

# OPINIO JURIS

## inComparatione

### Studies in Comparative and National Law

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## **COMPENSATION OF VICTIMS OF MISCARRIAGE OF JUSTICE IN A COMPARATIVE PERSPECTIVE**

Domitilla Vanni<sup>\*</sup>

### **Abstract**

The research aims to examine the complex and polyhedral topic of miscarriage of justice in two different legal systems.

Beginning from the English legal system it is clear that this expression is capable of a number of different meanings. Section 133 of the Criminal Justice Act 1988 provides that the Secretary of State for Justice shall pay compensation 'when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice'. It was enacted to give effect to Article 14(6) of the International Covenant on Civil and Political Rights 1966, which the United Kingdom ratified in May 1976.

The research will pass to explore the same topic in Italian legal system. In Italy judicial wrongs can bring to the review of the sentence and to the compensation of the damage suffered by the victim of the judicial wrong. The rule of art. 630 of criminal procedure code provides for the hypotheses in which a definitive sentence can be revised. After the introduction of art. 533 criminal procedure code - operated by art. 5 of the law 20 February 2006 no 46 - also the criterion of "beyond any reasonable doubt" has become an express rule of Italian criminal process giving rise to the need to coordinate it with other constitutional principles such as the mentioned principle of due process of law.

Given that the research focuses about how the application of these criteria must deal with respective specific legal contexts, taking into account, for example, the big gap between the procedures for forming judgments in the different legal systems.

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## **Keywords**

Miscarriage of justice – Compensation - Judicial wrong – Judgment - Review

### **1. Introduction**

The topic dealt with here with reference to the English and Italian legal systems touches on one of the most delicate aspects of any legal system, namely the very credibility of the administration of justice, referring to cases in which the judicial decision is based on a procedural truth that does not conform to the substantive truth

and is not faithful to the reality of the human events on which it intervenes. In other words, a connection is missing between the universe of human phenomena and their projection in a juridical ambit in which they will find their regulation by the judicial decision. What strengthens the seriousness of the topic and its consequences is the circumstance, unfortunately repeated several times in the history of almost all legal systems, that it occurs in a time subsequent to that in which the judicial proceedings take place, so that the break between historical truth and proceedings is revealed only after the judicial decision has been issued.

Miscarriage of justice in common law systems<sup>1</sup> refers to a situation in which a person is convicted of a crime but later his/her case is reopened by another Court as his/her conviction is found to be 'unsafe' and 'unsatisfactory'<sup>2</sup>. It happens when a break between the historical reality and its reconstruction in the courtroom arises after a judicial decision has been adopted and the pronouncement itself, which conflicts with

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<sup>1</sup> Common law doctrine concerned with miscarriage of justice, as c.walker - k.starmer, *Miscarriage of justice*, Oxford 1999, cites the fundamental work of dworkin, *Taking Rights Seriously*, London, 1977, chapters 7 and 12.

<sup>2</sup> Indeed today, the hypothesis of unsatisfactory sentence has lost importance, after the entry into force of the Criminal Appeal Act of 1995. See the famous case *Birmingham Six*, in which six Irish citizens, suspected of belonging to the military wing of the Irish Republican Army, an armed movement fighting for independence of Northern Ireland from England, were indicted for the explosion of two bombs in two Birmingham pubs, causing 21 deaths and 162 injuries. On 15<sup>th</sup> August 1975 the jury established at the Crown Court found them guilty of the murder. The defendants were, therefore, sentenced to life imprisonment. In the following years, an articulated and widespread campaign, also conducted thanks to the generous commitment of a British MP, Chris Mullin, led to the revision of the trial on the basis of a supplementary investigation into the explosives and the work of the Police. The new evidence collected, which threw a new light on the methods of acquiring the previous one, led, finally, after a first and unsuccessful complaint, the Court of Appeal on March 1991 to annul the verdict of guilty, deemed 'unsafe' and 'unsatisfactory'. See *R. v. McIlkenny and others* (1992) 2 ALL ER 417. See C. Mullin, *Errors of judgment*, Poolberg, 1990; l.blom – cooper, *The Birmingham Six and other cases: victims of circumstances*, London, 1997, about the fact that the trial against the police officers, believed to be the perpetrators of the manipulation of evidence, was abandoned by the prosecution: *R. v. Read Morris and Woodwis*, *The Times*, 8 ottobre 1993, I. The case just reported had been preceded by another analogue, concerning the false indictment and conviction of four innocent defendants, also Irish, in relation to a terrorist attack that took place, also in the autumn of 1974, in Guildford, a town in south-east of London (the case, later narrated in the film *In the name of the father*, is known as *The Guildford four*). Even then, after long disputes and the discovery of new evidence (obstinately kept secret by the police and only accidentally come to light), the judicial error was discovered and in 1989 the annulment of previous convictions was ordered by Court of Appeal in review. On it see G.McKee and R.Franey, *Time Bomb*, Bloomsbury 1988; R.Kee, *Trial and Error*, Hamish Hamilton 1986.

the truth of the facts, ends up in embodying the essence of the miscarriage of justice, that appears - because of circumstances which change from time to time - unable to ensure its primary social, institutional, political function, that is, the distributive one, among all men of wrongs and reasons, of rights and duties, of responsibilities and remedies, which finds its apogee in the equality of rights among all citizens<sup>3</sup>.

In the same way judicial wrongs in civil law systems occur when the criminal trial ends with a narrative that does not correspond to what really happened in the outside world<sup>4</sup>, although the different conformation of the mentioned legal systems and above all of the mechanisms of formation of judicial decisions and consequently of the nature of the relative remedies can determine a different approach to the topic and impose diversified solutions, shaped on the respective legal models of reference. Already for example the mere circumstance that the need to regulate this topic was in UK originally affirmed in a judicial precedent<sup>5</sup>, although subsequently regulated by a legislative source, that is section 133 of the Criminal Justice Act 1988, despite the unique source represented by primary legislation in Italian experience, including sections 629-633 and 643 of criminal procedure code, determines a different origin of the rules, reflecting on the structure, range of application and flexibility of the respective remedies, offering the starting point for a comparative view which - beyond of the terminologies used in this or in that legal model - can highlight the existence of elements of peculiarity of one or the other experience from the point of view of operational rules rather than on the level of theoretical propositions or, on the contrary, allow the identification of common protection itineraries that put in first place the protection of individual needs above other general principles and values regulating the whole legal system and the proper functioning of justice.

So even in Italian legal system a specific remedy, the so called revision, is provided by art.630 of criminal procedural code, by which the victim of a unjust decision can

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<sup>3</sup> In this perspective, M.SERIO, *Osservazioni Su Miscarriage of justice e diritti umani: un'indagine comparatistica*, in *Problemi attuali di Diritto Privato, Studi in memoria di Nicola Di Prisco*, I, Giappichelli, 2015, pp.1015-1040.

<sup>4</sup> R.NOBLIS – D.SCHIFF, *Understanding miscarriages of justice*, Oxford, 2000, with a preface by G.TEUBNER, p. VII.

<sup>5</sup> Lord Manfield affirmed this need in *R. v. Wilkes* (1770) 98 ER, 347. About the specific mechanism of forming judicial precedents in UK, Criscuoli-Serio, *Nuova Introduzione allo studio del diritto inglese*, Giuffrè 2021, p. 285.

obtain to reopen the judicial process for changing the final decision even if it has become *res iudicata*.

And, as well as the primary object of this kind of protection is clearly to compensate a person who had been convicted and punished for a not committed crime, both in English law and in Italian law the general provision of the miscarriage with the consequent duty of the judge to impose the truth on the erroneous misrepresentation, is followed by the acknowledgment in favour of the victim of a right to obtain compensation for the suffered damages. And just under this compensatory outline which makes effective the legal protection, I found very interesting apply the comparative approach<sup>6</sup> to recognize – besides the homologous legal provisions - the real amplitude of the respective remedies and to verify the actual functioning and the concrete restorative impact of the different rules. And it will be very interesting at the end of this brief search to discover by comparative tools that a wider practicability of the remedy does not always correspond to an equally broad capacity to satisfy individual claims and to reintegrate into the *ex ante* situation, altered by the erroneous representation of the human phenomena.

From another point of view, the topic also appears to be related to the structure and organization of proceedings in a way that respects freedom and individual rights, in order to avoid any violation of human rights, to which it is closely connected and for which reference to the European case law on the topic appears essential.

In this sense an important role in the creation and development of miscarriage of justice has been carried out by the <due process of law><sup>7</sup>, an expression of Anglo-Saxon origin which does not limit to guaranteeing the observance of the rules of the judicial procedure but underlies the claim of every citizen towards his/her own State so that rules that are suitable for guaranteeing the conduct of a fair trial will be

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<sup>6</sup> About the fundamental distinction between operational rules and declamatory statements cfr. R.SACCO, *Introduzione al diritto comparato*, Utet 1992, p.62; ID., *Sistemi giuridici comparati*, Utet 2008, pp. 3-6.

<sup>7</sup> About it see m. serio, *Brevi note sul due process of law nell'esperienza del common law inglese*, in *Europa e diritto privato*, 2000, pp.205-214.

adopted. The Edwardian Statute<sup>8</sup> of 1368 contains the first reference to the due process of law as an indispensable nexus for verifying the validity of a criminal charge. Indeed the chapter 3 of this ancient Statute presents an absolute modernity as it is claimed that every accusation must receive the scrutiny of a judge, before whom the accused must appear for due process to take place. So on the basis of it the penalty for non-compliance with due process of law is the nullity of any unlawfully performed act and its evaluation in terms of an error of law. The due process of law must therefore be seen as a place of celebration of the process which sees the accuser and the accused opposed before a judge, in order to guarantee the accused the possibility of fully exercising his right of defense by all means.

In the same direction, Article 24 par. 1 e 2 and Article 111 of Italian Constitution<sup>9</sup> guarantee the action and defense in Court, as the due process of law clause does,

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<sup>8</sup> 1368 c. 3 8 Regnal. 42 Edw 3 <Observance of due Process of Law>: *None shall be put to answer without due Process of Law. ITEM, At the Request of the Commons by their Petitions put forth in this Parliament, to eschew the Mischiefs and Damages done to divers of his Commons by false Accusers, which oftentimes have made their Accusations more for Revenge and singular Benefit, than for the Profit of the King, or of his People, which accused Persons, some have been taken, and [sometime] caused to come before the King's Council by Writ, and otherwise upon grievous Pain against the Law: It is assented and accorded, for the good Governance of the Commons, that no Man be put to answer without Presentment before Justices, or Matter of Record, or by due Process and Writ original, according to the old Law of the Land: And if any Thing from henceforth be done to the contrary, it shall be void in the Law, and holden for Error.*

<sup>9</sup> Art.24 of Italian Constitution states: 1. *Everyone can promote legal action to protect own rights and legitimate interests. 2. The defense is an inviolable right in every state and level of the proceeding. [...].* Moreover the subsequent Constitutional Law n° 2 of [23 novembre 1999 modified](#) Art. 111 of Italian Constitution which now states: 1. *Jurisdiction is implemented through due process regulated by law. Each process takes place in the contradictory between the parties, on equal terms, before a third and impartial judge. 2. The law ensures its reasonable length. 3. In criminal proceedings, the law ensures that the person accused of a crime is, in the shortest possible time, confidentially informed of the nature and reasons for the accusation leveled against him; he has the necessary time and conditions to prepare his defence; he has the right, before the judge, to interrogate or have interrogated the persons who make statements against him, to obtain the questioning of persons in his defense under the same conditions as the prosecution and the acquisition of any other means of evidence in favor of him; he is assisted by an interpreter if he does not understand or speak the language used in the process. 4. The criminal trial is governed by the principle of the adversarial process in the formation of evidence. The accused's guilt cannot be proven on the basis of statements made by those who, by free choice, have always voluntarily avoided interrogation by the accused or his lawyer. 5. The law regulates the cases in which the formation of evidence does not take place in a cross-examination due to the consent of the accused or due to ascertained impossibility of an objective nature or as a result of proven illicit conduct. [...]*



albeit apparently operating on a more technical level<sup>10</sup>. Really, on a closer inspection, both of the two principles placed at the foundation of the respective judicial systems determine a declination of procedural justice in terms of fairness<sup>11</sup>, to be understood - as well as compliance with the positive rules in force - as a guarantee of the concretization in the proceedings of principles which in a certain historical moment are felt in a specific social context as an integral part of that notion. And it is interesting to note from a comparative perspective how this similarity in the substantial content of the two clauses is reflected in a common approach of the respective Courts with regard to the guarantee of action and defence, as they are constantly concerned with verifying in practice the effective possibility of the parties to participate in the procedural adversarial rather than considering sufficient compliance with abstract forms or conditions.

The particular interest of the comparative analysis on this issue cannot but be underestimated, as we are at a field in which the evident structural differences attributable to the different traditions of the legal systems considered, which are reflected in the diversity of the technical tools actually used, do not prevent a commonality of judicial choices and trends that denote an evolutionary and creative interpretation necessary for every legal system to implement and make effective the guarantees of a constitutional nature.

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<sup>10</sup> v. vigoriti, *Garanzie costituzionali del processo civile*, Giuffrè 1970, Introduzione, p.1.; m.cappelletti, *Diritto di azione e di difesa e funzione concretizzatrice della giurisprudenza costituzionale* (art.24 Costituzione e <due process of law clause>), in *Giur. Cost.* 1961, pp.1284 ff.

<sup>11</sup> About fairness and its derivation from the due process of law see d.j.galligan, *Due process and fair procedures*, 1996, pp.170-171: <Procedural fairness is the modern concept, and only on rare occasions is reference made to its predecessor, due process. But on close inspection, it is clear that the two ideas cover the same ground; procedural fairness is a wider concept, but the core idea common to both is that certain procedures are needed to give effects to the ends of justice within legal decisions. There is, moreover, a direct line of development from the earliest idea of due process of law to the modern notion of procedural fairness. [...].>

## 2. The International framework: the European Convention of Human Rights 1950 (“the ECHR”) and the International Covenant on Civil and Political Rights 1966 (“the ICCPR”)

Given that the starting point of every speech about this topic cannot be different from the International framework as in this matter human rights play a fundamental role: firstly the European Convention of Human Rights 1950 (“the ECHR”) and the International Covenant on Civil and Political Rights 1966 (“the ICCPR”).

On one side infact, the [right to a fair trial](#) ex [article 6 of the European Convention ECHR](#) means everyone is presumed to be innocent until guilty is demonstrated and he/she is entitled to have a legal representation to prepare own defence<sup>12</sup>. On the other side, the [right to liberty](#) ex article 5 of ECHR ensures everyone to be imprisoned only in certain circumstances and, if arrested, he/she has to be told why and given speedy access to a judge<sup>13</sup>. Moreover [freedom of speech](#) ex article 10 of

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<sup>12</sup> Art.6 (2) and (3) ECHR states:

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
  - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
  - (b) to have adequate time and facilities for the preparation of his defence;
  - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
  - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

<sup>13</sup> Art. 5 ECHR states:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;

ECHR gives everyone the possibility to contact people who can help to investigate in the case and to collect proves to demonstrate every person innocence<sup>14</sup>.

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(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

<sup>14</sup> Art.10 ECHR states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

In the same direction article 14(6) of the International Covenant on Civil and Political Rights 1966 (“the ICCPR”), provides:

*When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.*

Nonetheless, we know that in practice in every legal system miscarriages of justice do happen. When they do, human rights are especially important because legal protection they give can help to expose the wrong that has been done.

In European Court of Human Rights case law, the leading case on compensation for miscarriage of justice is *Allen v. the United Kingdom [GC]* - 25424/09 Judgment 12.7.2013, stating that refusal of compensation following reversal of applicant’s conviction of criminal offence does not represent a violation of art. 6 par. 2 of ECHR. The question before the Court was not whether the refusal of compensation *per se* violated the applicant’s right to be presumed innocent (Article 6 § 2 did not guarantee a person acquitted of a criminal offence a right to compensation for a miscarriage of justice), but whether the individual decision refusing compensation in the applicant’s case, including the reasoning and the language used, was compatible with the presumption of innocence.

### **3. Miscarriage of justice in the English legal system**

#### **3.a) the doctrinal level**

The expression *miscarriage of justice* - which literally indicates the failure to achieve the purpose of an action - very popular in the English legal experience, generically indicates the hypothesis in which the outcome of a given process was actually contrary to justice for a variety of causes, among which mainly the judicial error, understood as an error of judgment, the irregularity in its conduct, the lack of knowledge of decisive evidence, the fraudulent behavior of some of the protagonists in the trial

himself, etc. As it has been well specified at a doctrinal level<sup>15</sup>, there may be the following miscarriage of justice hypotheses based on the violation of individual rights. In particular, the cases in which the suspect or the accused or the convicted suffer violation of their rights by the State as a result of: 1) irregular proceedings; 2) the erroneous application of the law; 3) the lack of factual basis for the application of sanctions; 4) the disproportion between the treatment inflicted on them and the need to defend the rights of the community; 5) the inadequate protection of individual rights compared to those of those who have attacked them; 6) legislative measures then declared illegitimate.

As for hypothesis 1) it occurs when individual rights are infringed due to irregular proceedings, such as in the case of unlawful arrest or detention. The hypothesis occurs even if the violation occurs due to the bias of the judge or the jury or the manipulation of evidence or, finally, the unfaithful patronage of the defenders. As for hypothesis 2) it occurs when the violation of individual rights depends on an intrinsically unjust law (rather than unjustly applied), or on discrimination to the detriment of the accused, from any cause depending. Hypothesis 3) occurs if there is no factual justification for the sentence (this is the case, for example, of the sentence resulting from an exchange of person). The State must, in fact, ensure the reliability of the jury and the relative ability not to make errors of evaluation and judgment that can be resolved in unjust convictions. Hypothesis 4) occurs when, for example, restrictive measures of personal freedom are adopted or sentences that are completely disproportionate to the seriousness of the crime are inflicted. Hypothesis 5), which can be briefly described as miscarriage of justice deriving from the inadequate protection of the rights of the victims of others crimes, can arise in a wide range of hypotheses, such as, for example, the failure to prosecute certain categories of crimes or the failure to plead guilty to a defendant due to pressure and intimidation suffered by the jury, as occurred in some cases of proceedings against Northern Irish terrorists or, finally, the oppressive methods of conducting trial examination of victims of sexual violence. Hypothesis 6) refers to the case of the existence and application of

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<sup>15</sup> C.WALKER, in C.WALKER and K.STRAMER, *Miscarriage of Justice – a Review of Justice in Error*, London, 1999, p. 31; S.Greer, *Miscarriages of Justice Reconsidered*, in the *Modern Law Review*, 1994, pp.58 ss. Not all doctrine agrees on the requirement of violation of individual rights to constitute a miscarriage of justice, as R.Nobles - D.Schiff, *Miscarriages of Justice: A Systems Approach*, in *The Modern Law Review*, 1995, p.299 ff., for whom cases such as the *Birmingham six* concern the erroneous assessment of evidence rather than the violation of individual rights.

inherently unjust or ineffective laws against victims of particular categories of illicit. All the hypotheses here examined can be briefly described as direct miscarriages. Then there is a seventh category, consisting of the so-called indirect miscarriages, which affect the community as a whole, as when there is a generalized inefficiency in the general system of administration of justice<sup>16</sup>.

It has been well said by doctrine<sup>17</sup> that four profiles can be deduced from the concept of miscarriage adopted up to now, always in the same way as the specialist doctrine cited several times. Firstly, the notion is not confined only to the hypotheses that occur in court, and in any case, within the criminal justice system. In fact, there may be miscarriages also linked to police activities, such as the illegitimate use of powers of personal coercion. Secondly, there may be miscarriages connected not only with the laws themselves but also with their erroneous application. Thirdly, for a miscarriage to occur it is necessary to have the defective exercise of a public function, both that it is directly carried out by the State and that it has been delegated to private subjects. Fourthly, the occurrence of a miscarriage of justice hypothesis is inextricably linked to the violation of individual or collective rights and implies the duty of the State to intervene to eliminate it.

### **3.b) the section 133 of the 1988 Criminal Justice Act and the UK Supreme Court**

#### **case-law**

On a legislative level miscarriage of justice arises under section 133<sup>18</sup> of the Criminal Justice Act 1988 (“the 1988 Act”) as amended by the Anti-Social Behaviour, Crime and Policing Act 2014.

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<sup>16</sup> The most alarming cases of misadministration of justice that provoke citizens' trust in it can well be ascribed to this category: see also *R. v. Enson* (1989) 2 All ER 586.

<sup>17</sup> WALKER, in WALKER AND STRAMER, *Miscarriage of Justice – a Review of Justice*, cit., p.32.

<sup>18</sup> Section 133(1) as originally enacted provided: *Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.*

And in fact, section 133 of the Criminal Justice Act of 1988 states that a compensatory obligation is incumbent on the State in favor of anyone who has served a sentence unjustly inflicted on him following a miscarriage of justice concretely manifested through a new fact, or a newly discovered fact, which demonstrates beyond any reasonable doubt that the original sentence - subsequently annulled or followed by judicial pardon - was vitiated, in fact, by a serious form of disadministration of justice.

Section 133 was enacted to give effect to the UK's international obligations under cited article 14(6) of the International Covenant on Civil and Political Rights 1966 ("the ICCPR"), which was ratified by the UK in May 1976. There is an almost identical provision in article 3 of the Seventh Protocol ("A3P7") of the European Convention on Human Rights ("ECHR").

The expression *miscarriage of justice* was not defined in the statute when originally it was enacted. So judges called to rule on the compensatory complaints made by the unjustly convicted had to verify whether in the specific procedural circumstance a qualified miscarriage of justice had taken place in the sense required by section 133.

Even though already in a case *R. v. Wilkes* of 1770<sup>19</sup>, the famous Lord Mansfield proclaimed the judge's duty to remedy the judicial error, whatever the consequences might be, the most recent English case law formed under the leadership of the newly constituted Supreme Court has found itself engaged in a work that is placed in an intermediate position between the systematic-conceptual definition of the recurrent phenomenon of miscarriages of justice and the determination of forms of protection, and remedies in general, even of a substantial nature to be recognized for the benefit of those who have suffered from it<sup>20</sup>.

The primary reason for caution that inspired the activity of English Courts over time has been to avoid uncritical and mechanical coincidences between the annulment of convictions resulting from the occurrence or the discovery of new evidence and the undue granting of compensatory measures. This consideration of judicial policy has led the Supreme Court, from its earliest experiences, to develop in a taxonomic form - also making use of previous decisions of the lower courts, and in particular of Court

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<sup>19</sup> *R. v. Wilkes* (1770) 98 ER 347.

<sup>20</sup> M.SERIO, *Osservazioni Su Miscarriage of justice e diritti umani: un'indagine comparatistica*, cit., p. 1027.

of Appeal - the factual and legal conditions implying the declaration of the recurrence, in the perspective of section 133 cited, of a miscarriage of justice. So this lack of definition gave rise to a series of cases in which the courts sought to interpret the meaning of the term, culminating in the Supreme Court of UK decision in *R (Adams) v Secretary of State for Justice*<sup>21</sup> of 2011, in which four categories of case were considered as candidates for satisfying the statutory definition:

- 1) where the fresh evidence shows clearly that the defendant is innocent of the crime of which he has been convicted, as reformulated by the Supreme Court;
- 2) where the fresh evidence so undermines the evidence against the defendant that no conviction could possibly be based upon it;
- 3) where the fresh evidence renders the conviction unsafe in that, had it been available at the time of the trial, a reasonable jury might or might not have convicted the defendant;
- 4) where something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted.

In *Adams* case, by a majority the Supreme Court held that the term included only category 1) and 2) cases, but no others. The minority view was that the term was restricted to category 1) cases.

Following the previous uncertainty as to its meaning and the litigation that it generated, Parliament inserted, with effect from 13 March 2014, a new statutory definition of *miscarriage of justice* in sub-section (1ZA) of section 133. The new definition provides: *For the purpose of subsection (1), there has been a miscarriage of justice in relation to a person convicted of a criminal offence in England and Wales....if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence (and references in the rest of this Part to a miscarriage of justice are to be construed accordingly)*. So section 133 of the Criminal Justice Act 1988 today provides for compensation by the Secretary of State of those whose convictions have been quashed in a narrow set of circumstances: on appeals out of time or on a reference by the Criminal Cases Review

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<sup>21</sup> *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48.



Commission (CRCC)<sup>22</sup>, when a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice. The previous leading case of *R (on the application of Mullen) v Secretary of State*<sup>23</sup> of 2004 presented differing views as to whether applicants had to establish factual innocence to warrant compensation under the scheme, with Lord Steyn finding that they did and Lord Bingham indicating that miscarriage of justice is a somewhat wider concept.

Later two conjoined appeals required the Supreme Court to address this perceived conflict and clarify the meaning of miscarriage of justice under the statute. In fact in the joined cases *R (Hallam) v Secretary of State for Justice; R (Nealon) v Secretary of State for Justice*<sup>24</sup> of 2019, the UK Supreme Court addressed whether the UK's scheme for compensating victims of a miscarriage of justice is compatible with the presumption of innocence, as guaranteed by Article 6(2) of the European Convention on Human Rights (ECHR). By a majority of five to two, the Court held that the scheme was compliant. In Court's opinion, it happens from time to time that a person's conviction is overturned after he/she has served a considerable period of time in prison for an offence of which, in the eyes of the law, he/she is not guilty. Inevitably the question arises whether, or to what extent, such a person should be awarded financial compensation. The International Covenant on Civil and Political Rights (ICCPR) imposes an obligation on States to provide compensation for a person convicted of a criminal offence where he succeeds subsequently in having that conviction overturned because a new fact shows conclusively that he has been the victim of a miscarriage of justice. A similar obligation is contained in Protocol 7 to the ECHR.

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<sup>22</sup> A Royal Commission, the first of the Thatcher and post-Thatcher eras, was appointed in the summer of 1991 under the chairmanship of Lord Runciman to <examine the effectiveness of the criminal justice system in England and Wales in securing the conviction of those guilty of criminal offences and the acquittal of those who are innocent, having regard to the efficient use of resources>. See *The Report of the Royal Commission on Criminal Justice*, London: HMSO, 1993. The Recommendations of the Royal Commission were implemented in the *Criminal Appeal Act* 1995, establishing the Criminal Cases Review Commission (CCRC), who began to work in 1997. See S.Field - P. Thomas, *Justice and efficiency*, Royal Commission on Criminal Justice in *Journal of Law and Society*, 1994, p.155; R.Nobles - D.Schiff, *Miscarriages of Justice: A Systems Approach*, cit., pp. 299 ss.

<sup>23</sup> *R (on the application of Mullen) v Secretary of State* [2004] UKHL 18.

<sup>24</sup> *R (Hallam) v Secretary of State for Justice; R (Nealon) v Secretary of State for Justice* [2019] UKSC 2.

Inevitably, such provisions give rise to the difficult question of what constitutes a miscarriage of justice for the purposes of compensation where a conviction has been quashed on the emergence of a new fact. Should it be confined to situations where a new fact (or newly discovered fact) shows that the person did not commit the crime in question? An example might be newly discovered DNA evidence or an alibi exonerating the convicted person. Alternatively, should a miscarriage of justice extend to situations where the conviction is subsequently quashed because a new fact raises at least a reasonable doubt over his guilt, but falls significantly short of establishing that he did not commit the offence? Or, should the cut-off point fall somewhere in between these two situations? If the bar is set too high, many individuals who are factually innocent will be denied compensation because of the inherent difficulties in proving factual innocence. On the other hand, if the bar is set too low, it will open the door to some factually guilty people qualifying for compensation.

A separate, but related, question is whether compensation should extend to situations where the conviction is quashed because the investigation, prosecution or trial was tainted by egregious corruption, even though there is still sufficient admissible evidence to warrant a conviction.

Pursuant to its obligation under the ICCPR, the UK provided for a compensation scheme in the Criminal Justice Act 1988. It applies to persons who were convicted of a criminal offence only to have that conviction quashed on an appeal out of time as a result of a new or newly discovered fact. Under the scheme, it is not sufficient to show that a new fact has resulted in the quashing of the conviction without an order for a re-trial. The applicant must also persuade the Secretary of State that the new fact shows conclusively that he has been the victim of a miscarriage of justice.

As originally enacted, the 1988 Act did not define a miscarriage of justice. Only in 2011, in *Adams case* (2011), the Supreme Court identified four possible categories of progressively wider scope:

1. the new fact shows clearly that the defendant is innocent of the crime of which he was convicted;
2. the new fact so undermines the evidence against the defendant that no conviction could possibly be based upon it;
3. the new fact renders the conviction unsafe in that, had it been available at the time of the trial, a reasonable jury might or might not have convicted the defendant; and
4. something had gone seriously wrong

in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted.

By a five to four majority, the Court in *Adams* confined a miscarriage of justice for the purposes of the compensation scheme to categories 1 and 2. It seems that the minority would have been more stringent and confined it to category 1. Even on the majority approach, many persons who had served long prison sentences for offences, of which they were not guilty under criminal law, would not be considered to have suffered a miscarriage of justice to qualify for compensation within the scope of the scheme.

Despite the arguably high bar for compensation set by the majority in *Adams*, Parliament raised it even higher by an amendment performed by the 2014 Anti-Social Behaviour, Crime and Policing Act. This confines a miscarriage of justice to situations where the new fact shows beyond a reasonable doubt that the applicant did not commit the offence (effectively category 1 situations). That, of course, looks very like a requirement on the acquitted applicant to prove his innocence beyond a reasonable doubt.

In 2019 *Hallam* and *Nealon case*, the Supreme Court was asked to rule on whether the new test was compatible with the Art.6 (2) ECHR presumption of innocence which states: *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*

The applicant in *Hallam* had been convicted of murder and related offences. He had spent almost eight years in prison before his conviction was quashed on the basis of a new fact that undermined the prosecution case to the extent that the conviction was unsafe. Critically, the new fact was not sufficient to prove beyond a reasonable doubt that the applicant did not commit the offence (category 1). Nor was it sufficient to establish that the evidence against the applicant was such that no conviction could possibly be based upon it (category 2). In effect it was a category 3 situation. Applying the statutory test, the Secretary of State refused the application for compensation on the basis that the new fact did not show beyond a reasonable doubt that the applicant had not committed the offence.

The applicant in *Nealon* had his conviction for attempted rape quashed by the Court of Appeal on the basis of a new fact after he had served seventeen years in prison.

As with *Hallam*, the Court of Appeal found that the new evidence did not completely demolish the prosecution's case, but substantially undermined it to the extent that the applicant's conviction was unsafe. In other words, it was a category 3 case. His application for compensation was also refused by the Secretary of State on the basis that the new fact did not show beyond a reasonable doubt that the applicant had not committed the offence.

There was a general consensus in the Supreme Court in these cases that setting the test at the category 3 threshold would not conflict with the presumption of innocence. An acquitted person's innocence is not necessarily called into question by saying that there remained evidence upon which a jury might convict. This had effectively been accepted by the Grand Chamber decision of the European Court of Human Rights (ECtHR) in *Allen v United Kingdom* of 2013. Although the Supreme Court in *Hallam* and *Nealon* was addressing whether the current category 1 threshold violated the presumption of innocence, the real issue was whether the threshold should be set at category 2; namely that the new fact had demolished the case against the person to the extent that no conviction could possibly be based upon it? The ECtHR in *Allen* gave a very strong indication that it would be a violation of the presumption of innocence to set the threshold higher at category 1 by requiring the applicant to prove that he did not commit the offence.

By a majority of five to two, the Supreme Court held that the current scheme (confining compensation to applicants who could show that they did not commit the offence) does not conflict with the presumption of innocence. However, the majority judges did not speak entirely with one voice in their reasoning. Four of them did not feel bound to follow the ECtHR lead in *Allen*, as they considered that its case law on the matter was not yet settled. The point at issue had yet to be the subject of a direct decision by the ECtHR and, at least some of them (Lord Mance and Lady Hale), were not confident that the ECtHR would find a violation of the presumption of innocence if called upon to decide it.

Lord Mance would have been content to dismiss the applications for compensation in both cases because neither the test nor the Secretary of State's decisions refusing compensation involved any suggestion that the applicants should have been convicted. Nevertheless, he went on to consider whether it would be contrary to the

presumption of innocence to confine the compensation scheme to category 1 situations.

He deduced its decision from *Allen* case in which the ECtHR would adopt category 2 as the cut-off point. In other words, there would not necessarily be any violation in requiring an applicant to persuade the Secretary of State that the new fact so undermined the evidence against him that no conviction could possibly be based upon it. If that was compatible with the presumption of innocence, he could see no reason why it would be incompatible to require the applicant to show that the new fact established his innocence (category 1). Lord Mance could see little, if any, practicable distinction between the two categories from the perspective of the presumption of innocence. Lord Lloyd Jones and, arguably, Lord Wilson, endorsed his interpretation.

It is submitted that there are a few problems with Lord Mance's reasoning. The ECtHR has yet to rule on whether it would be compatible with the presumption of innocence to require an applicant to persuade the Secretary of State that the new fact so undermined the evidence against him that no conviction could possibly be based upon it. That issue did not arise for decision in *Allen*. Moreover, the mere fact that the ECtHR deemed category 3 compatible with the presumption of innocence does not necessarily preclude it from finding category 2 incompatible. The categories were formulated by Lord Mance himself from the Supreme Court judgments in *Adams*. They do not possess a definitive status, and there is no reason why they might not be recast by the ECtHR when a category 2 type situation arises for decision before it.

Lord Hughes took a slightly different approach. He proceeded on the basis that the compensation scheme and the presumption of innocence are directed to two different issues. The former is concerned with whether the applicant is exonerated on the facts (and satisfied the other conditions for eligibility), while the latter is concerned with the proof of guilt beyond a reasonable doubt in a criminal trial. In his view, the presumption of innocence does not protect an acquitted person's conduct from subsequent examination in civil proceedings conducted on a lesser standard than proof beyond a reasonable doubt. He went on to say that an applicant's presumption of innocence was not infringed by requiring him to prove, for the purposes of compensation, that he was innocent of the offence. Innocent in the context of the compensation scheme meant exoneration on the facts while, in the context of the

presumption, it means not convicted or not guilty in accordance with the criminal standard of proof beyond a reasonable doubt. It is submitted that this reflects a highly artificial approach to the substantive issues at stake. Arguably, it also raises the peculiar prospect that the category 2 situation could violate the presumption of innocence even though a category 1 situation did not.

Lady Hale seemed more concerned with how a category 1 or category 2 test was applied in an individual case, as distinct from their formulation. For her, the key issue was whether the language used in determining a claim for compensation avoided any assertion to the effect that the accused was guilty of the offence. Indeed, she felt that it would not be impossible to explain a refusal of compensation under the current test (category 1) without necessarily using language that casts doubt on the acquittal. In other words, it did not necessarily violate the presumption of innocence. Ultimately, however, she felt it would be better to leave the matter until a category 2 situation arose where it might be more difficult to explain the difference with category 1 without necessarily using language that casts doubt on the acquittal. Since the facts of the instant cases were category 3 situations, she felt it was not necessary to address the matter.

Lord Reed (with whom Lord Kerr essentially agreed) delivered the main judgment for the minority. He relied heavily on the guidance offered by the ECtHR in *Allen* to the effect that requiring an applicant to establish that he did not commit the offence would be incompatible with the presumption of innocence. He explained that a decision by the Secretary of State that a new fact did not establish the applicant's innocence beyond a reasonable doubt would be the same as to casting doubts on his/her acquittal in the criminal proceeding. Accordingly, the test would almost inevitably provoke a clash with the applicant's presumption of innocence. Lord Reed doubted very much whether the current test would be in accordance with the ECtHR.

The minority's interpretation is surely more in accordance with the conventional understanding of the presumption of innocence. The majority's interpretation means that compensation will be refused where the acquitted applicant can do no more than prove beyond a reasonable doubt that a new fact shows that he should never have been convicted. For the Secretary of State to say that he/she is not persuaded beyond a reasonable doubt that such an applicant is innocent surely raises doubts over the applicant's acquittal. It is difficult to accept that this would not violate the applicant's

presumption of innocence. It also means that many persons who are factually innocent of a crime for which they spend many years in prison will be denied compensation, even though a new fact shows that they should never have been convicted before.

It must be acknowledged that the interaction between an acquittal (or the quashing of a conviction) and subsequent proceedings in the same matter presents complex challenges for the presumption of innocence. This is due in large measure to the diversity of situations in which the issue can arise. These range over applications by the acquitted person for costs or compensation for time spent in prison; claims for compensation by a third party against the acquitted person; disciplinary action against the acquitted person; child care proceedings; and more besides. Attempting to deal with these situations, and the different factual permutations within each, on a case by case basis as they arise has resulted in a complex, and not always coherent, case law on the presumption of innocence. It is difficult to extract clear and comprehensive principles from it. Admittedly, the decision of the Grand Chamber of the ECtHR in *Allen* has gone some distance towards providing a degree of principled coherence from the case law, but there is still some distance to go. Unfortunately, the judgments in the Supreme Court in the *Hallam* and *Nealon* cases have not made a significant contribution in this direction. Further clarification will be still required from the ECtHR.

Finally, it is worth advertng to a related issue that was discussed substantively in most of the judgments in the *Hallam* and *Nealon* cases. This concerns whether the Art.6 (2) presumption is applicable at all to a compensation procedure that is triggered later in time to, and separate from, the criminal proceedings in question. At least some of the judges were inclined to the view that it had no application as it applied to “a person charged with a criminal offence [...]” and, as such, had no application after the charge had been finally disposed of in the criminal proceedings. The Supreme Court’s decision in *Adams*, for example, has been interpreted to the effect that it is not so applicable. The later decision of the ECtHR in *Allen*, however, was emphatic that the presumption of innocence is not confined to the criminal proceedings. It extends to subsequent proceedings, and to the actions and decisions of public officials, in which the innocence of a person is called into question after he has been acquitted or had his conviction quashed. The justification proffered is the need to ensure that the

protection afforded by the presumption is not rendered illusory or theoretical. In the *Hallam* and *Nealon* cases, it is not always clear whether the majority judges are addressing the applicability issue or the violation issue. What is clear is that at least some of them are distinctly uncomfortable with the ECtHR's position on the former.

#### 4. Judicial wrong in the Italian legal system

The Italian Constitution in Article 24 paragraph 4<sup>25</sup> expressly guarantees the possibility of repairing judicial wrongs, referring to legislator for the indication of the conditions and forms suitable for this purpose. In doing it, it grants the victims two distinct rights: on one hand the right to act for the identification and correction of the error, on the other hand, the right to compensation for the unfair limitation of personal freedom deriving from the unjust conviction<sup>26</sup>.

Italian legislator by Articles 629-633 and 643 of criminal procedure code implemented the constitutional rule following the same two lines of legal protection. Article 629 introduced the so called revision, that is an extraordinary appeal aimed at the annulment of unjust conviction while Article 643 provides an economic compensation for the damages suffered as a result of the wrongful conviction<sup>27</sup>. For this purpose Article 643, paragraph 1, as it expressly refers to judicial wrongs, which

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<sup>25</sup> Art.24 par.4 of Italian Constitution states: *The law shall determine the conditions and forms regulating damages in case of judicial errors.*

<sup>26</sup> M.GIALUZ, *Remedies for miscarriage of justice in Italy*, in L.Luparia (ed.), *Understanding wrongful conviction. The protection of the innocent across Europe and America*, 2015, p.117.

<sup>27</sup> The rule of Article 630 clearly provides for the hypotheses in which a definitive sentence can be revised: a) *if the facts underlying of the judgment or the criminal decree of conviction are incompatible with those established in another final criminal judgment by the ordinary court or by a special court; b) if the judgment or criminal decree of conviction order considered the existence of the offence against the convicted person as a result of a judgment of the civil or administrative court, subsequently revoked, which decided on one of the questions referred for a preliminary ruling in Article 3 or one of the questions referred for in Article 479; c) if, after conviction, new evidence is found or is discovered which, either independently or together with already assessed evidence, proves that the convicted person must be acquitted in accordance with Article 631; d) if it is proven that the judgment of conviction has been delivered on the basis of or as a consequence of falsehood in acts or in court or another fact provided for by law as a crime.* Then the subsequent rule of Article 643 criminal procedural code provides for the hypotheses of compensation of the damage derived by the wrong, that are : 1. *If you have not sued for misconduct or gross misconduct, you are entitled to reparation commensurate on the basis of the length of imprisonment and of the personal and family consequences of the sentence.* 2. *The compensation is carried out by payment of a sum of money or, taking into account the conditions of the person entitled and the nature of the damage, by an annuity.* 3. *The right to compensation is excluded for that part of the sentence which states for a different offence.*



take the form of the unjust conviction, and the consequences of the conviction, requires the Court to take into account, in addition to the prejudices deriving from the pre-trial detention suffered, also the prejudices attributable to the criminal trial promoted against the instant and not only those related to the unjust conviction. Furthermore, more recent legislative interventions expanded the range of tools exploitable by convicted after final judgments, as the so called rescission, provided by the new Article 629-bis<sup>28</sup>, that is another extraordinary appeal aimed at removing the conviction in case of a trial conducted entirely in absence of the accused, who was unaware of the ongoing proceeding.

Revision is in Italian law the main tool to ascertain a judicial error. By it an irrevocable judgment of conviction can be reversed because of the existence of new cognitive elements which reveal the erroneous evaluation of the facts on which the final decision has been built on. Therefore the hypotheses of revision are intended to remedy a substantial and not procedural injustice of the ruling, i.e. an error in the reconstruction of the facts before the judge, expressing an antinomy between the definitive statement of guilt and the ascertained historical truth. So it has been well said<sup>29</sup> that between revision and judicial error there is a mutual relationship as the alleged error is the prerequisite for the request of revision while on the other side the judicial error acquires legal significance only by the revision judgment. Indeed only the errors emerging from new facts can justify the overcoming of a final judgment, thus avoiding the review may turn into a fourth degree of judgment based on a mere re-evaluation of the same facts underlying the previous judgments<sup>30</sup>. These hypotheses must be integrated with another one provided by Constitutional Court decision n° 113 of 7 April 2011, by which revision is allowed when the reopening of the proceeding is necessary to comply with a final judgment of the European Court of Human Rights, although this hypothesis differs from a functional point of view as

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<sup>28</sup> Inserted by Article 1 par. 71 Law n° 103 of 23 June 2017.

<sup>29</sup> R.DEL COCO, *Giudicato, progresso scientifico e prova nuova. Limiti e prospettive del giudizio di revisione*, in L.Luparia, L.Marafioti & G. Paolozzi (eds), *Errori giudiziari e background processuale*, 2017, p.101.

<sup>30</sup> As stated by Art. 637 par. 3 criminal procedural code. See A.PRESUTTI, *La revisione del giudicato penale tra impugnazione straordinaria e quarto grado di giudizio*, 3 *Studium Iuris*, 2009, p.245.

it doesn't imply giving the Court new evidence proving the convicted's innocence as the other hypotheses provided for Art.630 do.

Focusing on the compensatory aspect, which represents the objective of the present research, Art.643 entitles victims of a judicial error to a compensation in proportion to the duration of sentence or confinement that may have been served and to the personal and family consequences resulting from the conviction<sup>31</sup>. The request can be proposed by the victim within 2 years of the final judgment<sup>32</sup> before the Court of Appeal who decides on it in chambers.

Specifically clarifying the meaning and the scope of Art.643, by judgment of 25 February 2016 n°7787 the Court of Cassation ruled on the *vexata quaestio* of compensation for unjust detention and for judicial wrong, as well as on the criteria for its correct quantification. First of all, the Italian Supreme Court underlined it is appropriate to distinguish two different hypotheses (unjust detention and judicial wrong), which are different in terms of conditions and applicable discipline, although the Court of Cassation expressed itself more strongly on the second legal model. For this purpose Article 314 of criminal procedure code which provides that *those who are acquitted with irrevocable judgment because the fact does not exist, for not having committed the fact, because the fact does not constitute a crime or is not provided for by law as a crime, has the right to fair reparation for the pre-trial detention suffered, if it has not given you or contributed to sue you for malicious misconduct or gross negligence [...]* is applicable. Also in a European framework the Italian Supreme Court acknowledges that compensation for judicial wrongs is recognised by various regulatory sources, that is, by art. 3 of the Protocol to the European Convention on Human Rights, art. 14.6 of the International Covenant on Civil and Political Rights and Art. 85.2 of the Statute of the International Criminal Court. Moreover the Court underlines the central role developed in Italian legal system by the mentioned art. 24, paragraph 4 of Constitution (which provides that *law determines the conditions and ways for the reparation of judicial errors*) beside art. 643 c.p.p., where it is expected that the person who was acquitted during the revision judgment, if he did not give cause with malicious misconduct or gross negligence, is entitled to

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<sup>31</sup> See L.SCOMPARIN, *Errore giudiziario (Riparazione dell')*, XII Digesto penale, 1997, p.319; E.TURCO, *L'equa riparazione tra errore giudiziario e ingiusta detenzione*, Giuffrè 2007; ID., *Errore giudiziario e ingiusta detenzione (riparazione di)*, Foro Italiano, 2013, 2727, 10.

<sup>32</sup> See Court of Cassation n° 31432 of 10 August 2021.

a compensation commensurate with the length of imprisonment and the personal and family consequences deriving from the conviction.

It is interesting to note that the cited 2016 Court of Cassation judgment established<sup>33</sup> that, in the settlement of non-pecuniary damage, account must be taken of all the facets of which the specific case is composed, such as "the interruption of work activities" and affective ones, as well as the "[...] pejorative and radical change in life habits".

In particular, the Court of Cassation has considered "unjustly restrictive" the principle affirmed by the Court of first instance that "the only refundable biological damage" would be that related to the period of unjust detention and not that deriving from the prejudices suffered as a result of the "erroneous" conviction. This ruling does not appear to be accompanied by particular innovativeness, even in view of previous rulings by the Supreme Court<sup>34</sup>. In fact, the principle that biological damage consists of the impairment of the psycho-physical integrity of the person accompanied by a loss or reduction of vital functions can be substantially consolidated. Furthermore, the Court itself also pointed out that, for the purposes of determining that damage, it was not necessary to observe the table criterion adopted by civil caselaw as it must be considered that the non-patrimonial nature of this type of damage also makes it possible to resort to equitable criteria, provided that they are not illogical and lead to a result that does not deviate unreasonably and unjustifiably from the above-mentioned table parameters<sup>35</sup>.

With regard to economic damage as loss of profit, the Court of Cassation, again, seems to express itself in the wake of Italian legal tradition, recognizing the admissibility of the use of equitable criteria in the quantification of damage, even in the absence of the express reference to fair compensation in the rule relating to the recognition of reparation for judicial error (ex Art. 643).

Beyond considerations on the evidence of the damage - on which, of course, the Court did not rule, referring these aspects to the revision on the substance - the

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<sup>33</sup> Starting from a previous decision, 18 March 2009, n. 22688 on existential damage.

<sup>34</sup> Cfr judgment Cass. No 22444/15, and above all judgment Cass. No. 2050/2004, so-called "Barillà case".

<sup>35</sup> See in this sense, Cass. no. 36442 of 23/05/2013.

Italian Supreme Court seems to have confirmed once again the mixed, indemnity and compensation nature of the remedy for judicial error, which is now consolidated both in doctrine and case law<sup>36</sup>.

Once again - as already noted in the present discussion of the topic with regard to UK legal system - the influence of European law on the Italian rules on judicial error appears unavoidable, as Italian Supreme Court, in basing the victim's right to reparation on international law rules, aligns with the other Member States case law in the recognition of a common core in terms of judicial error, characterized by the need on one hand to ensure compliance with all the procedural rules in force within own legal system, and on the other hand to restore as completely as possible the victims of any judicial errors as a violation of a human right was committed<sup>37</sup>.

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<sup>36</sup> See also Court of Cassation, section IV, n° 273403 of 4 April 2018.

<sup>37</sup> Once again the national judge is called to come to terms with European case law. Previously the European Court of Human Rights in the case *Lorenzetti v. Italy* on 10 April 2012, in relation to the proceeding of reparation for unjust detention pursuant to art. 314 and 315 of the Italian Criminal Procedure Code, recognized the violation of art. 6, par. 1, ECHR, on the subject of "the right to a fair trial", due to the lack of publicity of the chamber ritual which is celebrated before the Court of Appeal. In particular, the European Court, underlined the importance that the publicity of the hearing assumes within the framework of the principles outlined by the Convention and also recalled, in the light of its own caselaw, the cases in which it may be considered possible to derogate from the principle in question (such as those that contemplate highly technical matters), observing that, in the proceeding for the reparation of unjust detention - where the judge is called to evaluate "whether the victim has contributed to causing his detention intentionally or through fault serious" - "no exceptional circumstance justifies refraining from holding a hearing under the scrutiny of the public, since we are not dealing with questions of a technical nature that can be settled satisfactorily solely on the basis of the file". Having taken note of this ruling, the joint sections of Court of Cassation (by ordinance 18 October 2012) could not escape the «obligation» to invoke the intervention of the Constitutional Court, declaring the relevance and the not manifest groundlessness - with reference to the art. 111, 1st paragraph, and 117, 1st paragraph, of the Constitution - the question of constitutional legitimacy of art. 315, 3rd paragraph, criminal procedure code in relation to art. 646, paragraph, in the part in which it does not allow that, at the request of the interested parties, the proceeding for the reparation is carried out, before the court of appeal, in the forms of a public hearing. On that occasion, however, the Constitutional Court had declared the question inadmissible due to lack of relevance, since in the main proceedings the party had never requested a public discussion. About the influence of European Court of Human Rights case law on Italian law, see AA.VV., *Giurisprudenza europea e processo penale - Nuovi parametri di costituzionalità, obbligo di conformarsi alle decisioni della corte europea, persistenti nodi di criticità nel diritto interno* a cura di R.E. KOSTORIS e A. BALSAMO, Torino, 2008; S. BUZZELLI-C. PECORELLA, *Il caso Scoppola davanti alla corte di Strasburgo*, in *Riv. it. dir. e proc. pen.*, 389; R. CONTI, *La Corte costituzionale viaggia verso i diritti Cedu: prima fermata verso Strasburgo*, in *Corriere giur.*, 2008, 205 ss.; U. DRAETTA, *Elementi di diritto dell'Unione europea - Parte istituzionale*, Milano, 2009, 332 ss.; M. LUCIANI, *Alcuni interrogativi sul nuovo corso della giurisprudenza costituzionale in ordine ai rapporti fra diritto italiano e diritto internazionale*, in *Corriere giur.*, 2008, 201 ss.; R. MASTROIANNI, *Conflitti tra norme interne e norme comunitarie non dotate di efficacia diretta: il ruolo della Corte costituzionale*, in *Dir. Unione europea*, 2007, 585, ss.; B. NASCIBENE, *Violazione «strutturale», violazione «grave» ed esigenze interpretative della convenzione europea dei diritti dell'uomo*, in *Riv. dir. internaz. privato e proc.*, 2006, 645 ss.; L. SALVATO, *Il rapporto tra norme interne, diritto dell'Ue e disposizioni della Cedu: il punto sulla giurisprudenza*, in *Corriere giur.*, 2011, 333 ss.; A. SACCUCCI, *Rango e applicazione della Cedu nell'ordinamento interno secondo le sentenze della Corte*

Moreover, the reception into Italian criminal procedure code of the rule of assessment of "beyond any reasonable doubt (b.a.r.d.)"<sup>38</sup>, carried out within the so-called reform of *due process*<sup>39</sup>, oriented to strengthen the accusatory structure of the Italian criminal trial also by the reception of some elements of the common law proceedings and, in particular, of North-American one that must concile with judicial wrong as it derives from a manifest illogic decision. In the US trial<sup>40</sup>, the exhortation to judge "beyond reasonable doubt" is, in fact, part of the instructions that judge must give to the jury, who decides by an unjustified verdict: it is therefore a recommendation that, in that system, has no consequences on the legal reasoning.

After the reception of the formula into the Italian code, the prevailing doctrine linked the criterion to the presumption of not guilty contained in art. 27, paragraph 2 of

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*costituzionale sull'art. 117 Cost.: un passo avanti, due indietro?*, in *Dir. uomo*, 2007, fasc. 3, 26 ss.; E. SCODITTI, *Il giudice comune e la tutela dei diritti fondamentali di fonte sovranazionale*, in *Foro it.*, 2010, V, 42 ss.; G. TESAURO, *Diritto dell'Unione europea*, Padova, 2010; A. TIZZANO, *Ancora sui rapporti tra corti europee: principi comunitari e c.d. controlimiti costituzionali*, in *Diritto comunitario e diritto interno*, Milano, 2008, 479 ss.

<sup>38</sup> Art.5 of Law n. 46 of 2006 states:

In article 533 of the criminal procedure code, paragraph 1 is replaced by the following: <1. *The judge pronounces a sentence if the accused is found guilty of the crime against him beyond any reasonable doubt. With the sentence, the judge applies the penalty and any security measures*>. For a historical reconstruction of this rule in common law see E.DEZZA, *Breve storia del processo penale inglese*, Torino, 2009, p.108; J.H.LANGBEIN, *The Origins of Adversary Criminal Trial*, Oxford, 2003, p. 261; B.SHAPIRO, "Beyond Reasonable Doubt" and "Probable Cause", *Historical Perspectives on the Anglo-American Law of Evidence*, Berkeley-Los Angeles-Oxford, 1991; T.WALDMAN, *Origins of the legal doctrine of reasonable doubt*, in *Journal of the History of Ideas*, 1959, p. 299; J.Q.WHITMAN, *The origins of resonable doubt. Theological roots of the criminal trial*, New Haven-London, 2008. For a theoretic reconstruction: L.LAUDAN, *Truth, Error, and Criminal law. An Essay in Legal Epistemology*, Cambridge, 2006, p. 29. Contra F.STELLA – M.C.GALAVOTTI, "L'oltre il ragionevole dubbio" come standard probatorio. *Le infondate divagazioni dell'epistemologo Laudan*, in *Riv. it. dir. proc. pen.*, 2005, p. 883; F.STELLA, *Giustizia e modernità. La protezione dell'innocente e la tutela delle vittime*, 3<sup>a</sup> ed., Milano, 2003, p. 154.

<sup>39</sup> As seen in note 9, in the previous due process of law Constitutional Reform, the Art. 1 of Constitutional Law n° 2 of 23 november 1999 introduced new five paragraphs in Art. 111 Italian Constitution. The 1<sup>st</sup> and the 2<sup>nd</sup> par. concern every judicial proceeding while the others paragraphs concern only the criminal trial. The new 1<sup>st</sup> par. states: <Jurisdiction is implemented through due process regulated by law.> The new 2<sup>nd</sup> par. states: <Every trial takes place in the contradictory of the parties, on equal terms, before a third and impartial judge. The law ensures its reasonable length.>

<sup>40</sup> The [US Supreme Court](#) held that "the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged." See *Coffin v. United States*, [156 U.S. 432](#) (1895)

Italian Constitution, finding authoritative confirmation in the United Sections of Court of Cassation case law<sup>41</sup>.

Italian doctrine also considered that the evaluation criterion in question marks the overcoming of the principle of "free conviction of the judge" and, therefore, of the need for the conviction to be based on the valorization of the evidence taken in adversarial terms which, in order to respect the evaluation fee, must have sufficient demonstrative capacity to neutralize the antagonistic value of the alternative thesis. Sharing this appreciable attempt to positivize the b.a.r.d. formula, the Court considers that the criterion in question cannot be translated into the enhancement of a "psychological state" of the judge, indeed subjective and inscrutable, but it is indicative of the need for the court to make a close comparison with the elements that emerged during the progression of the trial.

Not every "doubt" about the evidential reconstruction adopted by the Court of merit translates into an "obvious illogic", since it is necessary that a defect be found that severely damages the stability of the motivation, highlighting a logical fracture not only "manifest", but also "decisive", as it is essential for maintaining the reasoning justifying the sentence.

That is, it is believed that the evaluation parameter indicated in art. 533 of Code of Criminal Procedure, which requires that the sentence must be pronounced if any "reasonable doubt" is dispelled, operates differently in the merit and legitimacy jurisdiction: only before the merit jurisdiction this parameter can be invoked to obtain an alternative assessment of the evidence on the basis of the defensive allegations; otherwise, in terms of legitimacy, this rule is relevant only to the extent that its non-observance results in a manifest illogicality of the legal reasoning<sup>42</sup>.

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<sup>41</sup> Cass. United Sections. no. 18620 of 19/01/2017 ; Cass. United Sections no. 14800 of 21/12/2017.

<sup>42</sup> Cass. Sez. 2, n. 28957 del 03/04/2017 - dep. 09/06/2017, D'Urso and others.

## 5. Conclusive remarks

The big gap between the procedures for forming judgments in the considered legal systems transpires in the different consequences that the same legal model produces in practice. In each legal system this model must be reconciled with the respective procedural rules thus determining a significant gap among the areas of protection granted to victims of judicial error in one or in the other system. In this perspective, the narrowing of the area of compensation for damages in the English system, marked by the UK Supreme Court case law above examined, can be compared to the widening of compensation protection in the Italian legal system from the Court of Cassation's point of view. Despite it the present research highlighted the essential key role played by some common constitutional principles which guarantee in each of the considered legal system the correct conduct of the judicial proceedings and the fair, intended as according to law, treatment of every citizen<sup>43</sup>.

Moreover the brief analysis conducted so far offers interesting insights on a separate but related topic as relevant differences between the considered legal systems are also in terms of judicial liability<sup>44</sup> as in Italy the civil liability of magistrates — the other system of extra-procedural control of their activity through the threat of the penalty for compensation — is now governed by the new discipline of Law 27 February 2015 no 18 which has made significant changes to previous Vassalli Law 13 April 1988 no 117. The Law 18/2015 significantly reduced the judicial immunity in Italy. The magistrate will not be liable for errors made in the course of the interpretation of rules of law or for the assessment of the fact and evidence, unless it is established — in a positive way — one of the typed hypotheses of gross negligence, listed in the new formula of paragraphs 3 and 3° bis of Law 117/1988, in addition to the cases of malice and denial of justice ex art. 4.

It may be interesting to note how the United Sections of the Court of Cassation, with judgment 3 May 2019 n. 11747, delimited the control on judicial interpretation in the field of civil liability. The serious violation of the law must therefore be identified only in cases where the decision does not appear to be the result of a conscious

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<sup>43</sup> In this sense D.J.GALLIGAN, *Due process and fair procedures*, Oxford 1996, p. XVIII.

<sup>44</sup> On the connection between these different topics see Zuckerman, *Miscarriage of Justice and Judicial Responsibility*, 1991, 1 CLR 492.

interpretative process, but contains statements not attributable to it, because they are boundless in an abnormal way and characterized by an unjustified negligence, even before they are inexcusable. So the deviation from a precedent cannot in itself constitute a source of civil liability, because the precedent, although authoritative, is not binding in Italian law: failure to respect the previous one cannot, therefore, constitute, in itself, a serious violation of the law for the purposes of liability.

Under a different perspective in both legal systems it is immediately evident that a first conception of the relationship between miscarriage of justice and legal certainty, the latter understood as an immanent value in every legal system, is not extraneous to a feeling of conflict or, at least, difficult relationship. The reason for this first ideological impact is easily identifiable in the circumstance that both the empirical and the formal notion of judicial error are centered on the misadministration in judicial proceedings of the decision-making rules destined to lead to a just sentence, that is, that really reflects the actual truth<sup>45</sup>. In this sense Blackstone's words sound grave, according to whom it is preferable that ten guilty be subtracted from the sentence to the hypothesis of the conviction of an innocent<sup>46</sup>. It is, in fact, "unsafe" the sentence that lacks a positive confirmation of the logic and congruence of one's argumentative structure, and this also because of the failure to examine not only the *noviter inventum* evidence, but also that *noviter repertum*.

It is equally significant that the most accurate investigations carried out in the common law systems tend to combine the addressed theme with the lintel of those systems, consisting in the compliance with the fundamental principle of the *rule of law*<sup>47</sup>, which must be understood as an affirmation of the primacy and centrality of the law, and its more scrupulous respect, firstly by public authorities. In this direction

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<sup>45</sup> In this sense M.SERIO, *Osservazioni Su Miscarriage of justice e diritti umani: un'indagine comparatistica*, cit., p. 1019.

<sup>46</sup> W. BLACKSTONE, *Commentaries on the law of England*, 1765 – 1769, vol. IV, p. 27.

<sup>47</sup> A.V.DICEY, *Introduction to the Study of the Law of the Constitution*, X ed. with a preface by WADE, Londra 1968, p. 183; A.L.GOODHART, *The Rule of Law and Absolute Sovereignty*, in *University of Pennsylvania Law Review*, 1958, p. 945; I.JENNINGS, *The Law and the Constitution*, Londra, 4° ed., 1952, p. 47; R.A. COSGRAVE, *The rule of law: Albert Venn Dicey, Victorian Jurist*, The University of North Carolina Press, 1980; N.S.MARSH, *The rule of law as a supranational concept*, in A.G. GUEST (ed.), *Essays in Jurisprudence, A collective work*, London, 1961; W.LUCY, *Abstraction and the Rule of Law*, in *Oxford Journal of Legal Studies*, 2009, p. 483; M.SERIO, *Brevi osservazioni su rule of law e sviluppi della teoria di Albert Venn Dicey*, in *Persona e attività economica tra libertà e regola. Scritti dedicati a Diego Corapi*, 2016, pp. 233-245.



credit must be given to the doctrinal<sup>48</sup> opinion according to which the conflict between the rule of *due process* and the truth must be resolved in favor of the protection of individual rights, taking into account that the notions of truth and guilt find a pertinent place within a hierarchy of values, among which fundamental human rights must prevail.

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<sup>48</sup> C.WALKER and K.STARMER, *Miscarriage of Justice*, cit., p. 43.