impediment to the achievement of a compensation for a judge o prosecutor's civil liability. After twenty years from the *Vassalli Act* enactment, approximately 400 lawsuits for damages were filed against judges and public prosecutors and out of them just four were concluded with a conviction for the State sued for his officers liability.

d) Italian system conflicts with UE law, from Kobler case to the infringement proceeding[23].

Meanwhile the Italian civil liability system has experienced several issues of compliance with the European Union law. In 2003, indeed, the Court of Justice stated that members States must pay damages caused by the breaching of UE law, even though they have been occasioned by a Supreme Court judgment (*Kobler Case*). Three years later, in the well-know *Traghetti del Mediterraneo* Case, the Court of Luxembourg claimed that

23 See AA. VV., *Responsabilità civile dei magistrati, op. cit.,* page 223 and following.

national legislations which exclude State liability, in a general manner, for damages caused to individuals by an infringement of the Community law due to a court of last instance's judgment is not compatible with the EU law, if such an infringement results either from an interpretation of the law provisions and a fact or evidence assessment carried out by that court.

The European Community law also prevent national legislations from limiting such a liability to the sole cases of intentional fault and serious misconduct of the judges, if such a limitation were to exclude the liability of the Member State in other cases where a manifest infringement of the applicable law was committed, as set out in paragraphs 53 to 56 of the judgment in Case C-224/01 *Köbler* [2003] ECR I-10239. In order to appreciate if the infringement is manifest or not the judge must consider, among the other, a number of criteria, such as the degree of clarity and precision of the provision infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, and the non-compliance by the sued judge with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 of the EC Treaty; in such a case it is presumed that the decision involved is made in manifest disregard of the case-law of the EC Court on the subject (*Köbler*, paragraphs 53 to 56). After this last judgment, the European Commission opened an infringement proceeding against Italy in order to get some amendment of its civil liability regulation. The proceeding concluded with a condemnation for Italy, which was obliged to change its discipline to avoid heavy economic sanctions from the UE. Moreover the relationship between the political and the judiciary power in Italy became more controversial , so that a new civil liability regulation could not be postponed.

e) A short comparative analysis[24].

Before analyzing the new Italian rules concerning judges and public prosecutors' civil liability, it is useful to give a glance at others European Countries regulations in order to highlight analogies and differences among the national systems.

France has constantly developed and increased its judges and public prosecutors' civil liability regulation, but its legislation has also followed the purpose of preventing an enormous rise of actions for damages run by people who simply disagreed with decisions.

The citizen could act only against the State, which might make good its losses at judge's

24 AA. VV. (2015) *La nuova disciplina della responsabilità civile dei magistrati,* Roma, page 2 and following.; Penna, T. *La responsabilità civile dei magistrati in Europa*, available at www.rivistaeuropae.it

expense.

French regulation knows three different kinds of judges and public prosecutors' civil liability: the first one concerns all the judiciary power for cases of gross negligence and denial of justice; the second one is about civil and criminal judges' liability for negligence; the third one is related to the administrative judges.

Similarly in Germany the State is directly liable for judges' mistakes. German regulation punishes gross negligence or fraudulent behavior, but does not punish denial of justice in order to save judges and public prosecutors' independence.

Common law countries, such as the United Kingdom and Ireland, introduced a judicial immunity to protect the judge and public prosecutor's independence, although this old principle was tempered by the introduction of the European Human Rights Chart, which provided an indemnity for imprisonment without reasons.

In Spain the State is directly liable for judges' mistakes, but it might make good its losses at judge's expense. The action for damages can be brought only after the verdict on the case in which the damages occurred.

Portuguese regulation allows action for damages only in case of verdict of guilty against the judge. The State is directly liable for judges infringement of the law, but it might make good its losses at judge's expense.

Similarly in Belgium, where judges or public prosecutors are liable only if they acted with intent, while in the Netherlands the State only is held liable and recourse against the judge or the public prosecutor is not possible.

f) The new Italian regulation (l. 18/2015)[25].

After a long and tough parliamentary *iter*, the new Italian regulation was approved on February 24th, 2015. It was aimed at implementing the principles set pout in its judgments by the Court of Justice[26], but both judges and public prosecutor's indirect

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25 AA. VV., *La nuova disciplina della responsabilità civile dei magistrati, op. cit*, page 1 and following; D'Aloja, A. *La "nuova" responsabilità civile dei magistrati,* available at *www.forumcostituzionale.it*.

[26] Actually the reform on the judges and public prosecutors' liability recently passed in Italy does not seem imposed by the European legislators. The European Court of Justice judgments *Francovich*, *Kobler* and *Traghetti del Mediterraneo* actually do not infringe legislative act no. 117/88; by contrast they simply establish the cornerstones of the correct interpretation of the concept of gross negligence, stating that a limitation of responsibility is not permitted only in cases of judge's wilful misconduct or gross negligence, should this limitation exclude a Member State liability when a manifest infringement of the applicable law has been assessed. In the three aforementioned judgments the Court of Justice has never ventured so far as to impose on the Member State (namely Italy) to provide forms of judges' liability for misrepresentation of fact or evidence. So this "*comedy of errors*" consisting in the confusion created by the application of the European Court of Justice judgments should be concluded. The operation of restyling of the Italian law on judges' liability casts some doubts on its compliance with regulation of the Council of Europe in the "*Report on European standards as regards the independence of the judiciary*". Accordingly an important judgment of the Italian Supreme Court[26] recently stated that "*the interpretation of the legislative act no. 117/1988 by the ECJ (Case 24 November 2011 in C - 379/10 , 30 September 2003 in C - 224/01 , and June 13, 2006 in C – 173/ 03) does not conflict with the protection of the principles of judges' autonomy and independence, because they are situated at a different level from the one which regards the State's liability for illegal acts against the EU, that is different from the individual*

liability and the so called "protection clause" covenant were confirmed. Currently paragraph 2 includes as cause for liability, among gross negligence cases, the gross breaching of European law and the disguise of facts and proofs. In order to appreciate the kind of breaching committed by the judge or the public prosecutor, a number of criteria must still be regarded, such as the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, and the non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 267 EC. According to the new regulation, judges and prosecutors cannot be liable for the law interpretation and the evaluation of facts and proofs, with the limit, currently, of a gross infringement.

The discipline in force still provides the judge's indirect liability: the action for damages must be carried out against the State (Italian Prime Minister as before), but its recourse is now compulsory with the maximum amount of 50% of the yearly salary of the judge at the time of the action. Furthermore there is now a longer grace period (three years instead of two).

Finally the legislative act 18/2015 canceled the previous recognition proceeding: the plaintiff can now file a lawsuit directly against the State, without expecting the authorization by the Court of first Instance: this is the major newness of the regulation.

3. Conflict of powers

a) The power of iuris dicere.

According to the above mentioned regulatory environment, which are the consequences of the power of *iuris dicere*?

The judge abides by the law, *i.e.* decides according to codes and statutes pursuant to the

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liability of the judge". The judgments of the European Court of Justice did not impose Italy to amend the rules on the judges' civil liability, because the aim was to ensure the State liability for damages caused to individuals as a result of a breach of the EU legislation, not the individual judge's liability.This vicious circle can be overcome only by abandoning the perspective of one organ to assume that of the State in its unity. It is the reference to the State in itself and, in particular, the conduct of the State considered in its unity, that allows to overcome the obstacles in the identification of the liability. The liability is not due by legislator or by the judge, but by State and its foundation for the manifest infringement of the European legislation.There is a clear difference between the State's liability for breach of EU law and the judge's civil liability and this distinction has been implemented by the Italian self-regulation body for the judiciary (CSM). As stated in the Koebler judgment, there is no infringement of the principle of independence of the judiciary: the diversity of the conditions requires a different discipline.With reference to the judges' civil liability, the legislative act no. 117/1988 established a balance between the principle of accountability and the principle of independence of the judge: such a law is not an obstacle to the responsibility of the State simply because it is not applicable in the event of a breach of EU law, namely an unlawful act made by the State, not by the judge.If a judgment conflicts with the European Union law the State is held liable as holder of the judiciary, while according to legislative act no. 117/1988 it has a vicarious liability, because it is responsible for the unlawful act of the judge as if the latter was an auxiliary. So the State is liable for EU law infringement, although it was committed byu a judge, and the State responds as substitute, unless the remedy of compensation.

principles set out in the Constitution. Nevertheless he is recognized a dynamic role in the interpretation of the law, thus marking a difference between a discretionary judgment and a legislative bill.

Consequently the more complex the trial is and the more relevant the issues at stake are, the higher will be the risk of a mistaken use of the judge's discretion to the detriment of the citizens. This implies the urgency of overcoming the model of judiciary developed during the 19th century, when the privilege of the judge's immunity from any accountability towards the parties was offset by a complex system of disciplinary duties towards his senior officers: currently the relevance of the role played by the judge within the trial is such that he needs to be made accountable not only to his masters, but above all to the end-users of the justice administration.

Nevertheless the issue of the judge's civil liability cannot be overestimated, because if not properly defined it seriously risks to threat the judge's independence and impartiality.

To this purpose it should be pointed out that, although the judges and public prosecutors are ranked among the other State officers and employees, the peculiarity and relevance of their role impose a diversified discipline. Indeed a balancing test is required between accountability and independence: both of them are provided for in the Constitution, so the provision of conditions and boundaries to the judges and public prosecutors' civil liability not only seems appropriate, but is also necessary in light of the compliance with the Constitution .

If the judges and public prosecutors were to be exposed to unlimited direct claims by the parties of the proceedings, their impartiality in the decision making process could be undermined and their independence could be compromised. Therefore the enlargement of their civil liability must be prevented from becoming a dangerous attempt to reshape their power, thus charging them a price for their independence likely to affect the autonomy of the judiciary.

Remarkable this risk has proved more concrete after the new Italian regulation on judges and public prosecutors liability was passed on February 24th, 2015[27], as it abolished the previous preliminary proceeding, thus allowing the plaintiff to file a lawsuit directly against the State instead of being authorized by the Court.

Nevertheless the Italian Supreme Court[28] has recently stated[29] that following a civil

[27] Italian law passed on February 18th, 2015, no. 18, "*Judges and public prosecutors civil liability*", issued in the Official Gazette on March 4th, 2015, no. 52, available at http://www.gazzettaufficiale.it/eli/id/2015/3/4/15G00034/sg.

[28] Corte di Cassazione.

[29] According to the Italian Supreme Court, judgment no. 16924 published on April 23rd, 2015, available at

action against a judge the latter does not assume the role of a debtor to the claimant, because the action for damages is properly carried out against the State, except it is launched with respect to criminal conducts. This conclusion is not affected by the chance that the State itself, being condemned to damages, asks the payment back to the judge, because the conditions for the recovery action taken by the State are slightly different from the ones of a civil action taken by a private claimant against the State.

Consequently even if the judge is directly sued for damages, this does not suffice to give birth to a creditor-debtor relationship between the judge and the plaintiff; moreover the civil action brought according to legislative act no. 117/1988, even after the amendments introduced by Act no. 18/2015, does not lead to the replacement of the judge sued for damages.

b) Examples of conflict of powers

Remarkably judges and public prosecutors must be kept independent not only from citizens and end-users as previously stated, but also from other branches of the State organization: recently many clashes between constitutional powers arose and required to be solved in a balanced and reasonable way in accordance with the fundamental principles of the modern democracies.

Among these clashes one occurred between Palermo prosecution office and the State presidency: during the preliminary inquiries for the criminal case called "*negotiations between the State and the Mafia*", which allegedly took place between 1992 and 1994, some wiretapping, regularly authorized by the competent Judge for Preliminary Investigations, were carried out on the telephones in use to Nicola Mancino, former member of the Italian Senate. The recordings gathered evidence of four conversations with Giorgio Napolitano, former President of the Italian Republic, who raised a jurisdictional dispute against the Prosecutor at the Court of Appeal of Palermo, bringing the case before the Constitutional Court, alleging the unlawful use of conversations involving third parties.

The Constitutional Court[30] held that the action taken by the President was well-grounded with respect to the conduct adopted by the Palermo prosecutor, who did not promptly destroy the material, on the contrary submitted it to the Court: according to the judgment the Head of State represents the nation unity, that is the cohesion and harmonious functioning of the political powers which make up the constitutional order

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http://www.dirittoegiustizia.it/allegati/15/0000069431/Corte_di_Cassazione_sez_VI_Penale_sentenza_n_16924_15_depositata_il_23_aprile.html.

[30] According to the Italian Constitutional Court, judgment no. 1, published on January 15th, 2013, available at http://www.ilsole24ore.com/pdf2010/SoleOnLine5/_Oggetti_Correlati/Documenti/Norme%20e%20Tributi/2013/01/corte-costituzionale-Sentenza-Consulta-1-2013.pdf.

of the Republic. Consequently all his powers are intended to enable him to target appropriate impulses to the holders of the decisions making powers, without replacing them but by initiating and promoting their operations.

To effectively perform his role as guarantor of the constitutional balance and of the judiciary, the President must constantly weave a network of connections in order to harmonize any conflicting position, as well as indicate to the various representatives of constitutional organs the principles under which shared solutions to the issues at stake can be researched; so the exercise of his informal commitments is inextricably linked to the official ones.

It follows that the President of the Republic should be able to count on the absolute confidentiality of his communications, not in relation to a specific function, but for the effective exercise of all of them. In addition, the President has just a role of connection and balance, that does not involve taking political decisions; therefore it is not possible that he is subjected to the regulations on parliamentary immunity[31].

The above mentioned judgement is clearly aimed at resolving a conflict between the exercise of jurisdictional powers in the fight against organized crime, also through recording of the conversations of the President of the Republic duly authorized, and the peculiarities of the public function covered by the Head of State, whose sovereignty does not allow exceptions.

Another conflict of powers was raised with regard to the ILVA case, a polluting steel plant in southern Italy: in July 2012 the Judge for Preliminary Investigations of the Prosecutor's office of Taranto, following the joint request of five prosecution offices, ordered the requisition, without right of use, of six departments of the hot area of the company, ordering simultaneously the pre-trial detention of eight executives who ran the business in recent years. From the inquiries it emerged that the polluting activities run by the company, voluntarily carried out by the management, had caused a substantial increase in diseases and death among the locals, including children.

The case had an immediate media attention and raised a great social - environmental conflict, represented by the clash between two principles having equal constitutional

[31] According to paragraph 68 of Italian Constitution: "*Members of Parliament cannot be called to answer for opinions expressed or votes cast in the exercise of their functions. Without authorization from the House to which they belong, no member of Parliament may be subjected to personal or home search, nor may they be arrested or otherwise deprived of personal freedom, or kept in detention, except to enforce a final conviction, or if caught in the act of committing a crime for which there is the mandatory arrest in flagrante delicto. Similar authorization is also required before members of Parliament are subject to a warrant of the interception, in any form, of conversations or communications and seizure of correspondence*"

relevance: the right to be in good health and the right to work.

The judiciary, thanks to the criminal investigation carried out by the public prosecutor offices, finally broke the silence that had surrounded so far the ILVA plant, also due to accomplishing politics and condescending information that had covered an activity as unlawful as seemingly intangible.

The ILVA shutdown, indeed, created a huge contrast among citizens: some of them, supported by numerous environmental movements, wished to end the environmental disaster determined by many years of indifference, while groups and associations of workers protested against the loss of their jobs.

Since the issue had gained national relevance, the Government raised the possibility of appealing the Constitutional Court for the jurisdictional conflict arose between State powers, namely the Government that authorized the business despite the shutdown of the company and the Taranto prosecutor office that requested the warrants. Indeed, following the new results of the investigations, which led to the seizure of the finished and semi- finished products lying on the docks for over four months, the Monti government issued the law decree no. 207/2012[32], authorizing the company to produce despite the seizure orders.

Therefore the Judge for Preliminary Investigations of Taranto himself plead the Constitutional Court raising a conflict against the Monti government, in relation to the above mentioned law decree, as well as questioning the validity of the above-mentioned decree.

The Constitutional Court[33] rejected both the appeals, because the measure issued by the government "*has no relevance on the determination of liability in the criminal proceedings pending in front of the courts of first instance of Taranto*".

The law decree was held compliant with the Constitution because it was aimed at achieving a reasonable balance between the fundamental rights protected by the Constitution, namely health and healthy environment (para. 32 of the Constitution) on one side, and work (para. 4 of the Constitution) on the other, hence the interest to the maintenance of certain employment rates and to the public duty to make every effort in this regard. "*All the fundamental rights protected by the Constitution are mutually integrated and no one of them cannot be identified as absolutely prevailing over*

[32] Law decree December 3rd, 2012, no. 212, "*Urgent measures for health, environment and employment rates in case of turmoil of strategic plants of national interest*", issued on the Official Gazette of December 3rd, 2012, no. 282, available at http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto-%20%20%20%20%20%20%20%20%20%20%20%20legge:2012;207.

[33] According to Italian Constitutional Court, judgment no. 85 published on May 9th, 2013, available at http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2013&numero=85.

others". Therefore, ILVA business was allowed to run again, provided that all the provisions contained in the government authorization were implemented.

4. Conclusions.

In light of the above it may be appropriate to finally quote the words of an Italian judge murdered on September 21st , 1990, by four gunmen hired by the *stidda* of Agrigento, on his way to the tribunal without safeguards: "*Any judge's actions, like any manifestation of judicial power, necessarily affects individual rights; they are suitable to produce damage for their same nature. And it happens not only with judgments, but also with all the measures that have preparatory function in relation to final decisions (to grant or not to grant seizure, admit or not admit evidence, to grant or not to grant provisional execution).*

It does not exist an action of the judge or of the prosecutor that is painless. Each judge, adopting every kind of measure, wonders whether from his acts it will derive a lawsuit for damage.

Therefore, it was inevitable that he pays attention to take an innocuous measure rather than to make a right decision.

It is not easy to understand how a judge can be independent if he has to work primarily to escape unscathed from his activities. Especially in certain regions, people claims against the judge very easily, even for the most unjustified reasons, so it is possible that this kind of reform would immediately bring a lot of litigations.

If someone wants to sustain that the responsibility is laid down only for cases of gross negligence, it would be easy to answer that this limitation introduces even more uncertainty. It is hard to find cases of judge's guilt that cannot be considered serious: the stereotyped motivation; the omitted validation of the sequestration in flagrante delicto; the omitted examination of the evidences resulting from proceedings; the omitted motivation on specific points of claim, etc., all are serious misconduct. The judge's fault, if there is, is always serious by definition, according to the importance of the interests he manages.

The reform would also lead the Court to make a more strict interpretation: to protect himself against the risk of hassles, it is easy to predict that the judge would go through the road provided by the Supreme Court jurisprudence.

When the dispute touches business interests of exceptional size, every choice will become truly paralyzing: for instance a bankruptcy court's decision whether to bankrupt or not a big company or a chain of companies linked to political power centres.

But the most devastating effects would be in criminal matters, especially at the moment

of the beginning of criminal proceedings.

If the prosecution office knows that his investigative efforts can involve a lawsuit for damages, would it be possible to find a judge or a prosecutor who spontaneously prosecutes offenses that were rarely prosecuted in the past?

This is the perverse effect that can lurk in the bill to empower judge's civil liability: it punishes the action and rewards the inaction, the inertia and the professional indifference and the achieved principle of equality of all citizens before the law would suddenly defeat and the conditions of our criminal justice would regress at the time of the Albertine Statute."