

## JUDICIARY LIABILITY IN THE ITALIAN SYSTEM

**SUMMARY: 1. Foreword. - 2. Disciplinary liability. - 3. Civil liability. - 4. Criminal liability. - 5. Liability for excessive length of proceedings. - 6. Code of Ethics - 7. The new judicial organization. - 8. The new disciplinary action.**

### *1. Foreword.*

To deal with the topic of disciplinary liability of magistrates in Italy today holds a particular significance because of the present situation which sees a transition from the old and the new organic system, designed by the well known judiciary counterreform.

To speak of deontology and disciplinary liability of magistrates means, then, to address two sides of one same problem: on one hand, the duties of judges and prosecutors in their abstract being; on the other, the system's reaction in case of violation of said duties.

Magistrates' liability can be divided into disciplinary, civil, and criminal.

### *2. Disciplinary liability.*

The Italian system, until the reform came into force, did not provide for legally predefined disciplinary breaches. Until today, one of the strongholds of the system is art. 18 of law 31<sup>st</sup> May, 1946, no. 311 which defines disciplinary breach as the behavior of a magistrates "who does not comply with his duties, or holds in office or outside of office a conduct which makes him unworthy of trust and standing, or compromises the prestige of the judicial organization". The broadness of the rule gives the disciplinary judge a wide discretionary power in defining which facts amount to disciplinary breaches, based on the general standards set out in art. 18 (trust and consideration by fellow citizens or prestige of the entire judiciary).

Disciplinary sanctions provided for by the present system are: a) warning: consisting in a written account of the breach and a request that the magistrate resume his duties; b) censure: formal blame of the ascertained breach; c) decrease in service up to two years for the progression to the next step in the magistrate's career; d) removal: definitive cessation from any judicial function if he may not be reassigned to judicial duties in a different office; e) destitution: same as removal, but descending from a final decision in a criminal case if the actual facts are deemed serious. Censure and decrease in service may be accompanied by imposed transfer to different office.

### *3. Civil liability.*

Civil liability of judges and prosecutors in Italy was introduced through a law in 1988 (following a referendum) and concerns all behavior or acts of office which, by malice or gross negligence or by denial of justice, have caused and unjust damage. This

statute gives the private party affected and action against the Italian State; this latter may, if deemed liable, may ask compensation from the magistrate. The civil action may be brought only after all ordinary means have been tried against the decision and is subject to a preliminary scrutiny for admissibility. If this is the general rule, art. 13 provides for cases in which the magistrate is directly responsible for the damages deriving from his behavior:

- serious breach of law deriving from inexcusable negligence;
- affirmation or negation of a fact which uncontrovertibly is denied or affirmed by acts of the procedure;
- adoption of acts limiting personal freedom outside the cases disciplined by law or without motivation.

The law defines denial of justice as the situation where, after the expiring of the legal term for an act of office, the party has requested the magistrate to decide and he does not comply within thirty days (five days for acts concerning personal freedom).

The present system, in full compliance with the constitutional provisions which state the magistrates are subject to the law only, does not sanction the merits of the magistrate's judicial action nor the interpretation of the law he gives therein, unless a serious breach of law derives from malice or gross negligence.

The impossibility to censor the contents of judicial acts from a disciplinary point of view has been steadily affirmed by jurisprudence as a means for defending the independence of magistrates in the exercise of their functions.

However, even if the content of the judicial decision may not be cause for the magistrate's liability, his behavior in adopting a certain decision may amount to a source of civil liability if the conditions stated above are met.

Not every mistaken judicial decision may therefore give rise to civil liability, but only that which, by gross negligence, shows a serious and evident violation of law or arbitrary solution in interpreting the law.

#### ***4. Criminal liability.***

From the criminal point of view, magistrates, as any public official, may be subject to prosecution for any violation of criminal law. Through a law of 1998 (no. 420) special rules have been adopted concerning territorial competence for investigations and criminal trials concerning magistrates, by which it is stated that, if falling within the competence of a judicial office included in the appeal district where the magistrate is in service, they are automatically moved to the competent first instance court in the neighboring appeal district. Therefore, a mechanism has been devised by which not only transparency in judicial matters concerning magistrates is assured, but also freedom of magistrates judging cases in which colleagues are involved is safeguarded.

#### ***5. Liability for excessive length of proceedings.***

With Law no. 89 of 2001 (so-called “Legge Pinto”) a means has been introduced by which the right to reasonable length of proceedings, as provided by art. 6 § 1 of the European Convention for Human Rights, is enforced. The violation of this right causes “responsibility of the State for pecuniary or non-pecuniary damage suffered” by the citizen, who is entitled to an equitable compensation. Not all parties to a proceeding are entitled to compensation in case of excessive duration, but only those who have concretely suffered damage, whether pecuniary or of other nature. Such damage must be fully proved by the person claiming compensation.

The claim for compensation is handled by the Court of appeal with a summary hearing. The standards for judging on excessive duration are set by the law through reception of the criteria shown by the jurisprudence of the European Court:

“complexity of the case”, which is to say the need to solve complex problems of law or evidence, or to handle proceedings with numerous parties;

“conduct of parties”, including dilatory behavior or obstructionism;

“conduct of proceeding authorities”, including the judiciary or administrative authorities: malfunction of judicial offices as a whole or concerning single magistrates, registrars, technical counsel, etc. The evaluation includes conduct of the single magistrate in handling the case, as well as procedural norms in their functional aspect. However, even if in these cases the excessive length of proceedings is derived from the behavior of a magistrate, national and European jurisprudence state clearly that such delay in proceeding is due to defective organization of the judicial system, and it is therefore irrelevant to investigate the individual responsibilities of judges and all other authorities involved. Therefore, delays derived from: lack of judiciary and administrative personnel; transfer of personnel without immediate replacement; disproportion between judiciary personnel and number of cases, do not exclude the State’s responsibility, since it is considered that it could, by hiring more magistrates or administrative personnel, pursue a solution.

Summing up, law n. 89 of 2001 aims at subtracting from the judgment of the European Court of Human Rights all questions of compensation for excessive duration of trial, or at least at abating the number of cases decided against Italy by the European Court, which cause expenses and damage our Country’s image. Nevertheless, nothing has been done by the legislator to address the causes of delay in proceedings: neither concerning procedural law, nor by reorganizing judiciary offices. There is no attempt to avoid excessive duration of proceedings, which is considered as ineludible, and compensation is considered sufficient by a Parliament which has constantly shown to be impotent in finding solutions but tremendously efficient when it comes to limiting the judicature’s statute.

## ***6. Code of Ethics***

As members of Medel already know from our previous documents on the subject, the Italian Associazione Nazionale Magistrati (National Association of Magistrates) has adopted, in 1994, an Ethical Code. The adoption has been imposed by a specific provision of law.

While referring to our previous documents for the contents, we must point out how the rules laid out in the Ethical Code do not amount to disciplinary rules, unless there is an interference with specific provisions concerning disciplinary breaches. In itself, therefore, an infringement of the rules of the Ethical Code does not amount to cause of liability, disciplinary or else, of the magistrate.

### ***7. The new judicial organization.***

Law 150 of 2005, known as “reform of justice” (or, ironically, “reform of judges”) has deeply changed, and not for the better, the rules concerning magistrates’ disciplinary liability.

In requiring the Government to adopt executive decrees, Parliament has made the task in this sector easy by giving a detailed discipline and description of disciplinary breaches.

Globally considered, not many substantial innovations have been brought to the system, but the text contains several rules which seem excessively limiting for magistrates’ constitutional prerogatives (such as those governing disciplinary breaches in the field of relations with the public media).

As said above, disciplinary breaches are described in detail: whereas this may be considered as a positive innovation for what concerns the guarantee of predetermination of offences, it does on the other hand limit the disciplinary judge’s power of appreciation and conditions the magistrate’s behavior.

Article 1 enumerates the magistrate’s duties in service, which are: impartiality, correctness, privacy, diligence, laboriousness, equilibrium; generally, in service and outside of service, the magistrate must abstain from any conduct which may damage his personal credibility and prestige or that of the judicial body to which he belongs.

Although these are undisputedly fundamental duties, already stated by the previous regulation as well as in the Ethical Code, the above article does not contemplate independence of magistrates which, as observed by the Superior Council of the Judiciary in its observations on the discipline, is not a privilege but a duty for the single magistrate and a prerogative of the judiciary as a whole.

Not all breaches of the above duties, by art. 2, are considered disciplinary offences, but only those which concretely harm credibility or prestige. This provision, if on one hand connected to the principle of offensiveness and therefore a guarantee for the accused, can on the other hand easily be influenced and conditioned in its enforcement not so much by the actual behavior of the magistrate involved but, rather, by the echo and publicity that the single event has had on public media. As the Associazione Nazionale Magistrati has correctly observed, the risk is the creation of a “discipline of appearance” by which the magistrate is not judged by his concrete behaviors but by the symbolic value of his appearance, especially if there is no detailed definitions of offences in this area. Also, this may give rise to a number of complaints against a magistrate not based on hard facts but rather on subjective perception of the magistrate’s conduct.

Article 3 fully describes 29 cases of disciplinary breaches connected to the exercise of judicial duties. They can be classified as offences concerning the quality of judicial

acts (letters g, h, l, m, cc), offences concerning behavior of the magistrate in office and towards other judicial organs (letters b, d, e, f, n, o, q, r, s, t), offences concerning the violation of the duty to abstain and the divulgation of acts of office and, more generally, concerning the violation of the duty of secrecy (letters u, v, z, bb).

These last deserve specific comment, especially the case provided for by letter u) concerning the divulgation of acts of office covered by secret and the violation of confidentiality on proceedings if from it may derive undue damage to the rights of the persons involved. As the Superior Council has observed, this provision prevents a magistrate to defend himself if, for example, unduly attacked in his professionalism or person, by communicating, in due respect of the norms on secrecy, all information necessary to reestablish the truth.

Furthermore, all declarations and interviews to press organs concerning proceedings which are not closed are sanctioned; as far as public prosecutors are concerned, no relation with press organs is allowed outside the cases disciplined by provisions given by the head of office. This last provision is tightly bound to the more generalized hierarchization of public prosecution introduced by the judicial reform: it is therein stated that the head of the public prosecution office holds all contacts with the press personally or through a delegated magistrate, and that all information concerning acts of office must be attributed impersonally to the whole office; furthermore, the head of office must report all conduct by his inferiors which goes against this provision.

In a system which contemplates mandatory criminal prosecution this constitutes a serious breach of the right to independence, freedom of speech and freedom of the press. Even if it is necessary to avoid excessive spectacularization of proceeding and the search for undue mediatic consensus, it is just as necessary to protect the freedom of expression of magistrates.

Article 4 enumerates 9 cases of disciplinary breaches concerning behavior outside of judicial office. These range from conducts aiming at profiting from professional status to obtain advantages from parties to proceedings to the violation of the duty to communicate any situation giving rise to incompatibility, to the prohibition to participate in secret associations or political parties. Letter f) provides a specific breach for public expression of consent or dissent on a proceeding if, by the standing of the magistrate or by the means with which this opinion is expressed, this may influence the freedom of decision in that proceeding. A curious provision, not only because of the serious doubts of compatibility with constitutional provisions safeguarding freedom of thought and expression, but also because our experience does not contemplate a type of magistrate who may be intimidated by comments or considerations coming from colleagues.

Article 5 dictated 4 cases of disciplinary breach deriving from a definitive criminal sentence.

Article 6 enumerates, in order of growing seriousness, the sanctions deriving from disciplinary liability. These are: warning, censure, loss of service, temporary inhibition of directive or semidirective offices, suspension for a period of up to three months, and destitution. Once again, in order to limit the disciplinary judge's power of appreciation, the law prescribes which sanction may be imposed for which offence.

## ***8. The new disciplinary action.***

Another negative innovation introduced by the new judicial organization concerns the exercise of disciplinary action, which, from discretionary, becomes mandatory. Indeed, article 15 gives the Minister of Justice the power to promote disciplinary action through request to the General prosecutor to the Supreme Court which, in turn, has the obligation to promote that action notifying the Minister and the Superior Council. The provision does not leave room for action to the General prosecutor who, if faced with a fact potentially qualifiable as disciplinary breach, is forced to prosecute. This innovation has evident effects on the system as a whole. Through this mechanism the Minister of Justice acquires a position of supremacy with respect to the General prosecutor, being able to force prosecution of disciplinary action through a simple request, which could be based on mere rumors. Indeed, if the General prosecutor should maintain, after investigation, that the accused should be acquitted, the Minister may propose opposition or force the disciplinary organ of the Superior Council to prosecute.

This means that the disciplinary mechanism, which works on an inquisitorial base, is de facto in the full control of the Government, who is hierarchically superior both to the prosecutor (in opposition to the present Italian system which sees public prosecution – as yet – independent from the executive power) and to the disciplinary section of the Superior Council. The Minister of Justice, then, becomes the new protagonist of the disciplinary action in all its phases.

It is useful to recall that the Associazione Nazionale Magistrati has recently expressed strong criticism of this mechanism, underlining that it will cause the paralysis of the entire system as a consequence of the fact that no preliminary acquittal is provided for, except for macroscopically unfounded cases. Moreover, mandatory prosecution will overload the organs of disciplinary investigation through multiplication of proceedings. On the other hand, this system makes magistrates easy targets, forcing them to undergo disciplinary investigations regarding every accusation, no matter how absurd. This will put pressure on the entire judiciary, bringing to excessive conformism and bureaucratization of judicial functions, forcing magistrates to pursue formal correctness of their acts rather than their effectuality and readiness.

It is easy, then, to foresee for the accused magistrate and in the end for all of us a situation of diminished security, in which the guarantees for a just and objective proceeding will progressively slacken and in which the prerogatives of our self government body will be subject to strong limitation by political authority.

*La population attend des juges qu'ils fassent preuve d'une sagesse, d'une rectitude, d'une dignité et d'une sensibilité presque surhumaines. Probablement qu'aucun autre groupe de la société n'est soumis à des critères aussi élevés.*

Gerald Gall, *The Canadian Legal System*

*Alessandro Suter Sardo*  
Movimento per la Giustizia