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MAGISTRATES' ETHICS AND DEONTOTOGY

"THE JUDICIARY AND JUDICIAL PROCEEDINGS VIS-À-VIS THE MEDIA"

Ethical duties
Protection of the right to information
Protection of privacy rights

ITALIAN TEAM

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1.0 In every time and in every field of social life, one of the human communities' principal aims has been knowing facts that concern them. This knowledge is not a final purpose, but an instrument to solve some kinds of problem: for this reason, rules and criteria are created to discover a truth that can be functional to reach a settled goal and useful to satisfy the initial need.

In the field we are interested in – the trial – the need to satisfy is solving conflicts. In particular, the criminal trial tends to restore basic conditions upon which human societies are built, in presence of facts hurting the most important values for a community; and all this has to be made respecting persons' fundamental rights.

So, when a crime is committed, there are rules that say how to carry on investigations; that explain in which cases suspected person's rights can be touched, and in which limits; that gives powers to the parties; that establish which organs have to control. The trial is developed before a judge, who is an impartial and third party; the accused is considered not guilty until the final sentence, and he/she has the right to defend himself proving facts, in equal conditions with the prosecution[1]. Most of all, there are rules about the proof, which grant that only evidences formed in the respect of the principles of fair trial can be used for the decision, in this way safeguarding defendant's rights[2]. And so, at the end of a shared trial, we get a shared solution: the procedural truth, considered fair by the community – before which the violated order is re-established, and fundamental values are restored –, by the victim and the defendant, who refrain to claim their reasons in other ways, because they consider trial as the only place where justice can be made[3].

Trial, for its nature, needs to become public, for a lot of reasons. General – prevention, for the first. Trial can reassert the inviolability of a good and proclaim at the same time that human rights cannot be released, only if its message is brought into the knowledge of the largest number of people[4]. On the other hand, publicity plays an essential role in checking regularity and correctness of the jurisdictional function. When the trial is public, people can verify if crimes are really and effectively pursued; if 'rules of the competition' and human rights are respected; if the judge is independent and impartial, not abusing of the delicate and crucial power he/she has to administrate[5].

These functions can be performed, first of all, by immediate publicity, that is the possibility, for anyone – except for extraordinary cases prescribed by the law, to go to courts, and attend trials[6].

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[1] G. GIOSTRA, *Processo penale e mass media*, in *Criminalia*, 2007, n. 2, p. 57.
[2] N. RUSSO, *In video veritas: ovvero le verità mediatiche*, in *Tertium datur: dalla parte della Costituzione*, May 2006; ID., *Giustizia: tra essere e apparire*.
[3] G. GIOSTRA, *Processo penale e mass media*, cit., p. 57.
[4] W. HASSEMER, *Il diritto attraverso i media: messa in scena della realtà?*, in *Ars Interpretandi*, 2005, p. 151.
[5] F. PALAZZO, *Mezzi di comunicazione e giustizia penale*, in *Politica del diritto*, June 2009, n. 2, pages 201-202; G. GIRALDI, *Giustizia, giudici e opinione pubblica*, in *Questione Giustizia*, 2002, n. 1, p. 154.
[6] In Italian criminal procedure code, the provisions that rule this matter are articles 471-473. The hearings are public on pain of nullity; but minors, persons under restrictive measures or that look to be drunk, addicted or suffering from

However, in our age, what largely prevails is mediate publicity, through mass media[7]. Mass media – that have the function to spread knowledge of facts, turning them in news – are essential for the trial, and can also play another role, consisting in correction and spur. Journalistic inquiry tends to discover a truth – the journalistic truth – through investigations, researches, and examinations. Journalistic truth and procedural truth, even if different, can interact positively: televisions and daily newspapers' inquiries, for example, can stimulate the opening of prosecutors' investigation, help to correct enquirers' mistakes, discover abuses, and so on[8].

There are three types of dispositions, in Italian criminal procedure code, that concern the matter of representation of trial at the outside: they rules upon publicity of acts (art. 114 c.p.p.), publicity of hearings (art. 471 ss. c.p.p. and art. 147 disp. att. c.p.p.), and grounds of the sentence (art. 546 lett. *e)* c.p.p.).

Article 114 c.p.p. suits the right to inform with the principle of immediacy in criminal trial. When reasons that justify investigations secret are vanished, it is possible to publish the contents of a procedural act; on the contrary, it is not possible to publish the act itself, in its integral form, before the competent court has decided. This, because judges' decisions have to be taken only on the basis of proofs brought in trials, in a fair debate between the parties[9].

About publicity of hearings, besides provisions regulating the access for the public to courts (immediate publicity), see *supra*, a central role is played by article 147 disp. att. c.p.p., concerning trial broadcasts. The language of the law says that broadcasting can be authorized by the judge when the parties agree, but only if it does not harm "*the regular and peaceful development of hearings or judgements*". Even if parties' agreement lacks, it is possible to authorize broadcasting, if there is a great social interest in the knowledge of the particular trial. Anyway, showing the image of the parties, or of any other individual present at trial, is forbidden, without the agreement of the person concerned, or when the law prohibits it. Leaving out for a while the relationship between the right to inform and privacy, we have now to concentrate on the objective and procedural interest to the correctness of trial and judgement. The judge, in authorizing broadcasts, has to safeguard

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mental disease are not allowed to enter; the same happens for people carrying weapons, unless they are police. The judge forbids the presence of audience when a competent authority asks for it, when publicity would harm public morality or would disclose facts that have to remain secret in the State's interest. On concerned person's request, the judge forbids the presence of audience during the gathering of evidences that could harm witnesses' or private parties' privacy, relating to facts that are not the object of the indictment. The trial is not public when publicity could harm public health, when the public bother hearings, when it is necessary for witnesses' and defendants' safety. This may also happen for sexual crimes, or crimes against individual personality (i.e slavery), when the victim asks for it, or when he/she is a minor.

[7] E. BRUTI LIBERATI, *La rappresentazione mass-mediatica della giustizia*, paper prepared for CSM's conference *Le rappresentazioni della giustizia* (Representations of justice), in Rome, 23rd March 2010.

[8] I. RUSSO, *Giustizia e informazione*, in *Questione giustizia*, 2000, n. 5 pages 826 ss.

[9] I. RUSSO, *Giustizia e informazione*, in *Questione giustizia*, cit., p. 827.

authenticity of proofs (for example, in cases when witnesses could be threatened; on the contrary, let us think about the danger that a witness dramatizes his/her recollection, as to appear more fashionable on radios and TVs). Besides, the personal dignity of the defendant, who is not guilty until the final judgement, and of the offended has to be protected, just as judges' (and eventually jurors') impartiality, respectability and prestige – it is necessary to avoid external pressures just as temptations of protagonism –[10].

2.0 Relating to the matter of publicity and knowledge of the sentence – that close the trial and the 'social' conflict –, we have to talk about the motives, that is the whole of grounds, in fact and right, of judge's decision. One of the aims of motives is to allow some form of external control about jurisdiction, about correctness and loyalty in the application of the laws – substantial and procedural laws – that courts make. Due to motivation we can be sure that justice is administered in the name of the people, and that it will not become arbitrary: the fact of making public the grounds of decisions ensures democracy in jurisdiction[11]. In this way, the publication of a sentence not only on specialized journals and websites, but also through mass media – let us think about a decision taken at the end of an important trial, due to the public relevance of the defendants or of the other persons concerned, or to the gravity of facts –, amplifies this function.

However, the concrete relationship between trial and media suffers today for some tensions, which depend on the particular goals of media's research for knowledge. In our age, media truth tends to satisfy commercial and economic needs: the purpose is, for example, selling more and more copies of a newspaper, or shifting the audience of a TV show; for this reason, it is necessary to tell exciting, shocking, upsetting stories. The public do not have time enough, or are thought not to have it; dealing with an argument in depth is avoided, and news become very fast inputs, flashes, screamed slogans[12]. In this way, news on crime and trial are selected according to their appeal on the audience: the attention is driven principally on crimes against the person, and the more they are bloody and with sick details, the better it is[13]. Media keep on telling the same histories, or the same type of histories – that become in this way topical issues – just to attract public's attention, for the audience.

3.0 Media describe the imagine of investigations, trials, and even of prosecutors and judges, according to the product they want to sell to the public: sometimes this image is efficient and also

[10] G. DI CHIARA, *Televisione e dibattimento penale*, in *Foro it.*, 1998, V, 277 ss.
[11] L. LANZA, *La comunicazione con i mass media. I magistrati, la pressione dei mass media, il processo fuori dal processo*, paper prepared for CSM's conference *La Magistratura nel cinema, letteratura e mezzi di comunicazione*, (Judiciary on movies, litherature, mass media) in Rome, from 19th to 21st March 2007; I. RUSSO, *Giustizia e informazione*, cit., p. 831.
[12] N. RUSSO, *In video veritas*, cit.

heroic, in facing criminality – in particular in relation to organized crime –; sometimes it is depicted as feat and unable to face up with emergencies[14].

Trial time and media time, besides, are different. Even leaving out the problem of the (un)reasonable length of the trial, it is clear that criminal trial develops in a proceeding that needs the lasting of some time between happening of facts and final judgements: there is a plurality of steps, as the investigations – in which elements useful for the construction of the indictment are collected –, the trial itself – where the indictment is checked – and the appeal.

Mass media, instead, ask for speed and simultaneity: news are interesting, and have to be offered to the public, only when facts are topical and vivid in people's mind; as time goes on, memories vanish, and the old news are replaced by more recent and tempting facts. For this reason, media are mostly interested in investigations, showed as the very core of the proceeding, and not as a stage of its, whose results have to be checked on trial; interim measures, which are investigations' provisional results, are given the same importance of a final verdict upon defendant's guiltiness or not, or upon prosecutors' skill[15]. Most of all, the role of the grounds of the decisions is underestimated, because they are by definition the opposite of that speed and superficiality that media want: it costs time to write grounds of a sentence, to read them and to understand them[16].

In this way, mass media's function of controlling justice is falsified, because actually the trial object of media's tale is no more the real trial, celebrated in courts, but a rough copy of it: critics and comments appoint on a false target; justice administration's system cannot be really discovered by public opinion, and it is on the contrary deprived from that essential function of publicity and checks we talked about.

4.0 But this is not the worst inconvenient of the crisis between media and trial. We told that mass media search for their own truth: the media truth that, as any other form of knowledge, is nothing but one of the ways we learn reality of facts – the so called ontological truth, which cannot be learned in itself, because any knowledge proceeding tends to interpret this truth, in this way manipulating it –. Anyway, mass media try to smuggle their truth as the 'real' truth, against the trial truth, depicted as a 'conventional' or a 'false' truth. Rules of trial, evidence and proof are shown as

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[13] G. GIOSTRA, *Processo penale e mass media*, cit.; F. PALAZZO, *Mezzi di comunicazione e giustizia penale*, cit., pages 194 ss.

[14] I. DIAMANTI – A. NIZZOLI, *La rappresentazione della giustizia e dei magistrati nell'opinione pubblica e sui media*, relation prepared for CSM's conference *Le rappresentazioni della giustizia* (Representations of justice), in Rome, from 22nd to 24th March 2010.

[15] G. GIOSTRA, *Processo penale e mass media*, cit.

[16] L. LANZA, *La comunicazione con i mass media. I magistrati, la pressione dei mass media, il processo fuori dal processo*, cit.; I. RUSSO, *Giustizia e informazione*, cit., p. 831.

useless formalisms that, instead of aiming at the human rights' safeguard, obstruct the full knowledge of facts by the public – they become just quibbles, technicalities –.

5.0 By this way we get to the media trial, celebrated on networks – especially in TV talk shows – , which tries to replace, for its fastness and alleged perfection, the 'old' trial in courts. In the media trial parties must possess fascinating personalities, around which charming stories, good for the public, can be created. This means searching in deep in a person's private life, or pointing out personal features and behaviours; and this way of acting concerns also the description of prosecutors' and judges' personalities. Even these characters have to be shown to the public in such a way to excite popularity or unpopularity – all this looks like the phenomenon of supporting teams during football matches –. Media trial does not have rules to find and select evidences; on the contrary, all rumours, gossips, emotions are relevant. Reasoning with logic and laws does not exist: trial is a match you win or lose through your personal charm, or your ability to move the audience, to demonize the opponent, to shout louder than the others[17].

All this brings not only to moral decline of information, but also to de-legitimate trial as an instrument to solve conflicts. Trial truth is no more interesting for the public, is not important any more, but can only be the belated ratification of TV debates' results. It is no more criminal trial, but the media, especially TVs, that have to establish who is guilty or not; and the accused must develop his/her defensive strategy on TV shows. Trial's de-legitimation brings to judges' de-legitimation, shown as individuals unable to solve cases; the only, real judge is the public, which can decide with their favour defendant's destiny. It is easy to understand that, in this way, trial's shared nature is deleted: the decision, even the final one, is no more considered by the parties as the proper solution of their conflict, whatever the outcome. On the contrary, it will be always possible to go on TV to complain about the decision, and throw discredit on it[18].

There is also another way by which trial's importance and role is trivialized, through mass media. We are talking about cases of inquests and trials that involve politicians or people serving public offices that choose to defend themselves using mass media (for example, appearing in television news or shows, speaking from the columns of a newspaper, leaving messages on a web site); in this case, frequently their defensive strategy is to describe magistrates and in general

[17] A. GARAPON, *L'illusione della democrazia diretta*, in *I custodi dei diritti*, 1998, p. 70; G. GILARDI, *Giustizia, giudice e opinione pubblica*, cit., p. 159; E. BRUTI LIBERATI, *La rappresentazione mass-mediatica della giustizia*, cit.; N. RUSSO, *In video veritas: ovvero le verità mediatiche*, cit.; ID., *Giustizia: tra essere e apparire*.
[18] G. GIOSTRA, *Processo penale e mass media*, cit.

judiciary as a political party, that use trial in an improper way, to impose some type of establishment in public power or society[19].

In Italy this topic is of course sharpened by the problem of ownership and control upon mass media; anyway, what is to be underlined here, regardless of the merits of the single cases, is that when mass media describe trial as a politic instrument, they deprive it of its essential role of impartial instrument to solve conflicts and to apply the laws. In this way the very fabrics of democratic society are put in danger: the message that the public perceives is not the wrong working of a particular way to make justice, but the uselessness, the oldness, the harmfulness of justice itself, whose office could better be done by public-opinion polls.

The principal means to ride over this crisis between media and trial is the principle of loyal cooperation between institutions, among which mass media are necessary to check the democratic structure of a legal order[20].

Judiciary itself has to give the good example, not only accepting but also requiring that media check trial and justice's administration in general; because mass media can play the role of safeguard for the correct providing of jurisdiction, which means to avoid, discover or correct mistakes, and of sentinel of magistrates' independence and autonomy. Media's eye does not have to drive judges and prosecutors to act and behave like stars on the trial's stage, but must stimulate conducts that are impartial and look impartial; because this is the way in which judiciary can legitimate its office of administrating justice, and its essential role in society. It is also necessary to avoid technicality or 'legalise' language, when they are not necessary, and obstruct the knowledge of trial from the outside.

Mass media must take seriously their role of control. They have to give to the public complete, correct and serious information, not enslaved to some parties' interest, to commercial or profit needs, to economic powers. Journalists who write about justice must be well-trained and able to describe in a correct way how trial works, and explain accurately sentences' contents, because public opinion wants and deserves in-depth examinations. One of the principal goal media have to point at, regarding to this, is the education of the public in justice's matters: they have to explain terms, concepts, proceedings, whose function – protecting fundamental human rights and society's most important values – has to become generally understandable[21]. Only when one knows, he/she can check and be on the alert; only in this way we can be sure that justice will be administrated in the name of the people, and not in the name of public audience.

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[19] I. RUSSO, *Giustizia e informazione*, cit., pages 830 ss; I. DIAMANTI – A. NIZZOLI, *La rappresentazione della giustizia e dei magistrati nell'opinione pubblica e sui media*, cit.

[20] I. RUSSO, *Giustizia e informazione*, cit., page 830; G. GILARDI, *Giustizia, giudice e opinione pubblica*, cit., p. 158.

Coming to the particular problem of media trial, Italian Authority for Guarantees in Communications has recently provided some guide-lines about the manner to represent trial and judicial cases in TV and radio programmes. Those who work on television, radio, newspapers and on the other media have to adopt self-regulation codes in these matters; these codes have to respect some fundamental principles. In particular: *a)* It has to be avoided a disproportionate and excessive media exposure of judicial cases, that have to be treated and find their solution in front of a court, and not in other places; *b)* This means that media trial must be avoided: this type of 'trial' causes confusion in the audience, relating to the particular case, to the working of justice in general, and to the fundamental principles of criminal law and criminal trial; *c)* Information has to underline the central role of trial, of its rules – especially regarding to the principle for which no-one is guilty until the final sentence – and of its different stages; *d)* News on crime and on trial have to be inspired to principles of objectivity, completeness, correctness, and of protection of human dignity, avoiding turning someone's pain in a variety show; *e)* Media have to narrate facts in a loyal way, with good faith, without fascinations created just to render them more charming; f) there must be a proportional relationship between the presence of a case on mass media and its social relevance (think about the difference between a crime against public administration and a crime of passion): information has to allow citizens to control public matters and not to satisfy private curiosity[22].

6.0 Freedom of expression is a fundamental right protected by the Italian Constitution and the ECHR.[23] Consequently, its limitations should be explicitly provided or based on a principle obtainable from the same source through a strict interpretation.

As common people, magistrates have the right to express their thoughts, which cannot be limited to interventions without resonance (which means, only on law journals), regardless of the contents, because the primary purpose of freedom of opinion is to protect dissent. In a democratic system, indeed, magistrates' opinions should be sought, not opposed.

At the same time, as justice is administered in the name of the people, the critics and the public discussion, bringing out the inertia and shortcomings, are functional to the growing of the real independence of the judiciary.

However, magistrates are subject to the limitations related to their function, in addition to those that are valid for every citizen. In particular, they must not abuse of their freedom of expression; in other words, they must not affect the magistrates' independence and impartiality while discharging

[21] G. GIOSTRA, *Processo penale e mass media*, cit.

[22] Read act n. 13/08/CSP, *Atto di indirizzo sulle corrette modalità di rappresentazione dei procedimenti giudiziari nelle trasmissioni radiotelevisive*, 31st January 2008, in G.U. n. 39, 15th February 2008; and *Codice di autoregolamentazione in materia di rappresentazione di vicende giudiziarie nelle trasmissioni televisive*, 21st May 2009.

their duties, which in Italy are also values of constitutional status (Article 101 co. 2 and Article 104 co. 1)[24].

On the other hand, even Article 10 ECHR provides for the possibility of imposing limits on freedom of expression, *inter alia*, to safeguard the impartiality of the judiciary.

Nonetheless, the limit for fundamental freedoms should be sought with the utmost rigor, in order not to compress them in an illiberal way, by following preset parameters.

Consequently, the magistrate, without talking about the merits of the proceedings which he/she is dealing with, sometimes not only can but must speak and interact with the mass media, like any authoritative person who performs public functions and exerts a moral and intellectual influence on citizens through his/her office. For example, information is a duty for phenomena such as terrorism or mafia, which reproduce through environmental complicity.

Anyway, a magistrate's opinions, in particular those which are related to criminal proceedings, may have problematic consequences, "*for the prevention of crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of confidential information or for maintaining the authority and impartiality of the judiciary*" (Article 10 E.C.H.R.).

In our opinion, guidelines indicating a behavioral model should be developed, without imposing outright prohibitions *a priori*. In other words, the level of ethics and professionalism should be preferred rather than the disciplinary one. In the end, the magistrate, as a person in charge of judging others, should pursue moral excellence, also in the way he/she expresses his/her thoughts.

7.0 Having regard to international law, the ECHR rules (at least) two aspects of the relations between the administration of justice and the mass media.

First, Article 6 ECHR states the principle of public hearings, admitting, however, exceptions, *inter alia* (§ 1), for the press.

Second, Article 10 ECHR protects freedom of thought and expression[25]; however, § 2 lists the limits, which must be "*necessary*" and "*prescribed by law*". Anyway, a general principle imposes a strict interpretation of the exceptions and the conflict between principles must be resolved case by case.

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[23] See Disciplinary Section of C.S.M., Decision No. 37 of 1998 "*common heritage of liberal culture, which recognizes the positive value and importance of social dissent, discussion and criticism*".

[24] Italian Costitutional Court, Decision No. 100 of 1981.

[25] That includes the freedom to inform and to be informed, and, since Decision December 7, 1976, *Handyside v. United Kingdom, "it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population"*; in http://www.echr.coe.int/echr/en/hudoc/.

Starting from the careful distinction between facts and value judgments, the European Court of Human Rights has had a pervasive control over the restrictions imposed by the Member States on freedom of expression in order to protect the mass media as an essential tool for the exercise of (individual and collective) right of information. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof[26].

The Court decreed, regarding the limit concerning the "*authority and impartiality of the judiciary*", that "*the term 'judiciary'* (…) *comprises the machinery of justice or the judicial branch of government as well as the judges in their official capacity*" and "*the phrase 'authority of the judiciary' includes, in particular, the notion that the courts are, and are accepted by the public at large as being, the proper forum for the ascertainment of legal rights and obligations and the settlement of disputes relative thereto; further, that the public at large have respect for and confidence in the courts' capacity to fulfill that function*"[27].

This limit is infringed by "*statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of criminal justice*"[28].

For magistrates appointed to deal with a specific proceeding, the risk of seeming not impartial is so strong to preclude them from expressing any opinion about it; for others must be assessed in relation to the case. In fact, the Court decreed that "*the judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. That discretion should dissuade them from making use of the press, even when provoked. It is the higher demands of justice and the elevated nature of judicial office which impose that duty*"[29]. Actually, "*regard must* (…) *be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties*"[30].

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[26] See Decision February 24, 1997, *De Haes and Gijsels v. Belgium*.

[27] See Decision April 26, 1979, *Sunday Times v. United Kingdom I*, in http://www.echr.coe.int/echr/en/hudoc/, concerning an injunction of non-publication of an article on the conduct of judicial proceedings on thalidomide, under the law of Contempt of Court.

[28] See Decision August 19, 1997, *Worm v. Austria*, concerning journalistic interventions likely to affect the conduct or outcome of criminal proceedings, in http://www.echr.coe.int/echr/en/hudoc/; see Decision July 8, 1986, *Lingens v. Austria*, *ibidem*, too.

[29] See Decision September 16, 1999, *Buscemi v. Italy*, concerning a letter written by a President of a Juvenile Court to a newspaper to answer to statements made by the father of a child entrusted to an institution for children; in http://www.echr.coe.int/echr/en/hudoc/.

[30] Therefore, "*it may* (…) *prove necessary to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticized are subject to a duty of discretion that precludes them from replying*"; Decision April 26, 1995, *Prager and Oberschlick v. Austria*, in http://www.echr.coe.int/echr/en/hudoc/. Albeit in *obiter*, the decision recognized the legitimacy of restrictions on the right of expression arising from national legislation which imposes a duty of discretion to the magistrates.

Consequently, the magistrate seems to have a radical duty of self-restraint (the so called duty of discretion) in relation to specific cases, even when he/she is not appointed to deal with them.

With regard to the presumption of innocence, Article 6 § 2 ECHR "*cannot therefore prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected*"[31]. Obviously, the principle also applies to the Judicial Authority, regardless of whether it is or it will be appointed to deal with that specific proceeding.

8.0 In Italy there are three levels of discipline of the relations between magistrates and mass media[32]: criminal, disciplinary, ethics.

First, Legislative Decree No. 109 of 2006 provides for six cases of disciplinary rules relating to the matter in question; these cases can cover a wide area and for this reason they can preclude the showing of any kind of opinion concerning specific cases[33].

Article 5 of Legislative Decree No. 106 of 2006 provides for specific rules for the prosecutors. At a glance: the information given to the press must relate to the Office impersonally, which means without showing the names of the magistrates who deal with the specific case; only the Office Chief or the magistrates designated by himself can give information to the mass media; the Chief must also report the conducts in violation to the Judicial Council.

This ruling is aimed at avoiding excessive limelight, even unintentional, but it threatens to radicalize the hierarchical structure of the Office of Attorney.

Second, the Ethics Code adopted by the Italian National Magistrates Association (A.N.M.) in 1994, albeit containing no legal rules and applying only to members of the Association with sanctions that affect merely the *status* of membership, promotes the behavior and style of the magistrates; it is a hermeneutic support for the Disciplinary Section of the C.S.M.[34], too.

Article 6 of such Code of Ethics[35] does not prohibit, absolutely and unrealistically, relations with the mass media at all; as sometimes to give information is even a duty, it provides for guidelines

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[31] See Decision February 10, 1995, *Allenet de Ribemont v. France*, in http://www.echr.coe.int/echr/en/hudoc/.

[32] And they do not necessarily coincide. As Disciplinary Section of CSM, Decision No. 76 of 2003, decreed, a breach of the Ethics code could be index of a disciplinary offense, but sometimes falls below (for example, retraining requirements, availability to users, prudent management of resources *et coetera*).

[33] In particular: a) disclosure, even caused by negligence, of confidential acts of the proceedings or whose publication is banned (art. 2, lett. u); b) violations of the duty of confidentiality on the pending or defined proceedings when it is likely to prejudice the rights of others (art. 2, lett. u); c) public statements or interviews concerning individuals involved in pending proceedings, not defined by decision not subject to ordinary appeal (art. 2, lett. v); d) to seek the publication of news relating to one's own office or to create and use privileged or confidential information channels (art. 2 lett. Aa); e) making statements and interviews in violation of the *criteria* of balance and measure (art. 2, lett. Bb); f) to publicly express consent or dissent on a proceeding when, for the position of the magistrate or the manner in which the opinion is expressed, is likely to affect the freedom of decision (art. 3, lett. f).

[34] Which is the self – government institution of the Judicial Autority in Italy.

[35] In www.associazionemagistrati.it. Article 6 (Relations with the press and other mass media) – our translation:

about how the magistrate should act. In compliance with the duty of discretion, magistrates should avoid vanity and purpose of personal visibility and must express their opinions in a professional way, observing the *criteria* of balance and measure.

On the one hand, the duty of discretion enforces the public image of magistrates as isolated from politics as well as the trust in them; on the other hand, it is essential for their professional, moral and social authority.

Nonetheless, this does not mean that the citizen/magistrate cannot, with humility, try to grow the culture of legality, since the widespread illegality is a matter of costume, which can best be amended in advance, rather than in a purely repressive way. He/she has the right to interact with other institutions even in a very critical way, but certainly not challenging the legislative or executive powers, which may seem the result of ideological or partisan options.

9.0 Furthermore, in Italy the duty of discretion of magistrates had been enucleated by the disciplinary case since the 70s, in a twofold sense.

Strictly speaking, duty of discretion refers to proceedings in which magistrates are or will be called to perform their functions or where a stage has been defined by their intervention; in this case, it forbids any kind of statement. However, the magistrates still have the rights to:

- make statements about pending proceedings or judicial investigations of particular importance, in order to contribute to a correct public information;
- defend themselves against defamatory attacks pertaining to the exercise of judicial function;
- correct erroneous information in order to protect the reputation of the individuals involved in the proceedings.

Nevertheless, the magistrate must not make statements regarding any case which he/she may be charged to deal with that may call into question his/her impartiality and his/her freedom of opinion, or risk to vanish the secret or jeopardize ongoing investigations or interfere with the proper conduct of proceedings being handled[36]. The magistrate should avoid offensive or false expressions and limelight, too[37].

"*Reporting to the press and other media, the magistrate shall not seek the publication of news relating to the activity of the Office.*
When it is not bound to secrecy or confidentiality of information known for reasons of his/her office and feels the need to provide news in order to ensure correct information to citizens and the exercise of freedom of the press, or to protect the reputation of the citizens, he/she must avoid the creation or use of personal or privileged information channels. Provided the freedom of expression, the magistrate follows the criteria of balance and measure in statements and interviews to newspapers and other media of mass communication.".

[36] *Ex plurimis*, see Disciplinary Section of CSM, Decision June 3, 2004.

[37] There is no disciplinary responsibility, for example: when a magistrate, not requesting any person to collect his/her interviews, gives short answers (30 seconds) against the pressing questions of the mass media (Decision No. 174 of 1998); when a magistrate is merely repeating what has already been explained in a public measure to clarify facts of particular interest (Decision No. 104 of 1999); when a magistrate, in an interview, adds anything to what has been

The magistrate can make comments about cases he/she does not and will not deal with, exercising his/her right to criticize, but the statements should respect the historical truth and must not be gratuitously offensive[38].

Generally speaking, the Italian Supreme Court stands on the same settings[39].

Extra-judicial duty of discretion concerns matters not pertaining to judicial proceedings; so, it is inherent to the freedom of expression, a fundamental human right. Therefore, the decisions of the Disciplinary Section of CSM are characterized by a careful balance of the involved interests and, most of the time, it is exculpatory[40].

Again, the jurisprudence of the Italian Supreme Court and of the Disciplinary Section of CSM seem to correspond.

In particular, the Italian Supreme Court adopts the same standards in valuing the assertion of the right to criticize, which is also valid for common people, and verifies both the existence of a public interest in order to know the statements and the use of inoffensive expressions. On the other hand, whenever a magistrate commits a crime with his/her statements, there will always be also a disciplinary responsibility[41].

Instead, the expression by a magistrate of controversial political views not shared by a more or less extensive public is to consider within the bounds of his/her freedom when he/she respects the formal limit of continence. The standard to judge it, given the decay of morality and of political language, is the same used for political criticism, as there is no reason to believe that the same expression (of political content) can have a different offensive attitude as it comes from a politician or a magistrate[42].

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disclosed by the media and with a sober tone explains the statements of a "boss" during an interrogation, in order to avoid further allegations (Decision No. 122 of 1999); when a magistrate, in an interview on the workings of government and law enforcement concerning major social events, uses free from falsehood, clear and not offensive words, having regard to the content and the temporal context of the interview (Decision No. 33 of 2003).

[38] See CSM Resolution April 18, 1990.

[39] For example, see Cass. SS. UU. Decision No. 19659 of 2003 decreed that a magistrate should avoid overall polemical comments, having regard of where they were published (on a law journal), so that a large audience had a hint of a conflict between two judicial bodies.

[40] For Disciplinary Section of CSM, Decision No. 54 of 1999 the magistrate, meaning conduct a historical, social and political analysis, can express opinions about major institutional events, without wishing to discredit the work of other institutions and without gratuitous insult.

[41] See Cass. SS. UU, Decision No. 24666 of 2009: "*statements that represent the Constitutional Court as conditioned and contiguous - at least in some of its members - to an other power of the State, assume an offensive significance and escape the bounds of legitimate right to criticize, thus complementing the offense under Article 4, first para. d) Legislative Decree no. 109 of 2006*".

[42] *Ex plurimis*, see Cass. SS. UU., Decision No. 7443 of 2005, concerning the case of a judge who declared during an interview, that "*we must put away this ugly people*", referring to the Government, in connection with the passing of some laws and the failure adoption of other legislative measures necessary, in his/her opinion, for the good of the country and also the conduct of the President of the Council of Ministers and its parliamentarians, in the context of criminal proceedings that had seen them involved.

Such kind of behavior does not either violate Article 6 of the aforementioned Code of Ethics, because although the statements (free of falsity and defamatory connotations) could have been more sober, nonetheless, in relation to the particular historical moment in which they were issued, characterized by strong social tensions, have not exceeded the ethics bounds placed in defense of the judicial function, nor the image of independence and impartiality of each individual magistrate[43].

In the end, the elasticity of the ethical rules make them adaptable to the peculiarities of the case and, for the same reason, better suited for fundamental right than the rigid disciplinary rules.

10.0 It has been examined so far that the judiciary's relationship with journalism finds an inflexible limit in the protection of secrets and in persons' dignity; it has been also said that the individuals' right to privacy must be respected in the correct balance with the right of publicity and the public's interest to receive information about the activity of State bodies[44]; in any case, judicial public declarations must observe reservedness and discretion[45].

Magistracy's deontology in relation to media is therefore closely connected with procedural rules.

Since the privileged ambit of media's interest in the judicial activity is the preliminary inquiry, as the historical evolution described *supra* shows, it is now time to analyze some of the crucial issues raised by media information on investigations.

11.0 The journalists' right to inform, the public's right to be informed and the judicial power and duty to ascertain the truth without external infringements are constitutional principles[46] that in practical experience may become reciprocally antithetical, but are equivalent from a hierarchical point of view in Italian law[47]. Thus the sacrifice of a principle is thought to be justified only when the other one would be otherwise more intensively prejudiced. This is why the Italian criminal procedural legislation did not opt for a hands-off approach, leaving to each prosecutor the choice

[43] See Cass. SS. UU., Decision No 7505 of 2004, concerning comments on events that took place in Genoa during the G8 summit in 2001.

[44] See especially passages *supra* about art. 2 section 1 letters U, V, Z, AA, BB and art. 3 §1 letter I legge 23 febbraio 2006, n. 109; art. 5 d.lgs. 20 febbraio 2006, n. 106; art. 6 ANM Ethical Code

[45] Art. 1 legge 23 febbraio 2006, n. 109; art. 12 §2 ANM Ethical Code

[46] Respectively arts. 21 §1; 21 §2; 101 §2 and 112 Constitution; since the introduction in 2001 of new art. 117 Constitution, also art. 6 ECHR and art. 10 ECHR commented *supra* have a constitutional rank in Italian law; the same can be said for art.19 n.2 UN's International Agreement on civil and political right, ratified by Italy in 1977; art. 19 Universal Declaration of Human Rights, though being international soft law, is binding pursuant to art. 10 Constitution. About the connection between art. 112 Constitution and secrecy, see Corte Costituzionale, 420/1995, quoted in P. LONGO, N. GHEDINI, *Commentario costituzionale al Codice di procedura penale*, p.154

[47] Corte Costituzionale, 29 gennaio – 10 febbraio 1981, n. 18, in *Giurisdizione Costituzionale*, 1981, 92; Pier Paolo RIVELLO, *Segreto (profili processuali)*, in *Digesto delle discipline penalistiche*, IV edition, vol. XIII, Torino, 1997, p. 81; TOSCHI, *Il segreto nell'istruzione penale,* Milano, 1988, 24; similarly, about the constitutional necessity of a balance of the said three principles, Carlo Federico GROSSO, *Segretezza e informazione nel nuovo processo penale*, in *Politica del diritto*, 1990 (1), 77

whether (and to what extent) to keep investigation acts secret or to make them public[48], but on the contrary aimed at preserving unbiased sources of evidence, the independence of the judiciary from the public's expectations, and the internal consistency of the procedural system.

In fact the Italian Code, although based on the adversary system, inclines to a certain dilation of both the inquiry secret (the so called internal secret, i.e. the secret vis-à-vis the defendant) and the ban on the publication of procedural acts (this is the so-called external secret, i.e. secrecy vis-à-vis the outside of the proceedings[49]). Media may not disseminate, neither by quotation nor in summary, any part of the content not only of undiscovered acts – i.e. those still unknown to one or more of the defendants –, but also of the acts that the prosecution attorney decides to keep secret in order not to prejudice investigations about other people or other police operations (internal secrecy). Moreover, there is a ban on publications, even if only partial, of procedural acts – although already discovered to the defendant – before the conclusion of investigations and preliminary hearing, thus the content of such acts can only be published in summary (external secrecy). In addition to all this, investigation acts that are not used during the public trial may not be published until the end of the appeal process[50], i.e. presumably after some years, so that also appeal judges will have no way to read investigation acts that were subject to exclusionary rules, therefore the consistency of the procedural system is preserved. The aforementioned legitimacy of publications in summary, although doctrine initially alleged it was a hypocritical way-out[51], is now widely accepted as a balanced compromise: it has a lower impact than excerpts and quotations from process acts[52], it prevents the judge from reading in the newspapers what he/she could not read by effect of exclusionary rules[53], it makes the Italian system closer to the German one, i.e. one of the most widely estimated for its effectiveness in preserving both investigations secrecy and freedom of information[54].

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[48] This solution was supported by Glauco GIOSTRA, *Processo penale e informazione,* Milano, 1989, p.36; while former code was in force, E. FORTUNA, *Riflessioni sul segreto istruttorio,* in *Critica penale,* 1981 (3-4), 49 ff., V. GREVI, *Segreto istruttorio e stampa,* in *Quaderni Giustizia,* 1982 (6), 6

[49] Internal and external secrecy are longstanding categories of Italian doctrine about the criminal process: see V. PISAPIA, *Il segreto istruttorio nel processo penale,* Milano, 1960, pp. 43 and 129

[50] Italian Criminal Procedural Code (hereinafter "CPP"), respectively: art. 329 §§1 and 3.a, 3.b; art. 114 §1; art. 114 §§2 and 7 in joint construction; art. 114 §3. The defendant may agree about a later discovery of an act, thus extending its internal secrecy. Such rules imply that internal secrecy covers the judge's ordinance compelling the prosecution to integrate investigations or to issue a count (arts.410 §3 and 409 §§4 and 5); besides, internal secrecy shall be maintained, during the appeal proceedings against an interim measure, on all those investigation acts that have not been discovered to the judge authorizing such measure: S. PALLA, *Art. 329,* in G. LATTANZI, E. LUPO, *Codice di procedura penale, Rassegna di giurisprudenza e di dottrina,* vol. V, book 1, Milano, 2003, p.17

[51] Ennio FORTUNA, in E. FORTUNA, S. DRAGONE, E. FASSONE, R. GIUSTOZZI, A. PIGNATELLI, *Manuale pratico del nuovo processo penale,* IV edition, Padova, 1995, p.281; Pier Paolo RIVELLO, *Segreto (profili processuali),* in *Digesto delle discipline penalistiche,* IV edition, vol. XIII, Torino, 1997, p.86

[52] *Relazione al progetto preliminare del CPP,* in *Official Journal of the Republic of Italy (Gazzetta Ufficiale della Repubblica Italiana),* 24 ottobre 1988, n. 250, Suppl. Ord. n.2, p. 49

[53] D. SIRACUSANO, A. GALATI, G. TRANCHINA, E. ZAPPALÀ, *Diritto processuale penale,* II edition, vol. I, Milano, 1996, p. 256

[54] Marcel LEMONDE, in AA. VV., *Procédures pénales d'Europe (sous la direction de Mireille DELMAS-MARTY),* Italian translation by Mario CHIAVARIO, Padova, 1998, p.621

Anyone violates these legal bans, whether voluntarily or for mere negligence, or consciously concurs in the violations, is liable to an arrest lasting up to 30 days or to a light fine, according to the grossness of the crime[55]. Whenever an officer reveals an "internal secret", each of the concurring offenders may be liable up to a 5 years' imprisonment[56]. Apart from criminal punishments, judiciaries, civil servants, lawyers, auditors, accountants and journalists who violate said bans are liable to disciplinary measures and the prosecution attorney shall inform their disciplinary tribunal to that effect[57]. In fact everyone getting to know a secret in the criminal proceedings, whether legitimately or not, is bound to it[58]. These provisions are meant to cover as amply as possible the wide range of persons concerned with the trial who might have interest in an anticipated disclosure of investigations: let us think by way of mere hypotheses about a barrister who wants to be the first to offer to the public his/her version of the facts, or about a defendant who wants to divert the public's attention on certain gossip-like passages of wiretapping tape-scripts, or about a judge's technical consultant too generous towards journalists longing for an early scoop.

Hence, the source of investigation act leaks does not seem to originate from a legislative lacuna[59], but rather from the actual paucity of security systems allowing to trace back (among the too numerous people who deal with the execution of wiretappings[60]) to the very first culprit of any violation of internal or external secrecy.

Such a stiff legislative approach does not mean whatsoever that the public interest to the knowledge of inquiries has been considered blameworthy or worthless: when it is necessary to investigations, prosecutors can issue a decree by which they authorise the publishing of acts that would otherwise be secret[61],i.e. identikits of malefactors: this provision recognises the value of the role that sometimes journalism plays for the good outcome of judicial inquiries; in fact, there are instances of profitable cooperation between the judiciary and journalists, especially in the struggle against organised crime and in the sector of blood crimes.

Further limits to the right of publicity are imposed by the protection of people's privacy and reputation. As far as the publication of persons' identity and image is concerned, international and

[55] Arts. 684 and 133 Criminal code

[56] See art. 326 Criminal code for the distinction between various hypotheses and penalties. One of the most severe effects of the provision is that if a crime notice (i.e. the first act of the criminal proceedings) is issued by a public officer, he/she commits a crime if he/she reveals the content of such a notice during a press conference: Cassazione 11 febbraio 2002, CED Cassazione rv. 221983. If a secret has already been violated by others but not disclosed to the public, its revelation is a crime, too, when it causes a further diffusion of the information: see case law quoted in Marco GAMBARDELLA, *Art. 326*, in G. LATTANZI, E. LUPO, *Codice penale, Rassegna di giurisprudenza e di dottrina*, vol. III, book 2, Milano, 2005, p.369

[57] Art. 115 §§1 and 2 CPP

[58] E. LUPO, *Art. 329*, in *Commento al nuovo codice di procedura penale coordinato da Mario CHIAVARIO*, IV, Torino, 1990, p.36; as for penalties for offenders, see art. 379 bis Criminal Code

[59] Cesare PARODI, *Le intercettazioni*, Torino, 2002, p.19

[60] M. PATRONO, *Intercettazioni e divulgazione delle intercettazioni: regole del diritto e abusi della prassi*, speech at the conference *Rinnovare la magistratura nelle istituzioni, nella società* organized by Unione delle Camere Penali Italiane in Rome on 14th and 15th March 2008

European soft law about minors[62] has been enforced by dictating a general ban on the publication not only of their pictures whenever they are witnesses or victims of crimes, but also of their identity when they are involved in any way in a criminal process; strict exceptions are admitted if the minors' interest requires them[63]. Besides to that, the publication of pictures of detainees wearing handcuffs or shackles is forbidden; publicity must be avoided when a detainee is being transported to the prosecutor's or the judge's office; he/she shall be protected from the public's curiosity[64].

As for reputation, the magistracy's ethical code prescription (art.11 §2) is to act with care and prudence when someone's reputation is at risk. Moreover, the fact of a pending inquiry against a person is covered by secrecy for organised crime investigations and by a ban on publication for all other investigations[65]. However, delicate problems can arise due to the publicity of the so-called warranty information, by which the prosecution informs the defendant about the existence of investigations concerning him/her. Said act is in fact by definition not covered by secret, as it is meant to preserve the right to defence[66], thus it can be reported by journalists, though without quotations[67]; but the mere fact of such an act being served e.g. to a politician can arise discredit or at least strong suspicions against him/her in the public opinion.

12.0 Should it be legislation to prevent these inconveniences by a compression of the freedom of information and/or controls on it? Is today's judicial deontology the most effective tool to hinder these kinds of phenomena, or too strict rules, binding judges and prosecutors to silence, weaken their position in the public's eyes and eventually even inside the process?

Beyond the rules laid down in the Criminal Procedural Code to safeguard internal and external secrecy, privacy-oriented limits to the right of publicity have already been imposed. First of all, domestic longstanding case law states that media information must report the truth or at least accurately verified hypotheses, with fair exposition standards (the so-called proportionality rule); the reported facts must be of substantial public or social interest (the public interest clause)[68].

Moreover, the Code for the protection of the Right to Privacy on the one hand dictated directly some plain rules[69], on the other hand left the regulation of the matter to acts adopted by the Privacy

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[61] Art. 329 §2 CPP
[62] UN Assembly Beijing Rules approved in November 1995; Cousel of Europe's Recommendation n. 87/20 issued in the aftermath of the Committee of Ministers' deliberation dated September 17th, 1987
[63] Art. 114 §6 CPP; art. 13 dPR 22 settembre 1988, n. 448; compare art. 7 Journalism Code of practice, about which see infra
[64] Respectively art.114 §6 bis CPP and Art. 42 bis §4 legge 26 luglio 1975, n. 354; similar provisions are contained in art. 8 §§2 and 3 Journalism Code of practice, about which see infra
[65] Art. 335 §§3 and 3bis CPP; S. DRAGONE, in E. FORTUNA, S. DRAGONE, E. FASSONE, R. GIUSTOZZI, A. PIGNATELLI, *Manuale pratico del nuovo processo penale*, IV edition, Padova, 1995, p.493
[66] Art. 24 §2 Constitution; said information is provided under art. 369 CPP.
[67] G.P. VOENA, in G. CONSO, V. GREVI, *Compendio di procedura penale*, Padova, 2003, p.174
[68] Cassazione 18 ottobre 1984, n. 5259, in *Foro Italiano*, 1984, part I, column 1100
[69] Arts. 136 and 137 d.lgs. 30 giugno 2003, n. 196 (Right to Privacy Code)

Authority in junction with the National Counsel for the Press Association[70]. These specific provisions are bound to prevail on the right of publicity, since the right to privacy has a constitutional *status* as well[71] and domestic law must be construed in consistency with Directive 95/46/EC of 24th October 1995 of the European Parliament and the Council[72]. The Privacy Authority is thus enabled to issue recommendations whenever needed: some of them concern the essentiality and proportionality criteria[73], others emphasise and define the public interest clause[74], which appears also to be the fulcrum in the ethical code agreed upon by the National Counsel for journalists and the Authority[75].

Committing the delicate regulation of this topic to general clauses such as "public interest" and "proportionality" might seem risky, but the Authority and the judiciary have powers to repress abuses whenever a suit is brought in front of them, either for illegitimate publication of private data or for libel and slander[76]. Most importantly, such a flexible balance seems vital to our constitutional democratic values. State control would exceed its constitutional limits if a power of the State defined in advance and in the abstract the relevance or irrelevance of facts with regard to the public interest. This would result in a creeping subjection of journalism to the needs and interests of a governmental propaganda[77]. Justice is administered in the name of Italian people[78], in fact the need for social control on jurisdiction and on the parties' behaviour in the process was overtly taken into consideration by our legislator[79]. Hence an in-depth public knowledge of judicial activities and developments in investigations, trials and cases involving social or political implications is a right that cannot be waived. Silence on public powers and politicians is vital for tyrannies, while publicity is a prerogative of democracies[80].

A correct and detailed information of the public about inquiries, of course within the frame of legitimacy according to the limits stated *supra*, can make people able to have balanced opinions and

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[70] Mainly, the Code of Practice Concerning the Processing of Personal Data in the Exercise of Journalistic Activities, published in the Official Journal of the Republic of Italy n. 179 of August 3rd, 1998 (hereinafter "Journalism Code of practice"); see also the Agreement 11th June 2004 between the Privacy Authority and the National Counsel for the Press Association about the publication of most delicate data (i.e. those disclosing health and sex life)

[71] Arts. 2 and 117 in junction with art. 8 ECHR

[72] Gian Giacomo SANDRELLI, *Legge sulla privacy e libertà di informazione*, commenting on Cassazione 5 marzo 2008, in *Dir. Inf.* 2008, p.459 at 460; privacy seems to prevail on the right of publicity also to the effects of the magistracy's ANM Ethical Code, compare art.6 §2

[73] A famous instance is: Garante per la protezione dei dati personali, Comunicato Stampa 21 dicembre 2007, by which said Authority formally asked the Naples Prosecution Office whether some published wiretappings concerning President Berlusconi were supposed to be still secret or had been at least already discovered

[74] Garante per la protezione dei dati personali, Comunicato Stampa 2 luglio 2008

[75] Compare arts. 5 §1 and 6 §1 Journalism Code of practice

[76] Arts. 141 – 152 Right of Privacy Code; arts. 595 ff. Criminal Code

[77] David JONES, *"Collaborazione informativa" tra mass media e uffici investigativi*, in www.ec.europa.eu: similar statements, though referred by the Author to the UK, perfectly fit to Italy too: compare art. 21 Constitution especially in its section 2

[78] Art. 101 §1 Constitution; every Italian judicial decision begins with such words, see art. 132 CPC

[79] *Relazione al progetto preliminare del Codice di procedura penale,* 49

[80] E. BRUTI LIBERATI, *Mass media e (pre)giudizio, Relazione all'incontro di studio decentrato sul tema: Mass media e (pre)giudizio,* Bologna, 27th March 2010, quoting Beccaria, Hamilton, Pulitanò

better behaviours: the educational role of the judicial proceedings, for both the offenders and the public, should not be a Utopian ideal, but a common hope and effort[81].

The fundamental basis for all this would be, in our opinion, a trustworthy relationship between the judiciary and journalism, causing the former to speak with serenity and equilibrium and the latter to self-restrain from infringing in any way on the efficacy and impartiality of investigations.

For its part, the judiciary at its highest level has shown deep respect for the vital role of journalism to democracy, where the public is seen as a collectivity of intelligent beings, capable of mature opinions; where thus the public must be informed on facts that are relevant for political life and where the confrontation of opinions is the best way towards social progress[82].

As far as journalists are concerned, it is still actual an authoritative appeal to professional self-restraint, which was delivered years ago by a most famous Italian judge in order to avoid the prospective introduction of afflictive punishments such as professional interdictions[83].

As a matter of fact, things seem to have changed since the 90s, when some of the Clean Hands Operation echoes in media led European doctrine to say: "Actually, secrecy is patently and often violated, in complete impunity"[84]. It is not hard to believe that the current deontological rigour reported *supra* is also the outcome of international criticism against the Italian past situation. Maybe a positive factor has been the aforementioned provision that each Attorney General and each District Attorney shall be the only spokesperson of his/her Office: although very restrictive[85], such a rule – inspired to middle Europe models – has forced a neat detachment from past abuses.

However, after discipline in the judiciary has been strongly reaffirmed, as the disciplinary cases quoted *supra* show, too strict a construction of judicial deontology for the sake of privacy might actually lead to silence, thus result in a weakness of the State vis-à-vis lawyers and defendants rushing themselves to journalists, in order to force their own version of facts and investigations into the public opinion. This is in fact a potential genesis of perversions in the "media process" that has been analyzed *supra*. Furthermore, as European doctrine pointed out, a State body refusing to render information about its activity, through its spokesperson, may generate in the public the suspicion of partiality or lack of transparency; that is, in a word, discredit[86].

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[81] The topic s dealt with by Tullio PADOVANI, *Informazione e giustizia penale: dolenti note*, in *Diritto penale e processo* 2008 (6), 689; also in the past the educational role of the criminal proceedings was consciously and overtly emphasized, but mainly in other contexts and from a different perspective: Bruno CAVALLONE, *Pinocchio e la funzione educativa del processo,* in *Rivista di diritto processuale*, 2008, 133, quoting Harold J. BERMAN, *Justice in the USSR.*

[82] Aniello NAPPI, *Giustizia e informazione*, in *Cassazione Penale* 2005, p.3233

[83] Adolfo BERIA DI ARGENTINE, *Rapporti tra giustizia e stampa. Se al giornalista si toglie la penna*, article appeared on *Corriere della Sera* 12 aprile 1986

[84] Marcel LEMONDE, in AA. VV., *Procédures pénales d'Europe (sous la direction de Mireille DELMAS-MARTY)*, Italian translation by Mario CHIAVARIO, Padova, 1998, p. 631

[85] Criticism about art. 5 d.lgs. 20 febbraio 2006, n. 106 was espressed by G. MELILLO, *I rapporti con gli organi di informazione*, in D. CARCANO, *Il nuovo Ordinamento giudiziario*, Milano, 2006, p.286

[86] David JONES, *"Collaborazione informativa"* quoted *supra*

13.0 In this context, it appears clearly why today's reform projects about wiretappings and their publication have met neither the judiciary's nor the journalists' enthusiasm.

Among many reform projects supported by different political parties, the Majority's text is being discussed in the Parliament. Due to the fact that it may impinge on the feasibility and speed of key investigations, criticism has been expressed especially on its parts relating to the expense limits set for wiretappings; also the new procedural requirements seem meant to hinder prosecutors from asking for telephone traffic data and/or wiretappings[87]. Instead, as for their factual requirements and duration limits, the text has been substantially amended recently. On account of such essential differences, this project of law is no more a governmental priority according to the Premier's declarations[88].

Nevertheless, this reform proposal might still introduce innovations beneficial to privacy: let us think about the introduction of punishments for the violation of requirements for the keeping of wiretappings recording files. Over ten years ago doctrine hinted at such a possibility to enhance the legislation in force[89] but no change has been implemented so far.

From the point of view that is most relevant here, the reform project would introduce new exclusionary rules under which the irrelevant parts of wiretappings would not enter into the trial material, thus their publication would be banned until the end of the appeal process[90]. It has been pointed out that a drawback of such a privacy – oriented approach is that both the selection by the prosecutor and the parties' adversarial confrontation on the point take place too early, when the distinction between relevant and irrelevant facts might still be discretionary or at leastuncertain[91]; later integrations would be possible, but all the same time-consuming.

As for facts that are relevant for inquiry purposes, their publication would be totally banned, either in summary or by quotation, until the end of the preliminary hearing, irrespective of whether secrecy ceases[92]. The Privacy Authority expressed perplexities on such a legislative choice, that would create a different publication regime of inquiry acts on the sole basis of the investigation method[93]. In addition to this, the law project would introduce a new disciplinary ban on the

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[87] Guglielmo LEO, *Sul progetto di riforma delle "intercettazioni telefoniche",* in www.magistraturademocratica.it

[88] News published in http://www.corriere.it/politica/10_luglio_28/berlusconi-intercettazioni-tentato-di-ritirare-legge_9d83e496-9a74-11df-8969-00144f02aabe.shtml

[89] A. CAMON, *Le intercettazioni nel processo penale*, Milano, 1996, p.172, relating to art. 89 Criminal procedural code Enforcement Rules ("Att. CPP"); now art. 1 §27 letter H of the law project N. 1415-C would introduce art. 685 bis in the Criminal Code, to be read in junction with said art. 89 Att. CPP

[90] Art. 1 §§11 and 12 of the law project N. 1415-C introducing arts. 268 §6ter, 268 bis and 268 ter CPP; said provisions are to be read in junction with art. 114 §3 CPP already in force

[91] Guglielmo LEO, *Sul progetto di riforma delle "intercettazioni telefoniche",* in www.magistraturademocratica.it; such a provision would anticipate proceedings similar to those concerning illegal wiretappings pursuant to art. 240 CPP in force

[92] Art. 1 §5 of the law project N. 1415-C introducing art. 114 §§2bis and 2ter CPP; said provision is to be compared and contrasted with art. 114 §2 CPP as modified by art. 1 §4 of the same law project

[93] Privacy Authority, Speech of the President Prof. Francesco PIZZETTI delivered to the House of Representatives (Camera dei Deputati) on 30th June 2010

mention, in a criminal decision, of facts that are personal to third parties and did not affect the process[94].

Actually, there is a widespread concern about private life data (especially those regarding family and sexual aspects) being disseminated, which has occurred recently on account of the publication "in summary" of wiretappings contents. But the constitutional value of the secrecy of communications[95] may be better safeguarded by applying the law in force. First of all, if wiretappings are illegal, stiff rules impose their destruction during the process, while editors and media directors publishing them are heavily punished along with concurrent offenders[96]. Secondly, even if wiretappings are legitimate, the publication of their passages that are irrelevant for the purpose of the trial and concern private life, i.e. facts lacking public interest, constitutes a violation of the right to privacy pursuant to art. 8 ECHR[97]; therefore offended people are entitled to a full compensation. The *public* interest, as referred to *supra*, does not always equal the *public's* interest.

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[94] Art. 1 §38 of the law project N. 1415-C introducing letter H-bis in art. 2 §1 d.lgs. 109/2006

[95] The issue of how to balance the secrecy of communications under art. 15 Constitution with the right of publicity was deeply dealt with, from a theoretical point of view, by G.P. VOENA, *Mezzi audiovisivi e pubblicità delle udienze penali,* Milano, 1984, 276 ff.

[96] Art.240 CPP and arts.3,4 d.l.22 settembre 2006, n.259, validated by legge20 novembre 2006, n.281

[97] European Court of Human Rights 17 July 2003, in *Diritto dell'informazione e dell'informatica,* 2003, p.1063

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