The reform of civil liability of individual judges in Italy

Summary

A law (no. 18/2015) was enacted in Italy, based on the purported need to conform the Italian system to decisions by the European Court of Justice (which, indeed, concerned liability of the State, not of individual judges), reforming the basic law n. 117/1988 on civil liability of individual judges.

While maintaining formally unchanged the principle of indirect liability of the magistrates, the law broadened in general liability and *inter alia*:

- changed the so-called "safeguard clause" (according to which there was no liability for interpretation of provisions of law or the assessment of facts and evidence);
- redefined in a broader way grounds for liability;
- eliminated the filter of an immediate decision of admissibility on applications;
- made mandatory the recursory action of the state toward the magistrate found liable.

In particular: the broadening of the concept of "damage"

Law no. 117/1988 provided in Article 2 that anyone who has suffered undue damage as a result of behaviour, act or court order put in place by a magistrate may take action against the State for compensation for the financial and non financial loss "arising from deprivation of liberty".
The reform broadened the spectrum of damages apt to compensation, through the elimination of the words "arising from deprivation of liberty", previously provided for.
As for the extent of the compensation, paragraph 3 as amended by art. 5 of the. n. 18/2015, raises the pecuniary threshold previously provided for.

In particular: just an apparent maintaining of the concept of "indirect liability"

The principle of indirect liability remained formally unchanged: the citizen who has suffered undue damage as a result of the action or omission of the magistrate will have to act only towards the State, which will later recover from the magistrate found responsible, except in the cases of a crime, in which direct action is possible.

However, by a number of a collateral changes the concept of indirect liability – aiming at protecting the judge from an immediate pressure (e.g. pending the case, etc.) – was made much weaker, if not only apparent.

Following the assessment of the responsibility of the magistrate, and within two years (instead of one year, as required by previous legislation) from the compensation made, the State is obliged to exercise (i.e. mandatorily) a recursory action, pursuant to art. 7, paragraph 1, l. n. 117/1988, as amended by l. n. 18/2015, in the case of denial of justice, or manifest

breach of the domestic law or European Union law, as well as misrepresentation of facts or evidence, with fraud, malice or inexcusable negligence.
Art. 9 now provides, also, that the Prosecutor General at the Court of Cassation will exercise a disciplinary action on the basis of the notification of the claim, without having to wait admissibility of the application referred to in paragraph 5 of article 5, eliminated as a result of the suppression of the “filter” (see below).
With reference to direct action against a judge and the state, in the case of crimes committed in the exercise of i functions, the reform has integrated the content of art. 13 of l. n. 117/1988, providing for the new paragraph 2-bis, accountability of State officials for the failure to exercise the recursory action.

In particular: the broadening of the concept of “gross negligence”

As regards the conditions for compensation, the damage must be the effect of a behaviour, an act or judicial decision which was made by a judge with "malice" or "gross negligence" in the exercise of his/her functions, or resulting in "a denial of justice ".

Until the entry into force of Law. n. 19/2015, Article 2, paragraph 3, of the law defined what “gross negligence” was: a serious breach of the law resulting from inexcusable negligence; affirmation or negation, caused by inexcusable negligence, of a fact the existence of which is indisputably refuted (or subsistent) in the dossier; the issuance of a decision concerning personal liberty out of the cases permitted by law or without cause.
With the reform, the redesigned gross negligence, removing the reference to “inexcusable negligence” previously provided for, thus attempting to establish that the conduct of the magistrates who fall in cases of gross negligence are such by operation of law, and not by an evaluation in the trial. This has to be clarified by case law.

The cases of gross negligence provided for in the amended paragraph 3 of art. 2 are the the following:
- a clear breach of the domestic law and of the European Union law (in place of the serious violation of the law previously applicable);
- misrepresentation of fact or evidence;
- the statement of a fact the existence of which is indisputably refuted in the dossier, or, conversely, denial of a fact that indisputably exists;
- the issuance of a order affecting personal freedom or property outside of the cases permitted by law or without cause.

In the new paragraph 3-bis, in addition, the law specifies the conditions to be taken into account in the determination of cases in which there is a clear breach of the law and the law of the European Union, one must take into account "the degree of clarity and precision of the rules infringed; of inexcusability and gravity of the infringement ", as well as, with respect only to the manifest breach of EU law, “the failure to respect the obligation of a preliminary reference under Article 267, third paragraph, of the Treaty on the Functioning European Union, and the contrast of the act or measure with the interpretation given by the Court of Justice of the European Union ".

In particular: the change in the “safeguard clause”

The 1998 law provided for the application of the a "safeguard clause" in Article 2, paragraph 2, which stated that "it may not give rise to liability the activity of interpretation of provisions of law or the assessment of facts and evidence."
In such cases, the protection of the parties was only through the appeal of the judicial decision.

While confirming that the judge can not be held liable for the activity of interpretation of the law and assessment of facts and evidence, the reform has however delimited the scope of the clause in question, by excluding from the scope of irresponsibility of the magistrate the cases of wilful misconduct and gross negligence (this concept as it has be reformed by the Law 18/2015).

In particular: the new delay for the claim for damages

After the reform of the paragraph 2 of art. 4 of Law n. 117/1988, the claim must be made within three years (instead of the previous two) from the incident.

In particular: the elimination of the admissibility filter

L. n. 18/2015 has also intervened on so called "filter of admissibility", the provision contained in art. 5 of the Law n. 117/1988, now repealed, according to which, the Court, after hearing the parties, had to immediately declare the inadmissibility or otherwise arrange for the continuation of the trial.
This filter had the function not to keep for the long time usually required to collect evidence etc. the judge in a situation of uncertainty, even when no liability was evident.