State Liability for Judicial Wrongs: Impact of Rulings of the European Court of Justice and Debate in Italy

Daniela Cavallini

The interest in judicial liability has become stronger in Italy due to the pressure of the European Court of Justice. The European Court of Justice showed that reforms are required in the Italian legislation and case-law to comply with the European obligations existing for all the Member States. This debate is an effect of the dialogue “top-down” between the European Court of Justice and the Italian Supreme Court, which started from a specific issue (State liability for serious infringement of European Union law by the judge) and led to a broad reform of the Italian legislation.

As we know, in most countries, as well as in Italy, the liability of the judiciary is primarily a State liability and not the personal liability of the judge. State liability, moreover, due to the need to balance the institutional independence of the judiciary and its accountability, is limited to specific acts or activities of the judge. Compensation in fact is granted only in cases of intentional wrongdoing or gross negligence of the judge; in some countries it concerns only private actions or administrative activities, whereas official acts are excluded. This “protective screen” varies from country to country and it generally includes verdicts and judgments issued by the judge.\(^1\) The judge (and therefore the State) cannot be held responsible for the very substance of his decisions, except in serious circumstances.\(^2\) In some countries, in case of compensation, the State can take action towards the judge at a later stage.

---

2. In most established democracy the interpretation and application of the law – i.e. the content of judicial decisions – are not subject to any control except for appeal and judicial review (substantial accountability). On the contrary, the form of decisions can be subject to additional oversight (procedural accountability). Procedural accountability, for example, considers issues like the clarity of the decision or the significant delays in the handling of the file; Judicial Independence In Transition 1328 (A. Seibert-Fohred., 2012).
These general principles have come under debate in recent years, following a set of rulings of the European Court of Justice and lastly the judgments in the case *Traghetti del Mediterraneo v. Italy* in 2006 and 2011.\(^3\) The main question is the State liability for infringement of the European Union law (EU law) by the judge.

In 2003 (Köbler judgment),\(^4\) the Court had already affirmed the State liability for a breach of EU law by the judiciary adjudicating at last instance and a right of action requiring, under certain conditions, reparation. This principle, according to the Court, must be regarded as enhancing the quality of the legal system and thus, in the long run, the authority of the judiciary.\(^5\)

In the two cases concerning Italy, the European Court specified that a national law cannot exclude, in a general manner, State liability for the infringement of EU law by the judge, by reason that such infringement results from an interpretation of law or an assessment of facts and evidence.\(^6\) The Court pointed out the responsibility of the Italian legislator and called for a reform in the field.\(^7\) The problem was that the Italian law (no. 117/1988) established State liability only in exceptional cases and only if committed with intention or gross negligence. But, more than that, the practice of Italian courts was so tolerant towards the judiciary that it resulted in a systematic dismissal of complaints brought against the Italian State. In other words, our law proved to be completely inefficient in the protection of individual rights and resulted in a sort of general immunity of the State (and consequently of the judge) for damage caused by judicial decisions.

---


4 Case Köbler v. Republik Österreich (C-224/01), 30 Sept. 2003.

5 Compensation, however, must be granted only whether a manifest infringement has occurred; therefore the following factors must be taken into account: (1) the degree of clarity and precision of the rule infringed; (2) whether the infringement was intentional; (3) whether the error of law was excusable or not; (4) the position taken, if applicable, by a Community institution; and (5) non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of art. 234 TEC (now art. 267(3) TFEU). Moreover, according to the European Court of Justice, an infringement of EU law is sufficiently serious when the decision concerned was made in manifest breach of its the case-law in the matter.

6 EU law also precludes national legislation which limits such liability solely to cases of intentional faults and serious misconducts on the part of the judge; see Traghetti del Mediterraneo Spa v. Repubblica Italiana (C-173/03).

7 Giacomo Di Federico, *Responsabilità civile dei magistrati e diritto dell’Unione europea*, in Alla Ricerca Del Buon Governo 301, 307 (2012). This is also a consequence of the supremacy of EU law over national law (Terhechte, *supra* note 1.).