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Judicial Responsibility in Italy: A New Statute

INTRODUCTION

A new statute on the civil liability of judges came into force in Italy on April 16, 1988.¹

The worldwide movement toward more responsive systems of justice which seems to be a salient feature of our age may welcome the Italian statute as an important affirmation of a basic principle: the exercise of judicial power in a democratic régime should not go without accountability.² The new statute was preceded by a long and harsh political battle,³ as well as by a deep, and thorough academic debate.⁴ The motive of both was the fear that removing the

RICERCATORI DELL'UNIVERSITÀ DI TRENTO, FACOLTÀ DI GIURISPRUDENZA. The authors wish to thank Professors A. Gambaro, J. Gordley, R. Sacco, R. Schlesinger, for comments and suggestions on previous drafts of this paper. The research has been jointly conducted by the authors who share the responsibility. M. Graziadei has drafted para. 2, 3, 4, 5, 6, 8.

1. Statute of April 13, 1988, n. 117, *Risarcimento dei danni cagionati nell'esercizio delle funzioni giudiziarie e responsabilità civile dei magistrati* (Redress of damages caused by the exercise of judicial functions and civil liability of magistrates), *Gazzetta Ufficiale*, April 15, 1988, n.88.

2. M. CAPPELETTI, "Who Watches the Watchmen? A Comparative Study on Judicial Responsibility", 31 *Am. J. Comp. Law*, 1 (1983). Id., *Giudici irresponsabili?* (1988).

3. The new statute was enacted after a referendum abolished the previous regime contained in articles 55, 56 and 74 of the Code of civil procedure. The referendum on Judicial liability held on November 1987 has been the major issue of Italian political life for more than two years. The Constitutional Court, however, with the decision n. 26 of January 16, 1987, (*Foro Italiano I*, 638, 1987) held its admissibility on constitutional grounds despite the strong opposition of career judges. On the role of Constitutional Court in Italy see G. CASSANDRO, "The Constitutional Court of Italy," 8 *Am. J. Comp. Law* 1 (1959). G.L. CERTOMA, *The Italian Legal System* (1985), 155 ff. CAPPELETTI-MERRYMAN-PERILLO, *The Italian Legal System* (1967). 281 ff.

No use of the referendum took place for more than twenty years as a statute to apply art 75 Constitution (1948) was enacted only in 1970 (1.352/1970). After the enactment of that statute (in connection with the Christian Democracy attempt to repeal the law permitting divorce in Italy) referendums were held in a number of occasions, always by the initiative of the radical party. Despite the large political discussion which arose in each of these occasions, up to this last one the promoters never succeeded in abolishing any statute.

4. The Italian literature on our topic which preceded the new law is very abundant and takes the form both of books and of articles. We may mention here just the contributions which, for frequency of subsequent quotations may be considered seminal: V. VIGORITI, *Le responsabilità del giudice* (1984); A. GIULIANI, N. PICARDI, *La responsabilità del giudice* (1987); M. CAPPELETTI, *Giudici irresponsabili?* (1988). All these books used a broad comparative approach. A whole issue of the law review

previous judicial immunity doctrine⁵ could threaten another value of the western legal tradition: judicial independence.⁶

Quadrimestre (3/1985) has been devoted to this topic. It is possible to find there (among others) contributions by A. Pizzorusso, A. De Vita, P. Trimarchi, V. Vigoriti, U. Scarpelli. Other collective works are: V. FERRARI ed. *Garanzie processuali e responsabilità del giudice* (1981). A GIULIANI-N. PICARDI (edd.) *L'educazione giuridica, III La responsabilità del giudice* (1978); E. FASSONE, "Il giudice tra indipendenza e responsabilità," *Rivista Italiana diritto e procedura penale*, 3, (1980) may be interesting for a judge's approach. In English see M. CAPPELLETTI, *supra* note 1; N. TROCKER, "Judicial Responsibility in Italy", *Italian National Reports to the XI Int. Congress of Comparative Law* (1982) at 217 ff. It must be said that a significant group of scholars was skeptical on the aptitude of the law of torts to govern judges liability. See e.g. P. Trimarchi, U. Scarpelli. In English on the problem of judicial independence in Italy see A. PIZZORUSSOS' contribution to S. SHETREET-J. DESCHÈNES (eds.) *Judicial independence: The contemporary debate* (1985) at 196 ff.

5. The previous regime, abolished by the referendum, was based on the following provisions which, though contained in the Code of Civil Procedure, (1942) applied also to criminal cases:

Art. 55: (Civil Liability of the Judge) "A judge may be held liable only when

1) in performing his duties he has acted with malicious intent, fraud or bribery.

2) When, without a justifiable reason, he refuses, omits, or delays to decide about the parties demands or, in general, to perform an act of his office.

The cases described by n. 2 *supra* occur only when the party has presented a formal request for the decision, and ten days have passed without result."

Art. 56 (Authorization) "An action to hold the judge liable may not be brought without an authorization of the Minister of Justice.

Upon request of the authorized party the Court of Cassation will choose by decree the judge who will decide the action claiming liability.

The dispositions of the present and of the preceding articles to not apply in case of intervention by a party to a criminal action or a civil suit after a criminal conviction."

Art. 74 (Liability of the public prosecutor) "The rules related to judge's liability and to the corresponding action apply also to judges belonging to the public prosecution who intervene in the civil process when, in performing their duties, they have acted with malicious intent, fraud or bribery.

These provisions are a plain translation of the French model, and historically they have offered a very narrow ground for judge's liability actions. (See *Infra*).

The above mentioned provisions are briefly discussed in the general context of Italian civil procedure by M. CAPPELLETTI, J.M. PERILLO, *Civil Procedure in Italy* (1965), 74 ff at 77. For a broad discussion of civilian attitude and structure of civil procedure R.B. SCHLESINGER-H.W. BAADE, M.R. DAMASKA, P.H. HERZOG, *Comparative law*, V ed (1988), at 337 ff, 492.

The abolition of this regime, without the new statute would leave judges liable under the usual regime of negligence of the Civil Code:

Art. 2043 "(Compensation for unlawful acts). Any fraudulent, malicious, or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages".

6. J.P. DAWSON, *The oracles of the law* (1968) at 135 ff refers however that in medieval England clergies were disqualified from judicial duties just because they enjoyed a too wide immunity.

The Constitutional Court in a previous judgment of March 14, n. 2, *Giurisprudenza Costituzionale* 288 (1968) concerning the validity of articles 55 and 74 of the code of civil procedure did affirm that the constitutional principles on the autonomy of the judiciary from the other powers of the State, and on the independence of the judge, may suggest limits or particular conditions to his liability, but do not guar-

This paper sketches the main features of the new statute and discusses them in comparative perspective.

2. THE CONTENTS OF THE STATUTE: GENERAL STRUCTURE

The statute is rather comprehensive as it applies to all career judges and prosecutors who take part in the judicial activity, whether they exercise their functions in ordinary or special courts,⁷ and to lay judges (art. 1(1)). They are all known as magistrates, for the purposes of the statute, and are subject to its provisions whether they perform their duties individually or as members of a panel (art. 1(1)(2)).

The fundamental plan of the statute depends on a distinction between two different situations.

According to article 13 whoever has suffered damage as a consequence of a crime committed by a magistrate in the exercise of his functions has a right to redress against the magistrate and the State.

If the wrongful conduct of a magistrate causes damage but is not a crime, arts. 2 ff of the statute establish a civil liability that deviates from the ordinary rules on torts. The magistrate responsible for wrongful conduct is in any case subject to disciplinary proceedings, and to a claim of indemnity by the State⁸ if the State compensated the claimant.

We will consider these two situations separately.⁹

antee a complete immunity from civil liability. On the contrary, such immunity could be considered as an infringement of the constitutional provision on the liability of public servants (art. 28 Cost.).

7. The statute does not apply to the Constitutional Court: art. 5 of the Constitutional law 11.3.1953 n. 1, states that "the judges of the Constitutional Court cannot be held liable nor prosecuted for the opinions and the votes given in the exercise of their functions". The Constitutional Court has declared that some of the special courts created before the Constitution of 1948 do not contrast with art. 102 cost. which forbids the creation of special or extraordinary courts; among such we find: tax courts, disciplinary committees of various professional councils, etc.: cfr. G.P. CIRILLO & F. SORRENTINO, *La responsabilità del giudice* (1988), p. 93 ff.

8. In the statute that we are commenting the indemnity action of the State against the magistrate ("azione di rivalsa") is not necessarily aimed to recover an amount equal to the loss of the victim, being limited by the income of the magistrate. Due to this peculiarity it is not surprising that some Italian scholars are discussing whether to classify this action as tortious or not. See C. CONSOLO, "Sul giudizio di rivalsa dello Stato verso il magistrato e sul suo rapporto col giudizio risarcitorio", *Rivista di Diritto processuale*, 225 (1989). A similar action is known in France ("action recoursoire") and in Germany ("Rückgriff").

9. It is beyond the scope of this statute to modify the rules on compensation to victims of judicial errors imprisonment (art. 14) established by art. 571 — to 574 bis of the Code of Criminal Procedure (1930), as amended by the statute of May 30, 1960, n. 504. On this topic: M. PISANI, "La réparation de la détention préventive injuste", *Rapports nationaux italiens au IXe Congrès Internationale de Droit Comparé* (1974), 653, at 655 ff. A brand new discipline of this topic has been provided by Arts. 314 and 315 of the new Code of Criminal procedure which came into force on October 1989. The new provisions for the first time do take care of compensating the victims

(A) *Civil Liability for Criminal Conduct of the Magistrate in the Exercise of His Functions*

For the purposes of the statute, criminal conduct of a magistrate is relevant only if committed in the exercise of judicial functions.

The criminal code penalizes a public servant's malicious wrongdoing in a wide range of cases.¹⁰

Although it is possible to imagine a case in which the magistrate intentionally violates his legal duties without committing a crime, the provisions of the penal code are generally considered an adequate safeguard against intentionally wrongful conduct of the magistrate.

When the damage is caused by a crime, the civil action to obtain redress is subject to the ordinary rules on tort liability.¹¹ This means that the aggrieved party may pursue his remedy against the judge and the state with an independent civil action or by intervening in the criminal proceedings against the judge.¹²

(B) *Wrongful Conduct of a Magistrate That Does Not Amount to a Criminal Offence*

If the wrongful conduct of a magistrate is not considered by the law as a crime, the statute bars an action of the aggrieved party against him. In this case the claimant may only sue the State. The claim is successful when it is proved that the magistrate acted with malicious intent or gross negligence, or was responsible for a denial of justice (art. 2(1)).

Article 2(2) restricts the scope of the first section by establishing an immunity from liability for the construction and interpretation of legal rules as well as the finding of facts and the evaluation of evidence.

Article 2(3) of the statute which describes what constitutes gross negligence further limits the ground for an action. Gross negligence is inexcusable negligence that results in a gross violation of law; or the affirmation of a fact whose existence is uncontroversially excluded by the dossier of the procedure, or its denial when it is uncontroversially established by the same; or an act concerning personal freedom taken outside of the cases contemplated by the law, or without motivation.

of unjust imprisonment which does not follow a final judgment. See M. CHIAVARIO, *La riforma del processo penale. Appunti sul novo codice*, 183 ff (1990) II ed.

10. Articles 314 ff and in particular 324, 324, 328.

11. In particular, art. 2059 of the civil code provides compensation also for non-pecuniary damages in the case of a criminal offence.

12. R.B. SCHLESINGER et al., cit. *supra* n. 5, at 492 ss. on the different civilian approaches to the problem; V. ZENO-ZENCOVICH, *La responsabilità civile da reato* (1989).

The rules on denial of justice are contained in article 3.

The refusal, omission, or delay of an act gives rise to civil liability when the period fixed by the law for its accomplishment has expired, and thirty days have passed, without reasonable excuse (*giustificato motivo*), since the party's demand for it was filed.

This period may be extended up to six months by a motivated decree issued by the judge director of the office (art. 3(2)). If the omission or delay concerns the personal freedom of the accused, the period is shortened to five days and it cannot be extended. When a measure that limits the personal liberty of the accused is involved, the time expires on the day on which it should be revoked or modified.

These rules establish a strict connection between tortious conduct of the judge and the limits of the State liability to the injured party. They leave little room for complaints about maladministration of justice that does not depend on the fault of members of the judiciary. This means that the remedies offered by the European Convention on human rights remain without parallel in the new legislation, and that in the end the effort to narrow the grounds of liability of the State to very precise questions connected with a magistrate's act or behavior will only lead litigants on the road to Strasbourg.¹³

13. The deficiencies of the Italian system of justice lead many litigants to search a decision by the European Court of Human Rights. Italy is frequently condemned there. See, for example, Eur. Court H.R., Capuano Judgment of 25 June 1987, Series A n° 119, published also in *Foro italino*, IV, 385, (1987), with obs. by A. PIZZORUSSO (a civil case: seven years from summons — 11.10.1976 — to first instance judgment — 7.2.1983 —, on the 25th of June 1987 the case was still pending before the Court of Appeal of Potenza); Eur. Court H.R., Baggetta and Milasi Judgments of 25 June 1987, Series A n° 119 (two criminal cases: in the Baggetta case it took over eleven years from the beginning of the procedure — 11.27.1971 — to first instance judgment — 12.17.1982); Eur. Court H.R., Foti and Coreliano Judgments of 10 December 1982, Series A n° 56, n° 57, published also in *Foro italiano*, IV, 81, (1983). To compare how Italy ranks among the other States interested by the application of the Convention up to date statistics are available: M.E. MAS & S. SANSOTTA, "Aperçu statistique de la Cour européenne des Droits de l'Homme" in F. MATSCHER & H. PETZOLD, (eds.), *Protection des droits de l'homme: la dimension européenne — Melanges en l'honneur de G.J. WIARDA*, (1988), 691, at 712-713. Commenting on the Capuano case Professor Pizzorusso remarks ". . . the case of Ms. Capuano [. . .] does not appear extraordinary; on the contrary, it corresponds almost to the rule not only of criminal and civil procedures, but of administrative procedures as well". M.DE STEFANO, "Lentezza della giustizia italiana: appello alla giustizia europea", *Temì romana*, 879 f. (1986) remarks that there is a growing interest among members of the Italian bar in obtaining relief straight from Strasbourg. On the Italian situation see also O.G. CHASE, "Civil Litigation Delay in Italy and in the United States", 36 *Am J. Comp. Law*, 41 (1988). S. CHIARLONI, "La domanda di giustizia: deflazione e/o risposte differenziate", *Rivista trimestrale diritto e procedura Civile*, 752, (1988).

3. THE ACTION AGAINST THE STATE: SOME TECHNICAL PROBLEMS

Two major problems had to be solved in order to provide a satisfactory regulation of the action against the State. First of all, the action had to be coordinated with the rules on *res judicata*. A second problem was the need to avoid interference between the procedure that is assumed to have caused the damage, and the procedure that is initiated to obtain redress for judicial misbehaviour. The solution of these two problems turns on the vital question of how to avoid endless litigation and chicanery without reducing the remedy given to the aggrieved party to a useless device.

The answer is given in articles 4(2) and 5 of the statute. The action against the State cannot be initiated before all the means to correct a judgment that is not *res judicata* according to Italian law have been exhausted. This is the effect of article 4(2), that refers to the distinction — quite widespread in the civil law area — between ordinary and extraordinary attacks on judgments.¹⁴ Whether an attack is ordinary or extraordinary depends on whether the judgment is *res judicata* or not. Since different countries have different rules on *res judicata*,¹⁵ what is an extraordinary attack on a judgment in one country may well be considered ordinary in another.

For instance, according to our Code of Civil Procedure judgments that may be attacked with a “ricorso per cassazione” have no *res judicata* effect. French law reaches the opposite result for judgments that can be attacked by a “pourvoi par cassation”.¹⁶

To make sense of the rule contained in article 4(2) it is then necessary to know that according to Italian law a civil judgment has *res judicata* effects when is subject only to two types of attack, which are for this formal reasons classified as extraordinary. They are the “revocazione straordinaria” and the “opposizione di terzo”. The former is based on the supervening knowledge of certain elements which could influence the outcome of the lawsuit.¹⁷ The latter is an attack brought by a third party aggrieved by a judgment obtained through fraud, or in violation of an independent right of the third party.¹⁸

14. The action to obtain redress from the State can initiate only when the ordinary means of attack have been exercised (. . .). ”

15. R.B. SCHLESINGER, et al., cit. *supra*, note 5, at 454, speaks about mere acoustic agreement between legal systems on this point.

16. For this reason P.E. HERZOG — D. KARLEN, “Attacks on judicial decisions”, *International Encyclopedia of Comparative law*, XVI, ch. 8, p. 6, n° 12 observe: “the classification does not appear helpful in a comparative study”.

17. Article 395 (1), (2), (3), (6) of the code of civil procedure. M. CAPPELLETTI, J.M. PERILLO, *Civil procedure in Italy*, cit *supra*, note 5, at 287 ff.; C. CONSOLO, *La revocazione delle decisioni della Canazione e la formazione del giudicato* (1989).

18. Art. 404 ff of the code of civil procedure. M. CAPPELLETTI & J.M. PERILLO, cit. *supra* note 5, at 293 ss.

The rule stated the first part of article 4(2) is therefore twofold. It compels the litigant to pursue all the remedies available against a judgment which is not *res judicata* before demanding redress for the damage caused by judicial misbehaviour. It does not subordinate the liability claim to the rules governing on attack of a judgment that has *res judicata* effects.

The consequences of the second part of article 4(2) are more difficult to describe.

The purpose of the rule is rather clear. It attempts to condition the action against the State on the previous exercise of remedies available against a judicial act that does not possess the typical features of a judgment, but causes wrongful damage. The difficulty lies in the fact that these remedies are heterogeneous, sometimes not written in any statute, but established, with more or less certainty by scholarly writing or case law developments, and in most instances related to a particular procedure.¹⁹ This point deserves attention because it sheds light on some of the issues that were left open by the statute and that sooner or later will have to be handled by Italian Courts.

It is clear that in some instances — for example, orders for pre-trial detention — one can obtain a judicial review of the act which is assumed to have caused the damage. Whether this review satisfies the claimant or not, after it has taken place he is permitted by the new statute to pursue the remedy for judicial misbehaviour. In such a case the action against the State might be brought for an act committed by a magistrate who might be still in charge of the proceeding in which that act was committed. The same possibility is expressly contemplated by the statute when it speaks of cases that are still before some court in the judicial hierarchy three years after the act that caused the damage was committed. This is however of dubious constitutionality. It seems to violate the constitutional provisions that guarantees that no one will be deprived of the natural judge established by the law (art. 25(1) cost.),²⁰ because it seems that the magistrate whose conduct is a matter of complaint should refrain from further participation in the procedure which occasioned the complaint.²¹

To avoid chicanery the action against the State is subject to a filter. The Court that hears the complaint (art. 4(1)) may declare the action inadmissible for lapse of time, lack of the prerequisites listed

19. A. PROTO PISANI, "Il giudizio contro lo Stato di risarcimento dei danni cagionati nell'esercizio delle funzioni giudiziarie ai sensi della l. 13 aprile 1988, n. 117", *Foro italiano*, V. 409 (1988), at. 416.

20. "No one shall be denied the right to be tried by his natural and lawfully appointed judge".

21. A. PROTO PISANI, *cit.*, *supra*, note 19, at 419.

in articles 2, 3 and 4 of the statute, or because it is manifestly unfounded. A decree to that effect is issued after hearing the parties. The claimant has a right to an appeal, and to a review by the Court of Cassation (art. 5). The magistrate who allegedly caused the damage may intervene in the suit against the State but cannot be compelled to do so (art. 6(1)). He cannot be heard as witness (art. 6(3)). Though the magistrate's right to defense is somewhat limited, if he intervenes in the proceedings the judgment will determine a fact preclusion against him as regards the damage caused to the victim. This preclusion will be relevant in the indemnity claim contemplated by article 7 (art. 6(2)).

4. THE COMPLAINT AGAINST THE STATE AND THE DISCIPLINARY PROCEEDINGS AGAINST THE MAGISTRATE

On the basis of the facts alleged in the suit against the State the head of the prosecution office (Procuratore generale presso la Corte di Cassazione) must initiate disciplinary proceedings before the section of Superior Council of the Magistrature charged with disciplining the judges. The minister of justice also may initiate such proceedings (art. 107(3) Cost.) at his discretion (art. 9(1)). For this purpose the Court that hears the civil action must send a copy of the dossier of the case to these subjects. The magistrate may be subject to disciplinary sanctions for common negligence because the limitation of his liability to acts of gross negligence in article 2 of the statute does not apply to disciplinary proceedings (art. 9(3)).

The disciplinary action will probably remain a significant instrument to punish violations of the duties imposed to the members of the judiciary even the new statute. Due to insurance coverage of the risks connected with the exercise of judicial functions, the incidence of indemnity actions as sanctions for judicial misbehaviour is in fact greatly reduced. Nevertheless, the present regulation of the disciplining of judges is outdated and is generally considered unsatisfactory. A number of bills to reform the whole disciplinary system are presently under discussion in parliament.²²

5. THE ACTION OF THE STATE AGAINST THE MAGISTRATE: THE PROBLEM OF PANEL'S DECISIONS

The action of indemnity must be initiated by the State²³ within

22. On the relationship between the new regulation and disciplinary measures see S. CHIARLONI, "Prime riflessioni sui rapporti tra le azioni penali e disciplinari e le azioni civili nella legge sulla responsabilità del giudice", *Giurisprudenza italiana*, IV, 129 (1989). The topic of the reform of disciplinary proceedings is dealt by L. SCOTTI, "La riforma della responsabilità disciplinare del magistrato", *Documenti giustizia*, 73 ff (1988); V. MELE, *La responsabilità disciplinare del magistrato* (1987).

23. Art. 7 (1) "The State within one year from the redress . . . takes the indem-

one year after compensation for damages provided either by judgment or by an out of court settlement (art. 7(1)). The statute fixes the maximum amount of the sum that the magistrate is liable to pay as of 1/3 of his net annual income at the time when the action against the State initiated. This limit does not apply if the magistrate acted with malice (art. 8(3)). The liability of the citizens who participate to the administration of justice as lay judges (conciliatori), or as jurors, is limited to the case of malicious behaviour. The lay members of tribunals such as juvenile courts (Tribunali dei minorenni), tax commissions (commissioni tributarie), may also be held liable for gross negligence, in the wrong affirmation or denial of a fact (art. 7(3)).²⁴

Sometimes an act of a panel is the source of the damage for which the State had to pay compensation. In that event, the court hearing the indemnity action can obtain the record of the in camera deliberation of the panel in order to evaluate the responsibility of each member (art. 16(5)). The Constitutional Court has recently modified the text of art. 16(1)(2). Before considering the contents of this decision it may be interesting to see the enactment approved by the Parliament. According to the original text of this article a summary record must be made of the secret votes expressed in camera, including the reasons given for any minority vote, and an indication of the dissenter's name (art. 16(1)(2)(3)). The use of this record in the suit against the magistrate stirred the debate on the reform bill in Parliament.²⁵ In effect these rules represent a novelty in a civil law jurisdiction like Italy which, since Italian unification,²⁶ has constantly adhered to the rule that votes and opinions expressed in

nity action against the magistrate". Art. 8 (1); "The indemnity action must be promoted by the prime minister".

24. R.B. SCHLESINGER et al., *Comparative Law*, V. cit. *supra* note 5, at 479 for a survey of lay participation to justice in civil law countries. N. TROCKER, "Professional and non professional judges: Italy", *Italian National Reports to the Xth International Congress of Comparative Law* (1978), at 313 ss.; E. AMODIO (ed.), *I giudici senza toga: esperienze e prospettive della partecipazione popolare ai giudizi penali* (1979), J.P. DAWSON, *A history of lay judges* (1960).

25. A. PIZZORUSSO, "Osservazioni sul progetto di responsabilità civile del magistrato", *Documenti giustizia*, 65 (1988); A. ROSSI, "La nuova legge sulla responsabilità civile dei magistrati e gli organi collegiali", *Questione giustizia*, 1, (1988).

26. V. DENTI, "Per il ritorno al voto di scissura nelle decisioni giudiziarie", in C. MORTATI (ed.), *Le opinioni dissenzienti dei giudici costituzionali ed internazionali* (1966); M. ASCHERI, "Rechtsprechungs und Consiliensammlungen — Italien", H. COING (ed.), *Handbuch der Quellen und Literatur der neuen Europäischen Rechtsgeschichte*, II 2 1113 at 1157 ff (1976); G. GORLA, "Le opinioni non "segrete" dei giudici dissenzienti nelle tradizioni dell'Italia preunitaria", *Foro italiano*, V, 97 (1982) show that a number of pre-unitary Italian Courts did admit the filing of a separate opinion which was accessible to the parties, or to the public. An analysis of the style of Italian judgments from the 16th to the 20th century is presented by G. GORLA, "Civilian Judicial Decisions — An Historical Account of Italian Style", 44 *Tulane Law Rev.* 740 f. (1970).

camera are secret. Indeed the law forbade taking notes of these opinions or votes²⁷ to prevent their disclosure. It is true that before this statute some information about divergences of opinion among members of a panel could occasionally be gathered indirectly by examining the opinion of the Court,²⁸ or by comparing several decisions on the same matter taken by the same Court with the participation of different judges. The new Statute however makes a break with the past by providing that a record be prepared of proceedings in camera, which is to be kept secret until the Court hearing the indemnity action orders its production. Nevertheless, a closer look to these provisions reveals the distance between the Italian statute and dissenting opinions²⁹ in the style that is familiar to the common law world, or a public, separate opinion such as that permitted to the judges of the German Federal Constitutional Court,³⁰ or of the Spanish Constitutional Tribunal.³¹

27. This is commonly argued from the provisions of the Procedural Codes on the secrecy which has to be kept on deliberations in camera: e.g. art. 276 (1) of the code of civil procedure. Compare A. PIZZORUSSO, "Ordinamento giudiziario", 5 *Novissimo Digesto Italiano, Appendice* (1984), 530 ff, at 542: "Tutte queste attività non vengono in alcun modo verbalizzate . . .".

28. This may happen when the rapporteur, who is normally also the judge who writes the opinion of the court, does not agree with the other two members of the panel. In this case he may ask to the President of the panel to assign to someone else the task of writing the opinion. It becomes therefore possible to argue from the fact that the rapporteur (relatore) didn't write the judgment (did not sign the judgment as estensore) that the decision was reached by a majority which did not include the rapporteur. For an example, compare Trib. Venezia, March 11, 1981, *Diritto fallimentare*, II, 292 f. (1981), obs. D. DI GRAVIO, *Il segreto sul voto dei giudici e le vicende della trasformazione della società*.

29. A debate on this topic, and efforts to introduce the expression of dissent at the level of the Constitutional Court, have developed in Italy over the years. K.H. NADELMANN, "Non disclosure of Dissents in Constitutional Courts: Italy and West Germany", 13 *Am J. Comp. L.*, 268 (1964). But this debate and the unsuccessful projects of constitutional reform in this direction were not connected with the issue of the civil liability of judges. S.C. PANSA, A. REPOSO, "Le "dissenting opinions" ancora alla ribalta", 1 *Quaderni Costituzionali*, 595 ff (1981) give a brief account of the contrasting views of Constitutional judges and scholars on the subject.

30. The provisions of the Act that in 1970 allowed the judges of the *Bundesverfassungsgericht* to express dissenting or concurring opinions were enacted as § 30(2) of the *Bundesverfassungsgerichtsgesetz*, and were further implemented by § 55 of the rules of procedure adopted by the plenary assembly of the BVG. R.B. SCHLESINGER et al., *cit. supra*, note 5, at 452-453 describes the working of these rules. For the history of the debate in Germany and a comparative research on the subject: K.H. MILLGRAM *Separate Opinion und Sondervotum in der Rechtsprechung des Supreme Court of the United States und des Bundesverfassungsgericht* (1985); J. SOHIER, "Vote secret ou vote dissent", *Mélanges offerts à Raymond Vander Elst*, II, 755 ff (1986) (on the practice of the German BVG and the Belgian Cour d'Arbitrage). The Constitutional Courts of Bremen — for advisory opinions — and that of the Land of Bavaria also have rules that permit the disclosure of dissent with or without the indication of the dissenter. Compare: W. HEYDE, *Das Minderheitsvotum des überstimmten Richters*, 96-101 (1966).

31. The Ley Orgànica del Tribunal Constitucional (L.O.T.C.), 3 October 1979, n° 2, art. 90 (2) states that "the president and the judges of the Court can express with

The document mentioned by art. 16 is drafted by the youngest of the judges, and is signed by the other members of the panel. It must be filed for each case that the panel decides, whether the decision was taken unanimously or not. This rule was adopted to protect the secrecy of the votes cast in camera because it makes impossible to draw any conclusion from the fact that such document was filed. The document must be destroyed when the time limit for bringing an action against the State has expired (art. 16(4), and decree of April 16, 1988, art 3).³² If it ever is made public, it will only indicate the agreement or the dissent expressed by each member of the court on any issue that was decided, and, in a summary style, the reason given for the dissent.

6. THE CIVIL LIABILITY FOR JUDICIAL MISCONDUCT AND LEGAL AID

A last rule enacted by the new statute must be mentioned. Article 15 enables a low income claimant to obtain legal aid funded by the State in order to bring the action against the State. Article 15 refers to art. 10 ff. of the statute 11 August 1973, n. 533, that provides publicly funded legal aid for a limited range of cases including social security and labour controversies. This statute provides legal aid only if an action is not *prima facie* bad (art. 11).³³ The combined

a particular vote their dissenting opinion defended in the deliberation process, either if it refers to the decision, or to its ground (fundamentación). The particular votes will be annexed to the decision and, when they refer to judgments or declarations, will be published in the Official Bulletin of the State". For a comment on this article: J.L. CASCAJO CASTRO, "La figura del voto particular en la jurisdicción constitucional española", 17 *Revista española de derecho constitucional*, 171 ff (1986). G. ROLLA, *Indirizzo politico e tribunale costituzionale in Spagna* 137 ff (1986). Recently, the possibility to disclose dissents became a general rule in Spain. According to art. 260.2 of the Ley Orgánica del Poder judicial of July 1, 1985, n° 2, Boletín Oficial del Estado of July 2, 1985, n° 157, the particular vote, signed by the author "will be inserted in the book of judgments, and will be communicated to the parties together with the judgment approved by the majority. When, according to the law, the publication of the judgment is mandatory, if there is a particular vote, it will have to be published together with it".

32. The decree of 16 April 1988, *Gazzetta Ufficiale*, n° 89, April 16, 1988, describes the form of the record that for each type of in camera procedure must be used, and specifies the envelopes, the sealing, the type of safe, and the officers that are responsible for the safekeeping and the destruction of the record.

33. An English translation of this text is published in M. CAPPELETTI, J. GORDLEY, E. JOHNSON JR., *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Society* (1975), p. 446 ff. Despite the enactment of art. 24 (2) of the Constitution "poor persons shall, by institutions created for that purpose, be assured the means to plead and to defend themselves before any judicial jurisdiction", projects for an organic law reform of the whole field (including the bill n° 453, approved by the Italian senate, translated *ibid.*, at 438 ff) have been unsuccessful up to now. The general institutional setting of legal aid in Italy is therefore still the anachronistic royal decree of December 30, 1923, n° 3882 (translated *ibid.*, at 246 ff), against whom several distinguished Italian scholars have taken stand. Standard references on this topic have become: M. CAPPELETTI, "La giustizia dei poveri" *Foro italiano* V 114-

effects of the two statutes for those who seek legal aid is then rather cumbersome. The procedure they will have to follow has two introductory phases that for different reasons lead to two decisions by different bodies on the same point: whether the suit is bad on its face, or not.

The first decision is made by the judge who is normally charged with preparing the case for the court's decision, and concerns admission to legal aid. The second is made by the whole court, and determines whether the action will be dismissed because it is manifestly unfounded.

7. THE ITALIAN STATUTE IN A COMPARATIVE PERSPECTIVE

First of all, in order to see which models, if any, have influenced the new Italian law of judge's liability we should know where to go to look for them. The research must start therefore with the legal systems which have historically influenced Italian law. Like the majority of civil law countries, Italy has been principally influenced by the two leading civil law systems, the French and the German. French law has influenced Italian law by exporting, at the beginning of 19th century, the Napoleonic codes. These codes were first enacted in some of the pre-unitary states, and eventually preserved with some modifications in the first Italian Codes.³⁴ German law, on the other hand, never became part of the body of enacted Italian codes. Its influence, though very important indeed, was at the doctrinal level. Scholars and judges, from the beginning of the present century, started using the so-called German dogmatic legal reasoning.³⁵

In dealing with this new Italian statute, we cannot consider only the influence of French and German law, for two different reasons. First of all, in the last decades Italian scholars have become more and more sensitive to the common law (and particularly the American) experience. Many books by Americans are translated into Italian; American literature is more and more quoted in Italian

119 (1958); Id., "Povertà e giustizia", *ibid.*, V, 42-59 (1979); V. DENTI, *Processo civile e giustizia sociale* (1971); N. TROCKER, *Assistenza legale e giustizia civile* (1979), 91 ff. V. VARANO, "Recent trends in the organization of legal services in Italy", *Studi Senesi*, 271, (1984). A change in the laws is expected in the (hopefully) near future.

34. As regards to civil procedure, the Italian Code of 1865 "was drawn from a number of sources, including codes previously in effect in Italian States particularly the sardinian codes, the napoleonic code, the ordonnance of 1667 and even the *jus commune*". M. CAPPELETTI — J.M. PERILLO, *Civil Procedure*, cit. *supra* n. 5 at 40.

35. See R. SACCO, "Modèles français et modèles allemands dans le droit civil italien", *Rev. Int. Dr. Comp.*, 225 (1976). The code of civil procedure of 1942 whose provisions were subject to referendum was enacted in this scenery. In dealing with its models we should remember that the leading doctrinal authority at the moment of its promulgation, G. Chiovenda, was deeply impressed by the Austrian Code of 1898. See M. CAPPELETTI — J.M. PERILLO, *Civil procedure*, cit. *supra*, n. 5 at 41-45.

scholarly works; Italians increasingly choose the American legal system to do comparative work and last but not least, a comparative research mainly conducted in the common law orbit has accompanied the preparation of the new Code of criminal procedure, which has replaced the old civil law inquisitorial approach with a modified accusatorial criminal procedure.³⁶ We may therefore ask ourselves if something of the common law approach has found its way into the Italian legal system in the statute that we are analyzing.

Secondly, a short account must be given also of the Spanish solution. Spain incorporated into its democratic constitution a provision devoted to judge's liability which was implemented by a recent law.³⁷ As the Italian debate on judge's liability paid attention to foreign law, one could raise the point if in this instance the normal pattern of trade in legal ideas was reversed, and Italy imported from Spain.

With the French model the place of the judge in France still suffers from the revolutionary reaction against the exorbitant power of the courts under the ancient régime. France has developed a political culture and a constitutional order in which the position of the judiciary as "grande souffrante" of the division of powers after the revolution has been accepted as an institutional fact. A reassertion of the French judge's power an explicit plea for a more active role in shaping the law began with the 1958 Constitution.³⁸ Nevertheless, writing as recently at 1985, Professor Grivart de Kerstrat notes that the President of the Republic, who is charged with safeguarding judicial independence (art. 64 Cost.) but who is also chief of the executive never ceased to undermine judicial independence: "the executive has attempted to impose its will on the judiciary (. . .) judges are correct to stand up to political pressure from the executive. As a whole the career system is not favourable to the judi-

36. See *supra*, note 10. On September 22, 1988 with three different decrees, the new Code of Criminal procedure, the new rules on juvenile Courts, and the new rules to adapt the judicial organization to the new procedure have been enacted. The brand new accusatorial criminal procedure is in force in Italy since October 26, 1989.

37. See art. 122. 1, of the 1978 Constitution: "Los daños causados por error judicial, así como los que sean consecuencia del funcionamiento anormal de la Administración de la Justicia darán derecho a una indemnización a cargo del Estado, conforme a la ley". This provision was implemented by the ley organica 1st of July, n° 6/85 (Boletín Oficial del Estado, 7.2.1985). For comments on these texts see ANGELES RODRIGUEZ ALIQUE, *Algunas reflexiones sobre la responsabilidad civil de jueces y magistrados* 613 *Justicia* (1988).

38. See A. DE VITA, "A mali estremi prudenti rimedi: la responsabilità del giudice nel diritto francese tra l'eredità del passato e le soluzioni del regime odierno", *Quadrimestre*, 394 (1985). Id., "La responsabilità civile del giudice e dello Stato come problema nel diritto francese", *Foro italiano*, (1979), V. 181; GRIVART DE KERSTRAT, France, in S. SHETREET — J. DESCHÊNES (eds.), *cit. supra*, n.4 at 62, 67.

ary's independence".³⁹

Undoubtedly we are far from the Italian situation.⁴⁰ We must

39. F. GRIVART DE KERSTRAT, *ibid.*, E. PICARD, "Come progredire rimanendo immobili? (Riflessioni sullo stato della magistratura in Francia)", in P.L. ZANCHETTA (ed.) *Governo e autogoverno della magistratura nell' Europa occidentale* 51 (1987); a more technical analysis emphasizing the problem of the "dynamic guarantees" for a career judge can be found in R. PERROT — P. THERY, *Relazione francese in Giurisdizione e Responsabilità nei paesi della Cee e negli Stati Uniti d'America*, Proceedings of the symposium sponsored by Consiglio Superiore della Magistratura and Consiglio Nazionale delle Ricerche, Rome, June 1987, hereinafter quoted as *Symposium*. Recent facts in France have stirred the interest in the debate on judicial independence: see E. MOREAU, "France 1987: les juges sous pression!" in *Foro Italiano*, V, 219 (1988). See also J. ROBERT, "L'indépendance des juges", *Revue de Droit Public*, 1 (1988). The text of the article on *pris à partie* is quoted *infra* note 71.

40. Possibly no career of comparable responsibility is more guaranteed in Italy than that of judges. The rules which granted promotion and increased salary to judges on the basis of examinations which assessed their professional capacities and performance have been dismantled. Today the advancement of a judge, as far as salary is concerned, is completely disconnected from any kind of positive evaluation. An example may clarify the text above. After a short probationary period (2 years) the candidate who passed the national examination to become a magistrate begins his career as magistrato di tribunale. After 15 years of service he is promoted to the rank of consigliere di Cort e d'Appello. The rank of Consigliere di Cassazione is attained after 4 more years of service. Each promotion does not involve per se an assignment to a different court. An obvious result of this system is that many judges who hold office in first instance courts have reached the rank of magistrato di cassazione on the basis of seniority.

This remarkable achievement of the Italian judiciary was accomplished over a number of years, by statutes that were supported as implementations of art 107 (3) Cost. "judges are to be distinguished among themselves only by reason of diversity of functions". The first step toward the equalitarian approach was the statute of May 24, 1951, n° 392, the last one the statute of April 1979, n° 97. A. PIZZORUSSO, *L'organizzazione della giustizia in Italia* (1982), p. 41 ff, G.L. CERTOMA, *The Italian Legal System* (1985), 71 ff, 167 ff, offer a general view of this development. See also M.R. FERRARESE, "CIVIL JUSTICE AND THE JUDICIAL ROLE IN ITALY", 13/2 *The Justice System Journal*, 168 (1988-89); G. FREDDI, *Legitimacy and opposition in the Italian judiciary*, Ph.D. dissertation, Ann Arbor, University Microfilm (1970); a revised and enlarged edition of this work appeared in Italian with the title: *Tensioni e conflitto nella magistratura* (1978); G. DI FEDERICO, "The Italian judiciary profession and its bureaucratic setting" in D.N. MAC CORMICK (ed.), *Lawyers in their Social Setting* (1976), 115 ff; R. FERRARESE, *L'istituzione difficile: la magistratura tra professione e sistema politico* (1984). All important decisions related to judges career are taken by the judges, themselves through the "Consiglio superiore della magistratura". The constitutional provisions related to this by standard of independence are the following:

Art. 104, Cost. "The Judiciary is an autonomous order independent of any other power.

The Superior Council of Magistrature will be presided over by the President of the Republic.

The First President and the Procurator-General of the Court of Cassation will be ex officio members of the Superior Council.

The other members will be elected as to two-thirds by all the regular judges from among the ranks of the Judiciary, and as to one third by Parliament in joint session from among university professors of law and lawyers with fifteen years of practice.

The Council will elect a Vice-President from among the members designated by Parliament.

therefore use the utmost care when comparing the new Italian system with the French one. Nonetheless, there are notable analogies. With regard to career judges, the French law of 18.1.1979 has in fact abolished the old, "majesteuse", "archaïque", "dangereuse" and, more than all, "inusité" system of the *prise à partie*.⁴¹ The action must now, as in Italy, be taken against the State, which seems to function as a deep pocket in order to guarantee the victim will be compensated for the judge's error. It will therefore be the State who acts against the judge as in the new Italian Statute. Moreover — and here we find an important analogy — France has provided Italy with a model by establishing gross negligence, in this case known as "faute lourde"⁴² as the standard of judge's liability. The provision of a remedy for denial of justice (*deni de justice*), of the old French Code of Civil Procedure has been preserved in the new

Elected members of the Council will remain in office four years and will not be immediately eligible for re-election.

They shall not, while in office, practice at the Bar or be members of Parliament or of a Regional Council".

Art. 105 Cost. "It will be the responsibility of the Superior Council of Magistrature to designate, to appoint and transfer, to promote and to take disciplinary measures in respect of judges, in accordance with the rules of the judicial organization."

Though an institution with a similar name exists in France, its composition and role are different from those of the Italian C.S.M. For a survey of the different bodies that in various countries govern the judiciary: P.L. ZANCHETTA (ed.), *Governo e autogoverno della magistratura nell'Europa occidentale* (1987).

41. Loi n. 79-43 du 18 janvier 1979, *Dalloz Legislation* 76 f. (1979) has abolished it. However, the lay members of some Courts, e.g. commercial courts, are still subject to the *prise à partie*: Cass. civ., 5 mai 1985, *Dalloz, Inf. rap.* 228. The historical origins of this action can be traced back to the XVI century. Articles 505 ff of the old code of civil procedure state the rules relating to it. An historical and comparative survey on this topic is offered by G. PUGLIESE, *Riflessioni riassuntive e finali*, in A. GIULIANI & N. PICARDI (eds.), *L'educazione giuridica — la responsabilità del giudice*, cit *supra* note 4, 618 ff, at 626-227.

42. Art. 11 of the statute 72-626, of July 5, 1972 "The State must compensate the damages which are caused by the defective working of the service of justice. This liability does exist only in the case of *faute lourde* and *déni de justice*". The liability of judges for personal fault is ruled by the statute on magistrature for ordinary Courts, and by special rules for special Courts. The State guarantees the victims of damages caused by personal fault of magistrates, safe recourse to the action in indemnity.

This article is now contained in the Code de l'organisation judiciaire (art. L. 781-18 Décret n. 78-329, March 16, 1978) and must therefore be integrated by art. 11.1 of the Statute on Magistrature, Ord. n. 58-1270 22/12 (1958), as modified by the statute of January 18, 1979 n. 79-43, which provides: "magistrates of ordinary Courts are liable only for personal faults.

The liability of judges for personal fault as connected to the public service of justice can only be declared by way of indemnity action of the State. This action is taken in front of a civil section of the Cour de Cassation".

On this matter see A. DE VITA, cit. *supra* note 38 at 417 ff. French scholars have expressed contrasting opinions on these reforms. Compare for instance R. PERROT, *Institutions judiciaires* n° 91, at p. 98, (1986); J. VINCENT, G. MONTAGNIER, A. VARINARD, *La justice et ses institutions* 527-528 (1982).

law.⁴³

The different context in which "la magistrature" operates in contrast to the Italian "magistratura" seems to justify the difference between the French and Italian statutes. The French "faute lourde" is an open ended concept. It is moreover part of an idea of "faute de service" of the State (negligence in organizing a modern service of justice), for which the State is directly liable to the citizen even, at least in theory, in cases in which no fault at all can be shown on the part of an individual judge. It is an idea which concerns the organization of a service which could afford the citizen greater protection.

The Italian statute is very ambiguous from this point of view. As we have seen, the meaning of "colpa grave" in the statute refers to certain typical situations, all of which clearly concern misconduct by the judge and not the organization of justice. The State, instead of being directly liable for its own fault seems to be vicariously liable for actions of the judge. The statute is structured so that the citizen can not take action against the judge who is primarily liable, but only against someone else, the State, which is vicariously liable. This framework may create a dangerous situation. In Italy a citizen has no remedy in the many cases in which he is damaged by a series of acts, none of which in itself constitute gross negligence, but which, considered together, could well constitute a "faute lourde de service", i.e. a service not at the level to be expected from a modern State.

The German experience is notable for a particular privilege of the judge. He can never be held civilly liable if the damage results from a judgment, except when his conduct constitutes a crime (§ 839(2)BGB). Traditionally, this rule is explained by the need to avoid collateral attacks on judgments.⁴⁴

With this notable exception, the German model offers effective protection to the injured party. For every damage not caused by a "judgment", the State is liable upon a showing of ordinary fault.⁴⁵

43. It may be interesting to see the original text: Art. 505: "judges may be subject to pris à partie in the following cases:

- 1° If there is malicious intent, fraud or bribery committed either during pretrial or in deciding the case.
- 2° If the pris à partie is expressly contemplated by a statute.
- 3° If a statute declares judges liable and compells them to compensate damages.
- 4° If justice is denied.

44. This traditional explanation of the *Richterprivileg* (§ 839 (2) BGB) has been questioned by some scholars: see W. GRUNSKY, *La responsabilità del giudice nel diritto tedesco* in A. GIULIANI — N. PICARDI (eds.) cit. *supra*, note 4 at 223 ff, 230-231.

45. A general view of the German rules on judicial responsibility is given by J. SAMTLEBEN, "Die rechtliche Verantwortlichkeit der Richter", in U. DROBNIG — H.J. PUTTFARKEN, *Deutsche Landesreferate zum Privatrecht und Handelsrecht*, 85 (1982). The *Staatshaftungsgesetz* of June 26, 1981, mentioned by this author, was declared

In this context, it is important to note that an intentional misapplication of the law is a criminal offence (par. 336 St.GB.). Consequently, in order to understand the German regulation and to see how, if at all, it has influenced the new Italian statute, one must examine the German idea of judgment. For purposes of judicial immunity, it has been held that what matters is not the form of a decision but its substance. The decision "must close with the essential requisites of a judgment a judicial procedure formally begun with the civil or criminal action".⁴⁶ In full accord with the precision of German legal style, the essential criteria of a judgment have been defined to be the necessity of the full right of defence, the substantial *res judicata* effect of the decision, and the written opinion of the reasons of the Court.⁴⁷

This regulation apparently did not find its way into the new Italian law. Nevertheless, if we are not satisfied by merely comparing legal provisions but want to compare the law in action, we should consider Art. 2 n. 2 of the new Italian statute. As we already know: "In the exercise of the judicial functions, liability can not arise from interpreting the law or from evaluating the factual situation or the evidence". This provides Italian judges with broader immunity than is enjoyed by their German colleagues.

There are many instances, such as the important cases of interlocutory or urgent orders or injunctions, which certainly are not judgments in the German meaning, but require evaluation of facts and evidence covered by art. 2. of the Italian statute.

As damages to citizens will usually occur in such cases, we can compare the effectiveness the German model in which simple negli-

unconstitutional by a *Bundesverfassungsgericht* judgment of October 19, 1983, published in *Juristenzeitung*, 142 (1983). Among the most important rules on our subject in Germany we find therefore art. 34 of the Grundgesetz and § 839 of the BGB. Art. 34 of the Grundgesetz states: "If any officer in exercising a public function violates his office duties towards a third person, the State or the public body which he is serving is primarily liable. In the case of malicious intent or gross negligence an action of indemnity is admitted. For the redress of the damage and the action an ordinary court shall have jurisdiction".

According to § 839 BGB: (1) If a public officer violates with malicious intent or negligence the duties of his office toward a third person must redress the damages he caused in such way. If the public officer has been negligent he will be liable only if the damaged party cannot recover elsewhere. (2) If the public functionaire violates his duties in delivering a judgment he will be liable only if he has committed a crime. This rule does not apply in case of omission or delay of an office duty. (3) The redress is not due if the damaged party has omitted for malicious intent or negligence to avoid the damage by attacking the judgment.

46. BGH, *Neue Juristische Wochenschrift*, 246 (1966), and see for further decisions on the point STAUDINGER — SCHAEFER, *Kommentar zum BGB* (1986), sub § 839, Rz 434 ff, at p. 1162 ff.

47. BGHZ, 51, 326.

gence is sufficient to recover from the State with the Italian and the French systems.

For a proper comparison of the Italian and German systems, we must take account of a difference in constitutional background. According to art. 28 of the Italian Constitution, every public official is directly liable in tort to the citizens. According to art. 34 of the German Constitution, on the other hand, in principle responsibility rests with the State or the other agency to which the official belongs.⁴⁸ § 839BGB which makes simple fault a ground for recovery must be read in connection with art. 34 Const.: today these rules seem to provide that the State is liable for ordinary fault. According to § 78 *Bundesbeamtenengesetz*, which implements the Constitution, the State can then recover from the official only in case of malice or gross negligence.

The regulation of judge's civil liability seems to belie the influence of French and German law on the Italian experience. Undoubtedly, at least from a formal point of view, Italy leaves the more conservative civil law countries, to embrace what Professor Cappelletti has pointed out as the more advanced model of judge's liability: the liability of the State typical of Germany and France.⁴⁹ Nonetheless, the feature that permits German, French and, more recently Spanish solutions to be characterized as "modern" is that the requisite for the liability of the State is in some way *independent* from the requisites of liability of the single judge. This is true even in Germany at the operative level as the liability of the State extends to ordinary fault while that of the official is limited to malicious intent or gross negligence.

Despite the recent Italian interest in the common law experience the German and French influence seems to confirm a deeply civilian attitude of Italy towards this issue.

A comparison of the civil law and the common law worlds on the matter of judge's liability shows deeper divergences than analogies. To make a comparison on the operative level, one must take account of all the institutional and cultural factors that influence the role of the judiciary. It is extremely significant that some steps toward direct civil liability of the judges have been taken in America at the level of State Courts, where the selection of the judges is often less rigorous. Neither in England, nor in the American federal courts, where judges are selected from a very restricted élite, were these steps felt necessary.⁵⁰ To complete the picture, it is interesting

48. R.B. SCHLESINGER, et al., cit. *supra*, note 5 at p. 505 contains a comparative discussion of the rules of French and German Law on this point.

49. M. CAPPELLETTI, "Who watches the watchmen?", cit. *supra*, note 1, at 40; Id., *Giudici irresponsabili?* (1988) at 56 ff.

50. J.H. MERRYMAN, "Judicial Responsibility in the United States", in A. GIU-

to note that in a system so open to the civil law world as Israel, attempts to exclude judicial immunity at the level of humble magistrates were eventually abandoned.⁵¹ The explanation may be that in Israel, judges are selected in the same way as those in common law countries, and do not pursue a separate bureaucratic career. Thus there seems to be a strict link between judicial liability to citizens, State liability for the acts of the judges, and bureaucratic career judges.

As we have seen, the common law traditionally has been concerned about the selection of judges but has shied away from imposing liability on them.⁵² We cannot consider here efforts to improve the Italian judiciary by careful selection of the judges. Such efforts are beyond the scope of a statute on judge's civil liability, and the problem of judicial quality is too much rooted in the "sources" of the system. Nonetheless, at least an occasion was offered by the referendum result, if it is true that performing an action in public view is the first step towards accountability.

We are referring to the problem of making public the dissenting views of judges. In common law jurisdictions the importance of dissenting opinions in the growth of the law can scarcely be overemphasized. In Italy, the need to rule on the liability of different members of the judicial panel created a chance to profit from the common law experience because the typically civilian dogma that the individual views of the judges should be secret was an obstacle not only to the social accountability of the judge but also to his legal liability.

However instead of going right to the heart of the problem by

LIANI & N. PICARDI (eds.), *L'educazione giuridica — La responsabilità del giudice*, cit. *supra* note 4 at 260 ff; [and in 41 *Rechtszeitschrift* 332 (1977)]; R. RUDD, *Responsibility of Judges in England*, *ibid.*, at 331 ff; A. JOLOWICZ, "L'immunità del giudice nel diritto inglese", in *Symposium*, cit. *supra*, note 39. As to the responsibility of magistrates, see *Reg v. Manchester City Magistrate's Court* (1989) Q.B. 631 (C.A.) and also Note, *Personal liability of Justices* (1987) *Cambridge L.J.* 12. P.H. SCHUCK, "La responsabilità civile del giudice negli stati Uniti", *ibid.*; G. CALABRESI, "Il ruolo e la responsabilità del giudice in U.S.A. e in Italia", *Responsabilità civile e previdenza*, 285 (1988).

51. S. SHETREET, "Judicial Responsibility", *Israeli Reports to the XI International Congress of Comparative Law* (1982), 88 ff; *Id.*, "Judicial Independence and accountability in Israel", 33, *I.C.L.Q.* 979 (1984).

52. Some scholars have shown that the typical common law model of judicial accountability can be described as social, political or ethical, i.e. not based on tortious liability but on different kind of checks and therefore opposed to the system of legal liability. Nonetheless it was pointed out a certain trend, particular in America, towards a somewhat more formalized system of liability. See M. CAPPELETTI, cit. *supra* note 1 at 63; see also J.H. MERRYMAN cit. *supra*, note 50 at 275; V. VIGORITI, "Professionalità del magistrato: sistemi dei paesi anglosassoni e dell'Europa continentale" *Foro Italiano*, V, 451, (1986), at 455.

allowing the dissenting judge to state publicly his point of view, the Italian legislator decided to enact art. 16 of the new statute.

8. SECRET DISSENT: AN OLD RULE IN A NEW CONTEXT

In the past months several courts have taken steps to obtain a constitutional review of the statute.⁵³ The grounds for the challenge included a discrepancy in the treatment of the different categories of lay magistrates, and of lay magistrates and career judges,⁵⁴ the supposed violation of international customary norms⁵⁵ and, most often, the effects of the rules governing the liability of members of a panel contained in article 16.⁵⁶

This last aspect — the reaction against art. 16 — deserves discussion because it reveals some interesting features of our judicial tradition.

Though unknown to the French and the Italian codes of civil and criminal procedure, the rules enacted in article 16 of the statute are by no means unknown in other countries of continental Europe.⁵⁷ Apart from the special rules governing the Federal Constitu-

53. Up to November 30, 1988, in the *Gazzetta Ufficiale*, 1st special series (Corte Costituzionale) were published 58 orders (ordinanze) that questioned the constitutional validity of the Statute, and that disposed the sending of the dossiers to the Constitutional Court, in order to obtain a review of the statute. Of these orders, 39 were taken by the Military Tribunal of La Spezia, 12 by the Tribunal of Catanzaro, the remaining part was taken by other Courts of first or second instance, except one taken by the Penal section of the Court of Cassation (Cass. pen. June 2, 1988, *Gazzetta Ufficiale*, 1st series, n° 43, p. 67 *Foro italiano*, II, c. 485, (1988)). Trib. mil. Padova, May 3, 1988, *Foro italiano*, II, 385, (1988).

54. Trib. Bari, May 3, 1988, *Foro italiano*, I, c. 2074, (1988): Comm. Tributaria I grado Ravenna, April 28, 1988, *Corriere Giuridico* 585 (1988).

55. Trib. Firenze, May 13, 1988, *Gazzetta Ufficiale*, 1st series n° 43, p. 49; T.a.r. sicilia, May 12, 1988, *Gazzetta Ufficiale*, 1st series, n° 40, p. 19 ss. Such issue was taken on the basis of the O.N.U. Resolution on Judicial independence of December 29, 1985, 40/32 art. 16: "Without prejudice to any disciplinary procedure or any right to appeal or compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions". The possibility to raise a constitutional question on this ground was suggested in a short note by G. RAIMONDI, "Limiti internazionali alla responsabilità civile dei giudici", *La magistratura*, December 1987, p. 4.

56. It is a question raised by almost all the orders published in the *Gazzetta Ufficiale*.

57. The Directive Committee of the Association of the judges of the Consiglio di Stato in its remarks on the bills to reform the magistrates' tortious liability [*Sulla responsabilità civile dei componenti dei collegi giudicanti*, *Foro italiano*, V, 174 f, at 175, (1988)] on the contrary overlooks the contemporary rules and practices of different countries that admit a secret vote of dissent. According to this document the secret dissent "... is typical of absolute states, in which the judge was totally dependent from the sovereign, and had to answer to him for his actions". The other advisory opinions given on the bills by the C.S.M., the Court of Accounts, and the Consiglio di Stato are collected in *Nomos*, 121 ff (1988).

K.H. NADELMANN, "The Judicial Dissent. Publication v. Secrecy" 8 *Am. J. Comp. Law* 415 (1959) offers an historical and comparative view of the whole subject.

tional Court and some courts of the Länder,⁵⁸ German courts may keep minutes of the votes expressed by the members of the judicial panel that are not available to the parties or to third persons⁵⁹ and, according to a customary practice, a judge may insert his dissent in a closed envelope which is not accessible to the parties.⁶⁰

The Austrian system adopts a similar practice for the Constitutional Court and for other judicial panels.⁶¹ The same model is widespread in the Eastern Countries. According to article 16 (2) of the code of civil procedure of the RSFSR: "the judge or the popular assessor who does not agree with the majority may state in writing his personal opinion. The personal opinion becomes part of the record, but it is not read in the public hearing".⁶² The Polish Code of civil procedure has a similar rule.⁶³ This rule can be found in Hun-

His contribution to the historical research on the point can be integrated with the literature cited *supra* n. 26.

58. See *supra* n. 30.

59. Zivilprozeßordnung, § 299 (3) expressly states an exception to the right of the parties to see the processual acts, and to obtain copies or abstracts of them, for the case of writings (Schriftstücke) concerning votes, or minutes of judgments or orders. On this exception: B. WIECZOREK, *Zivilprozeßordnung und Nebengesetze*, (1976), sub. § 299, A II b. The rules concerning the deliberation and the votes are contained in §§ 192-197 Gerichtsverfassungsgesetz. The duty not to violate the secret of the in camera phase of the deliberation process is established by § 43 of the Deutsches Richtergesetz.

60. Thus G. and J. SCHMIDT — RAENTSCHE, *Deutsches Richtergesetz*, 4th ed. (1988), sub § 43 DRiG, Rz. 6, p. 466. This envelope is not included in the Prozeßakten; it is kept with the Senatsakten or the with the Personalakten of the judge so that the parties will not know its existence. And see A. BAUMBACH, W. LAUTERBACH, J. ALBERS, *Zivilprozeßordnung*, 45 ed. (1987), sub. § 43 DRiG, at p. 2383. This text suggests (at p. 2328, before § 192 GVG) to file such a document whenever the votes given by the other member of the panel may raise liability.

61. Austrian Zivilprozeßordnung, § 219 "the parties can see all the acts relating to their controversy (. . .) except for the minutes of judgments and orders, and the records of the deliberations and votes"; Jurisdiktionsnormgesetz of August 1, 1895, § 14 "the annotations concerning the discussions and the voting will be kept in a special record". The Geschäftsordnung für die Gerichte erster und zweiter instanz §§ 120, 121 specifies the rules on this matter. § 36 of the Constitutional Court internal rules of procedure provides that this special record should indicate the individual votes, and the reason given for them.

62. The text of this article was amended in 1980, with a decree of the Presidium of the Supreme Soviet of the RSFSR, n° 32 s. 987, in order to extend the possibility of dissent to popular assessors; a similar article (art. 174) was already enacted with the code of civil procedure of July 7, 1923. Article 307 of the code of criminal procedure enacts a similar rule. While in the past the parties did not have access to this opinion, the right to know its content is now affirmed on the basis of the provision of these codes that establishes the publicity of the acts of the procedure. See, for example DOBROVOL'SKIJ, *Sovietskij graždanskij process* 160 (1979); A.M. REKURNKOV, A.K. ORLOV, *Kommentarij k U.P.K.R.S.F.S.R.*, 368-369, at n° 12 (1981).

63. Kodeks postępowania cywilnego, it. trans. by W. BRONIEWICZ and E. ALVINO, Maggioli, Rimini (1981), art. 324, art. 330 (2). The code of criminal procedure, art. 101 enacts a similar provision. These articles are derived from art. 354 § 2 of the code of civil procedure of 1930, and from art. 364 of the code of criminal procedure of 1928. In Poland the practice admits the insertion of the separate vote in the dossier of the case, and the right to have access to its contents allows to the parties the possi-

gary and Yugoslavia as well.⁶⁴

The rule that permits filing a separate opinion, that is not to be divulged or that can be known only to those who took part in the procedure, does not therefore seem to be necessarily linked with a particular ideological or political background.

If the rule enacted by article 16 of the Italian statute is neither isolated, nor politically suspect, why was it so strongly opposed? It is hard to believe that this rule or its connection with the indemnity and the disciplinary actions against the magistrate is a real threat to the independence of members of judicial panels as it is charged.⁶⁵ On the other hand, the rule of article 16 has some side effects that touch neuralgic points of the organization of justice. Just to mention one of them, in civil cases where panels decide, the decision is taken on the basis of the report on the evidence by the examining judge to the other members of the panel,⁶⁶ and of the parties' submissions. During the in camera phase of the decision making process the examining judge votes first [art. 276(3) c.c.p. code of civil procedure], before the other judge and the president of the panel. The president then draws up and signs the part of the judgment that specifies the relief granted [art. 276(5) code of civil procedure]⁶⁷ while the opinion of the court is normally drafted by the rapporteur [art. 276(5); 118(4) disp. att.]. The whole judgement is eventually signed by him and by the president.⁶⁸ The other member of the

bility to take knowledge and make copies of it (thus the comments on art. 324 by the translators).

J. WROBLEWSKI, *Votum separatum dans la théorie et l'idéologie de l'application judiciaire du droit*, in A. GIULIANI, N. PICARDI, *L'ordinamento giudiziario*, III Maggioli, Rimini (1985), p. 389 ff, discusses the different theoretical and ideological approaches to this issue.

64. Hungarian Code of Criminal Procedure, German translation by L. PUSTI, *Das Ungarische Strafverfahren: Gesetz I von 1973* (1987), § 162 (3) *in fine*: "Der bei in der Abstimmung in der Minderheit geblieben Richter hat das Recht, seine Meinung dem Beratungsprotokoll schriftlich beizufügen". Yugoslavia: *Zakon o karničnom postupku* (Law on civil procedure), artt. 129-132, in *Službeni list*, n° 4/77. A different rule is enacted for the Constitutional Court.

65. E.g. by Cass., ord. June 2, 1988, cit. *supra*, note 53 at 488, according to whom the rule enacted with art. 16 endangers not only the moral independence of the judges, but also their safety (Trib. Roma, ord. April 29, 1988, *Foro italiano*, I, 1670 (1988); Trib. Roma, ord. May 4, 1988, *Gazzetta Ufficiale*, 1st special series, n° 30 of July 27, 1988, p. 116-117). It is possible to object that if the indemnity action against the magistrate is to be considered as a potential threat to his independence, this should be so also when the judgment is given by a single judge.

66. This means that the knowledge of the material facts on which the decision is given is unequally distributed among the members of the panel. The statute, however, does not differentiate the responsibility of the members of the panel according to their different positions. This legislative choice was challenged by several Courts: Cass. ord. of June 2, 1988, cit. *supra*, note 81; Trib. Biella, ord. May 12, 1988, *Foro italiano*, I, 2700, (1988).

67. This document is inserted in the dossier of the case: art. 168 (2) code of civil procedure.

68. The original text of art. 132 of the code of civil procedure (and of art. 119 of

panel does not normally read the draft of the judgment, but may ask to discuss it in a later session in camera.⁶⁹

The additional paper work that the new statute requires is in itself time consuming.⁷⁰ But what may be even more disappointing is that the statute changed the purpose of the procedure that we have just described without trying to control the effects of this change. According to the original text of art. 16 a magistrate who did not draft the judgment, and who is not expected or obliged to read it, may be exposed to a claim based on it. On the other hand, he was obliged to sign a document that will be withheld from the parties, and whose content should not be disclosed in the judgment.

A cure for these puzzling results came from the Constitutional Court.

9. A LAST DEVELOPMENT: THE CONSTITUTIONAL COURT AND THE NEW STATUTE

On January 25, 1989, the decision n. 18 (January 9–18, 1989) of the Constitutional court was published in the *Gazzetta Ufficiale*.⁷¹ Since that date the doubts on the constitutional validity of the statute received an authoritative answer. Using its powers of remodeling the statute to make it consistent with the Constitution the Court changed the letter of art. 16(1)(2). The provision of the statute that established: "a summary record is prepared" is now replaced by the wording "a summary record may be prepared if a member of the

the orders to implement the code) was amended by the statute of August 8, 1977, n° 532, Provvedimenti urgenti in materia processuale e di ordinamento giudiziario, *Gazzetta Ufficiale*, n. 226, of August 20, 1977. In order to accelerate the formation of the document that contains the judgment, this statute repealed the previous rule that required the signature of the judgment by all the members of the panel. The new rule had to be enacted to hinder irregularities such as the signing of the document by a judge who was not a member of the adjudicating panel: G. TARZIA, G. FONTANA, "Commentario alla legge 8 agosto 1977, n° 532", *Le nuove leggi civili commentate*, 178 at 184 (1978).

69. A. PIZZORUSSO, *Ordinamento giudiziario*, *cit. supra* note 25 at 542, holds that the president of the panel should discuss with the other members of the panel the draft of the motivation prepared by the rapporteur each time that there is a doubt on the correspondence between the discussion in camera and the draft of the judgment.

70. Appello Trieste, ord. 26 aprile 1988, *Gazzetta Ufficiale*, 1st special series n° 38, of 21st September 1988, holds that this rule has "very high social costs, caused in particular by a severe slow down of the administration of justice, with risks of a total paralysis". For a description of the possible effects of the statute on a typical case load of a first instance panel see: Trib. Biella, ord. May 12, 1988, *cit. supra*, note 66, at 2701, 2702. To avoid these effects the president of the Tribunal of Milan with a note of May 14, 1988 recommended to disregard the provision of article 16 for certain types of judicial decision: see M. CICALA "Un "percorso ad ostacoli" per la responsabilità dei magistrati", *Corriere giuridico* 746 (1988).

71. *Gazzetta Ufficiale* of January 25, 1st special series, n. 4, p. 32 ff.; *Foro Italiano* I, 305 ff., (1980) with observations by A. PIZZORUSSO, and by L. SCOTTI.

panel requests to do so". According to the Court only this formula is compatible with art. 97 of the Constitution which provides: "Public offices shall be organized according to the law in a way to ensure the efficiency and the impartiality of the administration". The Court held that the original text of art. 16 compelled panels to do such extensive additional paperwork in taking notes of every single step of the deliberating process to be plainly in contrast with a rational organization of justice. According to the Court the rationale of art. 16 is reached anyhow by merely allowing the dissenting judge to document his dissent in writing, and to have it enclosed in a sealed envelope which is kept by the Court officers.

In rejecting all the other grounds of objection, and particularly those based on the supposed threat to judicial independence coming from the statute, the Court thus gave its binding opinion on a very important point. Secrecy in the deliberation and the style of decision which consists of an opinion of the court, without mention of dissent, is not necessarily linked with the constitutional protection of judicial independence. On the basis of its previous case law,⁷² and alleging that the U.N. resolution on judicial independence is not part of the general international law binding in Italy ex art. 10 (1) of the Italian Constitution, the Court also rejected the view that the civil liability of the judge is in conflict with judicial independence.

Partly with detailed reasons, partly with short fiats, the Court has thus said its word on the statute. Undoubtedly, keeping the secrecy dogma out of the constitutional shadow has been a remarkable achievement. The Constitutional court decision has thus left the door open to legislative discretion. It may be a prelude to further steps towards a judicial function performed in the light of the sun.⁷³

72. See *supra* note 6.

73. A judgment of the Constitutional Court published on the *Gazzetta Ufficiale* of May 3, 1989, n. 18 came too late to be discussed in the text above. With this decision the Court held that the statute is not unconstitutional because it does not regulate in a different way the liability of the rapporteur and that of the other members of civil panels, and because it does not distinguish between civil and penal panels, that give judgment immediately after the deliberation in camera.