ADMINISTRATIVE POWER AND NECESSARY SATISFIED INTERESTS
CRISIS AND NEW PERSPECTIVES OF ADMINISTRATIVE LAW

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1. Administrative power and interests protection

1.1. Necessity and function of power

Administrative law regards:

– the juridicalization (*giuridicizzazione*)[1] of public powers;
– the satisfaction of necessary protected interests[2].

[1] This term refers to the subjection process of public power to the law. Translation as judicialization or legalization or regulation of the public power is inappropriate for this cause.

[2] This study is based, with integrations and modifications, on the first chapter of the book "Principles of administrative law ", Turin, 2010.

The clear and comprehensive exposition of the principles is intended as keys for reading, which served as an initial nucleation of the specific characteristics of the discipline, assumes a new educational and scientific importance. The turbulent evolution of systems makes it necessary to attempt to identify, in the disarticulation of the matter, the essential reasons that allow a re-composition of the fixed points with sufficient stability.

It is evident that this stability must be understood in a relative sense: referring to the basic features of a system which can be lost by their mutation. Historical cycles may have a different duration: those more durable regarding relationships between individuals and those more likely changing regarding the organized collective activities and their relationship with people and groups that compose it. For confirmation it is sufficient to think how many private Roman law institutions are still used while nothing remains of public law from that period.

This explains why the statement of "principles" is not possible in all historical periods. The legal theories cannot last beyond their time, living conditions, beliefs and economic systems, in which they were formed and in which they were exhausted. This statement is not possible in periods of dissolution of the systems, because in the moment of total fragmentation this can only be recorded and cannot be restored to a system. Neither this statement is possible in periods of long stability, because when conceptual milestones have been

The two profiles are interconnected: the powers exist to satisfy the interests and the interests are necessarily satisfied only if

established for some time, the doctrine cannot elaborate the principles as they are already developed, and in fact the doctrine in these contexts often focuses attention on matters of detail or mere description.
In general, the principles, intended as new keys of reading, are produced in nascent phases in which it is possible to identify with sufficient clarity the signs of evolution in act, the characteristics of a system that is being consolidated and in which, even in conceptual terms, new categories can be formed. It was so at the end of the Middle Ages, when the power of the Empire and the Church became evanescent and the jurists, who were aware, elaborated the sovereignty theory by referring to the emerging nation states, or even in the early 1800, when the affirmation of parliamentary democracy needed and permitted the jurist to develop theories about the division of powers and the rule of law. It is necessary to ask whether the current historical period presents such characteristics, or if its evolution is too rapid and excludes the possibility of identifying consolidating guidelines of a new system that can be theorized.
It is clear that the nation state intended as an "auto sufficient" organization (Aristotle) is in crisis. Therefore, in recent centuries the very foundation on which public law and so administrative law is founded is in crisis. The result is an inevitable crisis of administrative law, all public law and the categories on which it was built. Yet, as we shall see, there are signs that foresee the start of a new phase in the legal system's evolution, of which it is premature to define all the systematic profiles, that allows, however, for attempts of re-elaboration based on the essential elements of social and institutional arrangements, that are present in the transformations with new form and contents.
In the complexity and fragmentation of actual social and institutional contexts, reconstructive keys should be initiated from the foundation element of human aggregation, the renewed awareness of the existence of interests that the individual cannot meet alone and then by the need to belong to organized groups and of exercises of powers that are able to satisfy such interests.
This requires the adoption of a research method of the essential characteristics of notions. The applicative examples that are given confirm that this method is suitable to capture the cases' characterizing profiles and differentiate them from those similar. For this last part, which refers very briefly to the basic profiles of administrative law, the bibliography is omitted here because it would be disproportionate.
As for the indicated bibliography, it should be noted that when the edition cited (for example, is translated into any language) is much later than the first edition, dates are shown in brackets, to indicate the period in which the work was processed. The pages are shown only when the work is published in journals. When the work has already been mentioned first placed citation is given. I apologize to the past and present authors, who deserve to be cited but this is denied by the characteristics of this work.
The objective of research of the essential explains its exposition that appears a little apodictic and sometimes pretentious.

there are powers and organizations able to satisfy them.

Administrative law is a recent discipline, because the process of juridicalization of power is new and even more so is the satisfaction of necessary protected interests.

Co-essential to every legal system are those areas of law that regulate the basic relationships of social living. In every historical period, since when relationships have been established by juridical parameters, legal systems have introduced private law, to give certainty to the inter-private connections, criminal law, *ne cives ad armas veniant* and public law as discipline of the costitutional's organs ("constitutional", according to present language).

For as long as the functions of public authorities were limited (relating to the functioning of community life) and the relationship with the individual was not regulated by law, there were no conditions for the existence of administrative law.

Administrative law formed in continental European countries when the evolution of legal systems conferred juridical character to the public power actions and focused amongst its aims the welfare of the population.

In the contemporary world, the use of public power in the absence of rules has become an exception, it is difficult to understand the importance of the juridicalization of power, that was instead the result of bloody battles. The existence itself of a "public law" referring to the relationship between the state and citizens is a recent achievement. Even scholars do not always have a full awareness of this fact.

It is widespread in the French doctrine, and has been followed also in Italy (S. Cassese[3]), the thesis that administrative law began when the French "*Tribunal des conflits*", with the *arrêt Blanco* (1873), decided a claim for damages filed by the parents of a child hit by a van belonging to a state tobacco company. The court agreed the norms of the civil code could not be applied the liability of the state and public officers and the question was excluded from the jurisdiction of the civil courts. This thesis, considered a historical mistake by other authors, including french (P.M. Eisemann[4]), assumed a conception of administrative law as

[3] S. Cassese, *Le basi del diritto amministrativo*, (1989).
[4] P.M. Eisemann, *Cours de droit administratif*, I, (1982).

a right of privilege of public administration, rather than as a law designed to eliminate privileges not required by the function to absolve. If the thesis was well founded, this would imply the end of discipline due to the establishment of the application of the civil norms on liability to the public administration.

The events that led to the juridicalization of power and thus to the formation of administrative law has developed, like any historical process, in the long and bumpy paths that differ in the single countries, with accelerations and reversals. The maturation of the idea that power is subject to the law has been slow and arduous, and has never been fully acquired. It must therefore be assumed that there is not an exact date for the birth of administrative law but, rather, a historical period that can be identified in the first half of the 1800.

Administrative law has not the only task of put in general terms the problem of power and safeguard of necessary protected interests. This discipline, however, is particularly suited to the study of the dynamics of relationships between individuals and communities and allows verification in a real way in which historical relations are settled, an equilibrium that is given to the needs, interests, duties and powers.

1.1.1. The necessity of power and necessary memberships

The necessity of power derives from the existence of interests that the people cannot reach alone and implies the membership in an organized community.

In the western world, the explanation is dated back to Aristotle who clarified that human beings naturally belong to social groups, because «beings that cannot exist separately, unite» (Pol. 2,26) and give birth to families, villages and cities (understood as states) that form when «the limit of complete auto-sufficiency is obtained that makes life possible, rather, a good life» (2.30).

The membership of these communities is therefore necessary for life itself (2.30). In the presence of necessary protected interests there must be a suitable organization to satisfy them, and this must have powers.

This finding is not controvertible or historically dated except in reference to the state as a self-sufficient entity. The

"power" has the capability to effect the legal situation of individuals through unilateral acts that could modify the legal sphere of individuals without their consent, and even against their will.

Thus, the legitimacy ways of the powers exercise are variables, even though they may be fundamental, such as the democratic variable. Much of the legal and political sciences have focused on these variables, often underestimating their assumption or taking them for granted.

Against the idea of necessary membership there were a myriad of theories that, in more radical forms, are expressions of the difficulties to accept human condition.

Many of these theories can be explained as a reaction to the binding memberships that have repeatedly and under different forms, compressed freedom: the dependence between people in the Middle Age, corporations in the period until after the French Revolution, when the Le Chapelier Law (1791) overruled these forms of belonging, creating a political system formally based on freedom and equality but essentially an expression of the interests of the bourgeoisie. In fact, the Le Chapelier law, not by chance, made illegal any type of association, even forbidding «all agreements to refuse to work if not at a determined price» and impeding the formation of unions, while middle classes were organized with professional bodies and chambers of commerce (G. Rossi[5]).

The hostility to the power, in the form it has taken (P. Grossi[6]), leads one to deny the legitimacy of all forms of institutionalized power (P.J. Proudon[7]), to promote their destruction in violent ways (M. Bakunin[8]) or theorizing the end of the state, based on class antagonism (C. Marx[9], Engels[10]) and then destined to disappear with the disappearance of social classes.

The intolerance against power is manifested, as is well known, even in individualistic conceptions which, while not denying the necessity of power, have led to an expression of

[5] G. Rossi, *Enti pubblici associativi*, (1979).
[6] P. Grossi, *Prima lezione di diritto*, (2003).
[7] P.J. Proudon , *Cosa è la proprietà*, (1840).
[8] M. Bakunin, *Stato e anarchia*, (1873).
[9] C. Marx, *Manifesto of the Communist Party*, (1848).
[10] F. Engels, *Anti-Dhring*, III, 45 (1877).

freedom of the individual theorizing its contractual foundations (J.J. Rousseau[11]), permanently subject to revocation and therefore not obliged, or have theorized the "minimal state": «the state must delimit its activity as much as possible and when compelling reasons do not prevent such» (W. von Humboldt[12]). Assuming that power is opposed to freedom, it is allowed to be exercised no more that the minimum indispensible.

These currents of thought, despite having lost over time the early radical set-up, have continued to surface (see eg. H.S. Maine[13] who described the history of mankind as a passage from status - positions of membership – to the contract, leading to deny any legal effect to be a member of a family), up to contemporary authors who, in a context of economic globalization, theorized the primacy of "market" to the state (this thesis was that prevailing for several decades).

It is clear that the issue could be developed in many different way because of various interests connected.

It remains non-controversial however, the observation of Aristotle, if not on a purely theoretical level, it is correct to assume as a basis for reflection on public law, and in particular on administrative law, the existence of interests that the individual cannot meet alone and implicates the membership to the community with powers. Einstein's[14] consideration may be exact, that even the most basic assumption contains in itself, inevitably, a subjective option, yet a science such as law, which has no intent of abstract speculation in as much as is limited to study the rules of the legal relationships between people and between them and the community, in fact it cannot consider the arbitrary determination of human social character and then the required membership of social aggregates, as is confirmed by the rest of the positive law of every country in every period of history.

[11] J.J. Rousseau, *Il contratto sociale*, (1762).
[12] W. von Humboldt, *Saggio sui limiti dell'attività dello stato* (1773), trans. to it. Milano (1965).
[13] H.S. Maine, *From status to contract*, in *Ancient Law: Its connection with Early History of Society and its Relations to Modern Ideas*, (1861).
[14] A. Einstein, *Come io vedo il mondo*, trans. to it. (1975).

1.1.2. The gradation of memberships

Memberships are variably graduated and range from forms of absolute necessity to forms that derive from free choices, increasingly similar to a contract.

Distinction should be made between those social groups that hold interests connected to the objective conditions of life or otherwise historically objectified, and those that are remitted to the will of the individual in relation to which organizations may be formed that remain to the availability of individuals (T. Ascarelli[15]); *Gemeischaft* and *Gesellsschaft* (F. Tonnies[16]).

Membership is necessary for the essential profiles that relate to community life, families and local authorities are now considered: birth is not a voluntary act and the legal consequences that arise from it in order of family relationships and membership in an organized community are not attributable to voluntary acts, which become *ipso facto* holders of instrumental powers and duties primarily above all for the protection of new life. The legal systems connect to the family relationship a series of legal consequences to varying degrees for the protection of minors without parents. Also membership to a state is required; international law qualifies such as a human right to have a nationality (Article 15 of the Universal Declaration of Human Rights, 1948) and protection of stateless persons, sanctioning a series of rights for the period necessary to obtain such (New York Convention, 1954).

Beyond these profiles, the variations in the type and degree of membership are related to the single legal systems according to a set of conditions, namely economic, social and cultural factors that characterize them in a specific historical period.

The progressive acceleration of the dynamics of economic and social relations, that have occurred in recent times, have worked in the sense to diminish required membership conditions, by removing those related to religious faith (e.g. *cuius regio, eius religio*), decreasing those related to family life and the exercise of professions. At the same time the interests the law considers of necessary protection, that imply the membership in communities

[15] T. Ascarelli, *Considerazioni in tema di società e personalità giuridica*, in *Riv. dir. comm.*, I, 247 (1954).

[16] F. Tonnies, *Comunità e società* (1887), trans. to it. (1963).

that are able and have obligation to satisfy them have been increased: dating back to R. von Jhering's[17] observation that «man depends on others for the satisfaction of his own interests in an increasing manner as they increase».

It can refer to territorial or sectorial collectively, such as those that organize sports, forms of assistance or professional activities. The ways and degrees of belonging vary over time and in the single systems and include constraints on membership, or just pre-determined effects resulting from free choices (whether or not to exercise a profession or a sport) that however relate to essential interests.

Binding memberships, in the given context, that are not necessary for the safeguard of necessary satisfied interests have pirated nature of freedom; the theses, that do not require any form of membership, do not take human condition into account, in which human essential interests can be satisfied only through social organizations.

1.2. The source of power: derivation from the state or social bodies

The thematic of the necessity of power should not be confused with the issue of its source. Clarified that power is necessary we must ask from whence it came.

The problem is examined here with reference to legal science and in particular to administrative law, being out of place here to address the whole issue of power and recall the multiplicity of philosophical, political science and sociological theories available .

Legal science has elaborated two lines of thought that were formed in the second half of the 1800's.

The first goes back to the authors of the German school of public law (C.F. von Gerber[18] P. Laband[19], O. Mayer[20]) which considered the state as the source of all power. The power of the state, understood as a legal body, for a long time the one, no

[17] R. von Jhering, *Lo scopo nel diritto* (1877), trans. to it. (1972).
[18] F. von Gerber, *Sui diritti pubblici* (1852), trans. to it. (1971).
[19] P. Laband, *Il diritto pubblico dell'impero germanico* (1876), trans. to it. (1925).
[20] O. Mayer, *Deutsche Verwaltungsrecht*, (1893).

longer lays in the autocracy of the "sovereign" but it has inherited characters transferring them to the "law". The principle of unity of state power is maintained, but the source is modifiable.

The theory has represented an important evolution respect to previous conceptions (J.L. Carro Fernández Valmayor[21]). The pandectistic school of F.C. von Savigny[22] had actualized the individualistic categories of Roman law and placed in the centre of its elaboration the concept of «fictitious legal person» (intending that a legal entity other than the individual can exist only in fiction). From this setting G.F. von Gerber used the concept of legal person applying it to the state, making it «the premise of every legal structure of public law». The population as a legal entity is realized only through the state. The prince is no longer the holder of sovereignty (M. Nigro[23]), but the state absorbs all forms of power: «citizens, municipalities and territory are natural objects of state power, in the dominium of which it manifests its peculiar essence».

The second explanation of power has been developed almost simultaneously, also in Germany, by O. von Gierke[24] and his school: the thesis is that at the base of power there is a social body, every social body.

Thus, the power derives, in this setting, even by the state, but the state is one of the social bodies, and so there are minority communities, territorial and non: the municipalities, associations and families. Gierke noted that Gerber's theory of the state had assumed the power of this as a postulate, of which no explanation was provided, because he has not researched the underlying reasons. These are identified in the associative character of the state, and more generally in the reality of the associations, the substantial existence of organisms carrying scopes that transcend the goals of individuals.

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[21] J.L. Carro Fernández Valmayor, *La doctrina clásica alemana sobre la personalidad jurídica del Estado. Notas de una relectura*, in *Homenaje a Manuel Francisco Clavero Arèvalo*, (1994).

[22] F.C. von Savigny, *Sistema del diritto romano attuale* (1840-1849), trans. to it., (1888).

[23] M. Nigro, *Il segreto di* Gerber, in *Quad. fior.*, 293 (1973).

[24] O. von Gierke, *Das deutsche Genossenschaftrecht*, (1868), then completed with three more volumes (1873, 1881, 1903).

Hence Gierke's criticism of the theory of the artificial character of the legal personality of the over individuals bodies (see. R. Orestano[25], P. Rescigno[26], M. Fioravanti[27], A. Massera[28] and for other countries P. Legendre[29], E. Fortshoff[30], S.M. Retortillo Baquer[31]). The importance of the contribution of Gierke was widely felt in Italy, especially by the doctrine of private law: thus F. Ferrara[32] has sustained that «the modern doctrine has not done other than develop and elaborate the concept of Gierke, stripping its poetic veil and *transcendency*». F. Ferrara noted, that merit should be given to Gierke[33] for the elaboration of the concept of "institution", taken from the canonical doctrine and then widely used by public law doctrine; as it will be used, and will become the common heritage of legal science, the concept of "body" and the underlining of the difference between this notion and that of representation.

Gierke, referring back to the currents of thought (G. Althusius[34] e U. Grozio[35]) had affirmed the autonomy of the various forms of social organization in the period of absolutism, underlined the totalitarian implications of unitary conceptions of power, whilst remarking that, at the opposite extreme, an excessive articulation leads to the fragmentation of organizations.

The two theses, in their net formulations, appear in an irreducible contrast and the declared or implied adherence to either of these is reflected in the definitions that are given to individual legal institutions.

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[25] R. Orestano, *Il "problema delle persone giuridiche" in diritto romano*, (1968).
[26] P. Rescigno, *Persona e comunità*, Padova (1988).
[27] M. Fioravanti, *Savigny e la scienza del diritto pubblico del XIX secolo*, in *Quad. fior.*, 319 (1980).
[28] A. Massera, *Contributo allo studio delle figure soggettive nel diritto amministrativo*, I, (1986).
[29] P. Legendre, *Historie de l'administration de 1750 a nos jours*, (1968).
[30] E. Fortshoff, *Traité de droit administratif allemand*, IX ed., trans. to franc., (1969).
[31] S.M. Retortillo Baquer, *El derecho civil en la génesis del derecho administrativo y de sus instituciones*, (1996).
[32] F. Ferrara, *Teoria delle persone giuridiche*, (1915).
[33] O. von Gierke, *Giovanni Althusius e lo sviluppo storico delle teorie giusnaturalistiche* (1880), trans. to it. (1943).
[34] G. Althusius, *Politica* (1603).
[35] U. Grozio, *De iure belli ac pacis*, (1625).

Thus, for example, if the power of the municipality originates from itself or is derived from the state, and therefore whether the notion of autonomy indicates the power owned by a determined organism, at most "recognized", strengthened and conditioned by a higher power, or if the autonomies can only derive from an act of the state. Furthermore, for example, if the legal personality of the supra-individual bodies is granted by the state or must be understood as its own intrinsic feature or if the "subjective right" should be qualified as a power "attributed" by the system or simply "recognized" by the same (R. Orestano[25]).

However the intermediate positions are prevalent in scientific elaborations, which start, on one hand, from the assumption of reality, plurality and originality of the phenomena of social groups and, on the other hand, that attribute to the law, to the manifestation of the will of the state, the character of the source of any form of legal power.

Thus Santi Romano[36], whose work on "*Ordinamento giuridico*" (Legal Order) (1917) is considered by legal science as a cornerstone of pluralistic theories, as theorized the plurality of legal systems (there is a legal system every time a social body has its own organization and norm making power), adopted an intermediate position: each social body has its own power, which does not come from the state, but the state is a unique institution of its kind, that is qualitatively different from other social bodies. N. Bobbio observed exactly[37] that Santi Romano was theoretically pluralistic yet ideologically monist. The same observation can be made from the setting of M.S. Giannini. Thus, again, E. Garcia de Enterria[38], the leader of the current science of administrative law in Spain, after having revealed the Hegelian inspiration that underlies the theory of legal personality of the state, disputed the thesis that the state has legal personality, which he attributed to public administration.

[36] Santi Romano, *Il comune*, in *Trattato Orlando*, II, (1907).
[37] N. Bobbio, *Dalla struttura alla funzione*, (2007).
[38] E. García de Enterría, *Principi di diritto amministrativo* (1974) trans. to it. (1983).

1.3 Needs, interests, subjective legal situations[39]

Now the notion of "necessary protected interests" must be defined depth, distinguishing them from others that may appear analogous or similar and from those which are, instead, different.

The problematic is complex because the very notion of "interest" is among the most frequently used by legal science and, together, one of the most inaccurate (E. Betti[40], A. Rocco[41], A. Falzea[42], L. Bigliazzi Geri[43]), so much so that the definitions given by legal science are the most different.

The different theories are inspired by a subjective conception (interest is what is perceived as such by a subject), or an objective conception, understood as objective existence of the interest on a substantial plain (the interest is a fact that is independent from "the will": one may have an interest without even wanting it), or, even, a normativistic conception (it is the norm that identifies the interests and then, in a certain sense, determines it). The theses underline different ways of conceiving law. Beyond the different shades, these can be grouped into:

1. normativist or substantialist, depending on what is placed at the centre of the qualification, the norm or substantial interest;
2. subjectivist or objectivist, depending on prominent reference to the subject carrier or to the "objectified" interest.

An approach should aim to reduce the opinionable implication, arriving to make the notion practicable, leading to adopt the notion of interest as the "relationship between a subject and a good" (A. Falzea[42], S. Pugliatti[44]).

A further step may then be taken by distinguishing the interest from need and from the subjective legal situation.

The "need" is the subjective perception of the interest that cannot be object of assessment. Even imaginary needs could exist or that, being totally referred to a subjective dimension, do not

[39] This term here can be translated as all those legal situations giving rise to actionable rights.

[40] E. Betti, *Interesse, Teoria generale*, in *Noviss. dig. it*. (1962).

[41] A. Rocco, *I concetti di "bene" e di "interesse" nel diritto penale e nella teoria generale del diritto*, in *Riv. int. sc. giur*., 59 (1910).

[42] A. Falzea, *Il soggetto nel sistema dei fenomeni giuridici*, (1993).

[43] L. Bigliazzi Geri, *Interesse legittimo: diritto privato*, in *Dig. disc. priv*. (1993).

[44] S. Pugliatti, *Esecuzione forzata e diritto sostanziale*, (1935).

have any legal significance. Such as, for example, the need for love.

As for "interest", the relationship between subject and good is a substantial situation relevant for law. Such is for example the interest in bargaining or to purchase a property. The "subjective legal situation" has in itself the substantial case and juridical qualification intrinsically connected; it is an interest to which the legal system confers protection by configuring it as a subjective right or other protected situation.

The legal phenomenon, explained S. Pugliatti[44] and A. Falzea[42], consists of two sets of elements, "a formal element and a substantial element", which in their connection give rise to legal institutions.

In stressing the contemporary presence in the legal phenomenon of formal and materials elements these authors have re-taken the theses of O. von Gierke[24]. The notion of "legal relevance" has been proposed by B. Donati[45], and taken up by A. Falzea and by various authors.

It should be noted that diverse norms, starting from the Constitution, and judges of all kinds, make extensive use of the notion of interest, identified as a substantial prerequisite of legitimacy and place the parameter of legitimacy of norms and acts.

1.3.1. Necessary satisfied interests

With the term "necessary protected interests" are defined those interests that, in a given contest whether historical, social, cultural, economic and political, collective communities can and must necessarily satisfy. These are community interests as a whole (safety, development, welfare), of social groups, of individuals whom correspond to a situation at least potential of dutifulness by public administrations.

This definition does not have legal but substantial character: as for other interests, those necessary protected constitute the substantial profile susceptible to giving rise to "rights" in the presence of a legal qualification; to be necessary protected it does not determine itself their transformation into

[45] B. Donati, *Interesse e attività giuridica*, (1909).

subjective legal situations that can only be realized when the dutiful potential becomes concrete and eligible. In many cases, therefore, they coincide with the "rights", but these can also not coincide.

Thus, for example, the interest of health, certainly considered "necessary protected", becomes an subjective right towards public administration only when certain normative and organizational conditions are fulfilled; the interest for recovery in the case of disease becomes a right when there is a hospital structure.

This explains how necessary protected interests can be satisfied even by the market, acquiring satisfaction through free contractual acts; and if it is not possible the public power has a duty to ensure and foresee that satisfaction occurs. Thus, for example, there is no doubt that the interest on food is a necessary protected one, without that this determines itself the rising of legal situations towards public administration, whose task is limited to guarantee that the market will provide with adequate economic and hygienic conditions, but may otherwise require operative performance obligations (for example due to disasters or to meet particular situations of poverty).

1.4. Self-satisfaction and necessary satisfaction, "market" and "state"

Necessary protected interests can be met through liberal forms of negotiation (the so-called "market"), but at the same time there is a dutifulness of the public power to put into place the necessary tools to ensure its satisfaction. This co-presence of "state" and "market" (K. Popper[46]) centralizes the question of boundaries of both and the relationship between them.

The balance point between them is the most significant indicator of the type of asset of political systems, of the preference given to the collective or individual sphere. Every specific solution is historically dated; there are no optimal solutions and each choice is based on questionable value judgments (D. Helm [47], J.E.

[46] K. Popper, *La lezione di questo secolo*, (1992).

[47] D. Helm, *I confini economici dello Stato*, in *Regolazione e/o privatizzazione*, Quaderni Formez, n. 18, (1992).

Stiglitz [48], P. Krugman[49]). Also from the value judgment derives the theories of the primacy of the market on the state, or viceversa, when it is established *a priori*, without verifications in terms of advantages and disadvantages that each choice involves in the protection of interests or in the sacrifice of interests.

These observations seem obvious, but have been re-proposed in recent years (S. Cassese[50], G. Rossi[51]) after that, as a result of economic globalization, the prevalent orientations were in the sense of unquestionable primacy of the market. Rather than analyze the recurring economic cycles in their historical dimension, the economic and legal science had made absolute the momentary evolution, in a liberal sense, as in the past, during the expansion of the public sphere, the evolution in the public sense was made absolute.

Despite the economic and political cycles, wealth, in contemporary legal systems, is absorbed in variable yet in always very high percentages by the public sphere.

Just after political option on the quantity and quality of interests to consider to be necessary protected the problems on concrete ways to ensure substantial and judicial protection are then placed.

At the two extremes there is a full freedom on one side and the total regulation and public management on the other.

Between these two extremes, the gradation measures heavily on positive law and goes from various types of regulation and control, to prevent abuses in the performance of freedom, to protect third parties who are involved (for example guarantees hygiene and quality of operators and products, determination of standards, regulations of various kinds), to the management by accredited persons (as part of the health service) and moreover to the co-presence of free, social and public modalities of management.

2. The *juridicalization* of power

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[48] J.E. Stiglitz, *Il ruolo economico dello Stato*, trans. to it. (1992).

[49] P. Krugman, *La coscienza di un* liberal, trans. to it. (2008).

[50] S. Cassese, *Stato e mercato, dopo privatizzazioni e* deregulation, in *Riv. trim. dir. pubbl.*, 382 (1991).

[51] G. Rossi, *Pubblico e privato nell'economia di fine secolo*, in AA.VV., *Le trasformazioni del diritto amministrativo*, (1995); and Id., Riflessioni *sulle funzioni dello stato nell'economia e nella redistribuzione della ricchezza*, in *Dir. pubbl.*, 289 (1997).

2.1. The characters of *juridicalizated* power

Every form of power involves the possibility to affect the sphere of other subjects without and even against their will. This characteristic of power does not fail if its exercise is designed to care for the interests of the recipients (e.g. education or health service). The observation that the purpose and also the fundamental legitimacy of power consists in the welfare of the community and its members is acquired from the earliest philosophical reflections, but remains at the pre-legal level. The idea of power as a service to the community and the people who compose it indicates an auspicious "must".

According to Aristotle[52] «each community is constituted to reach a good"; according to Thomas Aquinas[53], «*civitatis ordinetur ad aliquod bonum, sicut ad finem*», according to Cicerone[54], the state has as its scope, the happiness of its citizens, «*beata civium vita*».

Due to its juridicalization, of which the gradual and never definitive acquisitions will be seen, the idea of power as a service assumes a legally defined configuration. The power remains the same, but acquires features that result in a qualitative change.

1. First, the source of the power is external to this. The need for justification that has always been felt is resolved, not or at least not only, with ideological expediency, as derived by the grace of God or the will of the nation or of the people, but from a specific source that affects the existence, the scope and mode of exercise. The source is the law. It is not decisive in determining the nature of power, the fact that it is itself the sovereign himself (later the parliament) to establish the law, it is crucial that he also submits (no longer the *legibus solutus*) ; public power is then "allocated" by an external source and there is a judge who ensures compliance.

2. The power is, within itself, articulated in the sense that there is no single person or body which fully possess it.

3. The interests for the satisfaction of which the power is attributed are not those of the holder of the power but those of communities of which it is an expression and of the recipients of its activity: the power is therefore directed to care of others

[52] Aristotle, *Politica*, I, 1.
[53] Tommaso d'Aquino, *In octo libros Politicorum Aristotelis expositio*, I, 10.
[54] Cicerone, *De Republica*, I, 25.

interests; it is functional for their protection; from such derives the obligation to explicitly state the reasons of acts.

4. The protection of interests assumes the character of duty, it is not left to a free decision of the public power.

The essential characteristics of juridicalized power are therefore legality, articulation, functionalization and dutiful nature.

Its discipline is left to instruments of public law not only because the power has in itself the authoritative profile but as it has the public discipline that can ensure the dutiful exercise, the funzionalization to the interests to be pursued and the training of suitable apparatus.

Public law can be considered as a derogatory system with respect to private law only by assuming the latter as the normal discipline of legal phenomena. Public law is, conversely, the type of regular discipline of the organization and activity of the collective phenomena of territorial authorities and relationships between communities and individuals. The absence of public law implies the reduction of power to extra-legal dimensions (autocratic, unregulated power; politics).

The notion of power, of authority has taken on negative connotations over time, probably because (P. Grossi[55]) in a context of domination of one social class, first aristocracy then the bourgeoisie, on the others it has been advised by those, and even by sensitive souls, such as arbitrary abuses of power.

It is enough to think about the meaning the term "police" has taken, so different from the Aristotelian idea of the care of *polis*, but also the sense in which the term " state of police " was intended in the second half of 1700 in Austria and Prussia, where it was to indicate the obligation for the public power to pursue common good.

It is important not to confuse the uses of it that have been made with its essential nature in any organized society, useful to all its components, and indeed even more so to those who are less able to self-satisfy their needs. The idea that the juridicalization of power has emerged through a conflict between authority and freedom (from which it follows that the power is opposed to a "good" and should therefore be restricted as much as possible) is

[55] P. Grossi, *Prima lezione di diritto*, cit.

correct from the historical point of view but does not identify the features of authority intended as a service.

That the public power can safeguard necessary protected interests even using private law is increasingly true in as much as these interests are safeguarded through the provision of services and the preparation of infrastructure, through activities that do not only require authoritative acts, but are made better with the contract.

The research of the "reasons" and the limits of the public discipline, does not imply the hiring of private law as a general law with respect to which the specificity of public law must be understood as an exception. This means that it is necessary to verify the suitability of public law to achieve the objective of safeguarding interests.

2.2. Freedom of private individuals, private law and private powers

A clear difference exists in respect to the legal situation of private subjects which is freedom, protected by the legal order that does not pose objectives but negative limits to their actions to guarantee the legal situation of other subjects.

The private subject acts to satisfy a personal interest, even when it comes to an altruist interest that is made as his own freely chosen. The private subject may decide whether or not to act and the reasons that determine the action are, in general, legally irrelevant, given that they are not illegal: the contract is null «when the parties are determined to conclude exclusively for an illegal motive common to both» (eg Art. 1345 c.c).

The legal action of the private subject is exercised in relation to other subjects, it is a relational activity, not solitary, but has no effect in the legal sphere of others except with the concurrence of their will. The safeguard is modeled by the legal system with regard to the interests of a financial nature or otherwise «susceptible of economic evaluation» (Art. 1174 c.c).

The patrimonial nature of the performance should not be confused with the nature of the interest, a patrimonial performance could be made to satisfy a non patrimonial interest

(as a major opinion of R. von Jhering published by V. Scialoja[56]). The fact remains, however, that private law has just the instruments translate interests in patrimonial terms, not even a judge could force a person to "do something", which makes it inadequate to satisfy the interests of the person that are not fully safeguarded by the compensation of damages (T. Ascarelli[57], S. Mazzamuto[58]).

The anchorage to the economic evaluation is not a residue of liberal conceptions, but derives from the nature of the instruments available by private law, in as much as the bond that the legal order can give to inter-private relations cannot go beyond these instruments (M. Giorgianni[59], G. Oppo[60]).

The typical act of private law is the contract, which produces effects only between the parties.

The polarity of the public power implies the unilateralism of acts, the production of effects on beneficiaries without their will, the unavailability of interest and its character normally not patrimonial. The polarity of the private based on *consent* of the recipient for unilateral acts, the *availability* of interest, except in cases established by law, the patrimonial nature or otherwise evaluated in patrimonial terms.

There exists, between private and public law, border areas that presume the two different polarities. The alteration of the typical model is verified as more as the free actions of private determines the consequences of fact on other people when the principle of freedom fades to take account of the interests involved.

Thus, for example, freedom of enterprise, as it involves other subjects and affects their right to work, is variously regulated by different legal systems with the introduction of rules of juridicalization of the employer's power.

It is really felt, especially in the United States of America, the problem of large companies, especially banks that went

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[56] V. Sciajola, in *Arch. Giur.*, vol. XXV (1882).

[57] T. Ascarelli, *Teoria della concorrenza e dei beni materiali*, (1957).

[58] S. Mazzamuto, *L'esecuzione forzata*, in *Trattato di diritto privato*, directed by P. Rescigno, (1985).

[59] M. Giorgianni, *Il diritto privato e i suoi attuali confini*, in *Riv. dir. proc. civ.*, 399 (1961).

[60] G. Oppo, *Diritto privato e interessi pubblici*, in *Riv. dir. proc. civ.*, I, 41 (1994).

bankrupt after the economic crisis and in part have been rendered publicly owned. When a private company due to its very large size becomes essential for the life of a country, its existence cannot be left to the full availability of the owners.

Private powers can be derived from several circumstances of fact: the natural condition of membership in social groups (family) or belonging by free choice (sports groups) or only formally free (subordinate employment) (A. Cicu [61], C.M. ca[62]). The ownership of the financial and economic resources can determine positions of private power, that, occurring only on a substantial level, escape from legal regulation (M. Weber[63], P. Rescigno[64], F. Galgano[65]).

These various types of cases correspond to various gradations of legal relevance, till the considerable conformation of aims and the modalities of operation. This is what happens to the tutor and the curator of incapable people, to the will executor, to administrators of companies and the bankruptcy liquidator.

In general, the degree of juridicalization of private power is less than what has been created for the public powers (G. Lombardi[66], C.M. Bianca[11]).

The U.S. experience of juridicalization of private power drawn by the Supreme Court with reference to the problem of discrimination against African-Americans was significant. The Federal Constitution prohibited discrimination, but the protection was applied against the activities of the state and public powers in general, was not applied against acts of private autonomy. The Court has progressively extended the warranty also to private individuals (such as owners of restaurants and other commercial exercises that forbade entry to African-Americans).

The attempt to force the civil categories that led to theorize an "objectification" of private law, namely an adjustment of relations between individuals which is not affected by the relief of the person's free choice, is the result of ideas that underestimate the value of freedom.

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[61] A. Cicu, *Il diritto di famiglia e teoria fondamentale*, (1914).
[62] C.M. Bianca, *Le autorità private*, (1977).
[63] M. Weber, *Economia e società* (1922), trans. to it. (1961).
[64] P. Rescigno, *Persona e comunità*, (1988).
[65] F. Galgano, *La globalizzazione nello specchio del diritto*, (2005).
[66] G. Lombardi, *Potere privato e diritti fondamentali*, (1970).

The extreme positions that have been added to theorize the abolition of the difference between public law and private law have been followed in the doctrine of private law and public law only in totalitarian contexts.

The assertion of the importance of public law in the protection of subjective situations and the necessary distinction between the public and private law sectors comes across more strongly by those scholars (S. Pugliatti[67], F. Vassalli[68]) who had warned in youth of the risk of totalitarianism present in the theories that deny the distinction between public and private law.

They remind us of the resolution adopted by the Committee of Italo-Germanic Jurists, in the late '30s: «the distinction between public law and private law, as expressing the contrast between community and individual, between state and society, is surpassed by the Fascist and Nazi concepts of the law and the nation». At that time the solution was to bring the whole legal system to the public law, but non different results arrived in denying the distinction of bringing the unitary system to private law. The prevailing thesis in the Soviet thinking of the '20s was that the reduction of the entire juridical phenomenon to the private law ended up in the reduction of public law to politics and instruments of the State to implement the will of the ruling class.

2.3. The minor *juridicalization* of power in Anglo-Saxon countries

The need for public regulation of the exercise of public power, different from that governs the inter-private relations, has been questioned by the thesis that this legal system's choice of structure is characteristic of continental European countries only ("Administrative law" countries) and not those Anglo-Saxon, in which the activity of public administration and its relationships with private are governed by private law. Since there is no specific discipline, private law is "common-law" to the public and private operators.

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[67] S. Pugliatti, *Diritto pubblico e diritto privato*, in *Enc. dir*. (1964).

[68] F. Vassalli, *Diritto pubblico e privato in materia in materia matrimoniale*, in *Arch. eccl*. (1939).

The thesis that Anglo-Saxon countries are deprived of administrative law has been asserted by many schoars (M.S. Giannini[69]) and is derived by the influence of the work by A.V. Dicey[70], which expressed a liberal orientation, opposing the expansion of the public sphere and thus to a specific regulation for the public sector. A.V. Dicey was in turn influenced by A. de Tocqueville[71], hostile to the development of French administrative law and the existence of a special litigation for public administration. According to this view in Anglo-Saxon law the exclusive principle of "rule of law" exists. Among the many and uncertain meanings that have been given to this principle (T. Bingham of Cornhill[72]) these authors interpret these results to mean a same law to public and private subjects, submitted to the same judge.

The thesis contains some correct features and some misunderstandings.

The Anglo-Saxon system is different from continental one in several more general respects, from the absence of a constitution in England (although there are several constitutional laws) and a civil code, to the different role of judges of the scarcity of statutory acts. The character of a people jealous of individual freedom and intolerant of harassment, favoritism and falsehood has allowed the formation of a body of sufficiently impartial judges, that judge through equity (A. de Tocqueville[20]). This fact may have produced a lower need for special protection of the citizen against the public administration and for a long time, however, the formation of administrative justice different from the ordinary one was missing.

The historical analyses agree in pointing out the strong spirit of independence of the northern populations (G.M. Trevelyan[73], J. Lindsay[74]), who found in England an institutional response in the non-acceptance of theories of absolutism of the King, in realization of the first parliamentary experience and in the

[69] M.S. Giannini, *Diritto amministrativo*, (1970).
[70] A.V. Dicey, *Lectures introductory to the Study of the Law and Constitution*, (1885).
[71] A. de Tocqueville, *L'antico regime e la rivoluzione* (1865), trans. to it. (1989); Id., *La democrazia in America* (1835-1840), trans. to it. (1992).
[72] L. Bingham of Cornhill, *The rule of law*, Lectio magistralis, on March 14th, 2008, at "Roma Tre" University.
[73] G.M. Trevelyan, *History of England* (1926), trans, to it. (1977).
[74] J. Lindsay, *I normanni*, trans. to it. (1984).

progressive separation of the courts from the king. This institutional asset was formed through a long process that started with the imposition to the King the Magna Charta (1215); this was consolidated with the "glorious revolution" mid-1600 when continental Europe had the formula of the absolute state. Furthermore it is a common observation that the supremacy of the law with respect to the king determined an oligarchic system of power: Barons were camouflaged as interpreters of the common will: «the King must comprehend about community needs from them» (Carmen de Bello Lewensi; C. Barbagallo[75]). «The masterpiece of English aristocracy was making believe for such a long time to the democratic classes of society that the common enemy was the prince, succeeding then to become their representative, rather than their main adversary» (A. de Tocqueville[20]).

The protection afforded by the ordinary courts, however, has proved inadequate and has led to introduce in England analogous forms to those of countries of administrative law, albeit with the formula of a specialized sections of the ordinary judges. The fact remains that some forms of privilege of the public administration, overcome by decades in countries of administrative law, have continued longer in the Anglo-Saxon countries, and still largely remain: thus, for example, the work relationships in the civil service remained configured until recently as not having a contractual nature in as much as the Crown may not have legal relations with their employees; so, again, the state may terminate contracts at any time, without notice, if it considers that the execution is no longer in the public interest because it is the fundamental principle that public prerogatives cannot be bound by the non-exercise.

The lack of specific protection has been confused by several authors as the existence of ordinary protection, rather than a simple lack of protection. It is a mistake which is easily continued as one studies the laws and sentences that exists rather than those that do not.

Some terminological problems have long favored the idea that public authorities in England have been the subject of evidenced juridicalization to the point to use fully and solely

[75] C. Barbagallo, *Storia universale*, III, *Il Medioevo*, (1950).

private law: thus the term "common law", intended as common to the entire nation (G.M. Trevelyan[22]), was understood to refer to the private and public administrations, so, again, the "civil service" does not indicate a statutory scheme of the relationship between administration and civil servants but the distinction between these and the military (M. Ascheri[76]).

The doctrine agrees in pointing out the process of its progressive approach between the Anglo-Saxon system and that of "administrative law", because it evolves in the direction of greater use of private law by public authorities in civil law countries while in Anglo-Saxon countries has now established the existence of administrative law, with important doctrine contributions (P. Craig[77], H. Wade[78]) and attributed to a specialized jurisdiction of ordinary court sections (S. Cassese[79], M.U. Hesserlink[80], G. Napolitano[81]).

The English texts of administrative law deal prevalently with judicial review procedure and procedural issues. The administrative organization is not the subject of extensive studies (see, for example. J. Marston, R. Ward[82] and P. Legland[83], G. Antony), even though it is possible to find studies that treat the matter in an in-depth manner (P. Craig[84]).

Several authors point out the obvious differences between English system, and that observed by the United States of America. The first, though hostile to abstractions and use of the deductive method, has a more formalistic approach, while the second has a more substantial approach, prevalently wary of consequences deriving from their legal choices, which led to the doctrine to develop interesting analyses that jointly utilize social,

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[76] M. Ascheri, *Common law – Ius commune tra dottrina e storia*, in AA.VV., *Relations between the ius commune and English law*, edited by R.H. Helmholz e V. Piergiovanni, (2009).
[77] P. Craig, *Administrative law*, (1983).
[78] H. Wade, *Administrative law*, (1977).
[79] S. Cassese, *Le basi del diritto amministrativo*, cit.
[80] M.U. Hesserlink, *La nuova cultura giuridica europea*, edited by G. Resta, trans. to it. (2005).
[81] G. Napolitano (edited by), *I grandi sistemi del diritto amministrativo, Diritto amministrativo comparato*, (2007).
[82] J. Marston, R. Ward, *Constitutional and Administrative Law*, IV ed., (1997).
[83] P. Leyland, G. Antony, *Administrative Law*, V ed., (2005).
[84] P. Craig, *Administrative law*, fifth ed., (2003).

economic and legal sciences (P.S. Ativah e R.S. Summers[85], U. Mattei[86]).

2.4. Relevance of the emergence of administrative law in China

The subject of administrative law in the People's Republic of China is particularly interesting for the study on the juridicalization of power, because, although with some specificity, over the last decades it is evolving similarly to that, spanning more than a century, has characterized the formation and modification of administrative law in Europe (D. Pappano[87]).

China has had, in the imperial period, consistent administrations, organized according to the Confucian rules, and at the end of the Qing dynasty, early 1900, systems of protection comparable to administrative appeals were introduced, with the appropriate offices for grievances and censors (M. Sabattini, P. Santangelo[88]). The Maoist revolution, on the basis of the principle "yes to the government of man, no to the government of the law", destroyed the public administrations and both materially (in 1970 the number of central government employees decreased from 70,000 to 10,000), and culturally, for the absolute primacy given to politics in the life of the institutions.

After Mao's death, starting from the second half of the '70s, the end of the Cultural Revolution marked the beginning of a process of reconstructing of the legal system, through a series of regulatory interventions in various sectors, especially in civil and commercial law, but also in criminal and administrative law.

In 1982, a new constitution was adopted, and several times later amended. In civil and commercial sectors the general law was approved on the principles of civil law (1986) and then on some specific laws: the company law in 1993 (amended several times), patents (1982 and later updated), inheritance (in 1985 and subsequently amended), on the Foreign Trade (1994), on copyright (in 1990). The penal code and criminal procedure with two

[85] P.S. Ativah, R.S. Summers, *Form and substance in Anglo-american law*, (1987).
[86] U. Mattei, *Common law. Il diritto angloamericano*, (1992).
[87] D. Pappano, *L'emersione di un diritto amministrativo in Cina*, in *Dir. amm.*, n. 3, 212 (2010).
[88] M. Sabattini, P. Santangelo, *Storia della Cina,* (1986).

legislative initiatives (1996 and 1997) that proposed changes to the previous law of 1979 were adopted. In the administrative sector a law on the administrative process was approved in 1989, a law on administrative sanctions referred to as the principle of legality was approved in 1996, a law on compensation for damage caused by the state in 1994.

The evolution of the Chinese system and the resumption of law have been accelerated by the adhesion of China to the World Trade Organization (WTO), completed in 2001, which implies the adoption of principles of administrative consistency, transparency of decision making processes, equality treatment and judicial review of acts of public administration. These principles, introduced for the competence of the WTO, for their vast application have inevitably been of a general nature (R. Cavalieri[89]).

The legislative production and evolution of the legal system took place despite the background of the doctrinal debate on the role of law and its principles on the state of law (Li Buyin[90]) and culminated in 1999 with the introduction in the Constitution (Art. 5, c. 2) of the principle of "country ruled by law" (fǎzhì guójiā· 法治国家), translated into English by the term rule of law or state of law, or sometimes, to better express the instrumental nature, rule by law (G. Ajani[91]).

Since the late 90's to today there have been further legislative actions on contracts (1999), the sources of law (2000), administrative permissions (2003), property rights (2007), mediation and arbitration (2007), regarding labor law (2008), in terms of civil liability (2009).

Chinese jurists are aware that the affermation of the principle of the country ruled by law is not an end point, but it represents a starting point for a new phase of the legal system in which the law is not simply an instrument of government, but rather represents a limit to the action of governments.

[89] R. Cavalieri, *L'adesione della Cina alla WTO. Implicazioni giuridiche*, Lecce (2003).
[90] Li Buyun, *Costitutionalism and China*, (2006).
[91] G. Ajani, *Fa Zhi, rule of law, stato di diritto*, in G. Ajani, J. Luther (edited by), *Modelli giuridici europei nella Cina contemporanea*, (2009).

This has determined the profiles of the control of power and protection of the private entered to the science of administrative law (Luo Haocai[92]).

In China, administrative law, understood as a right of juridicalization of power, is still a young discipline and a newly developed theory. In fact the first text of the General Administrative Law (Wang Mincan, Zhang Shangshuo[93]) was published in the early '80s. Only since 1986, administrative law matters have been included as mandatory in university legal studies. The scientific production is intense, but the books that attempt an arrangement of a general nature are still few (Zhu Weijiu, Wang Chengdong[94]). Instead, the works are mostly informative texts or directed towards didactic or in-depth research on specific topics.

On the doctrinal level, whilst civil principles have been acknowledged and revised even on the basis of the conceptual categories of Roman law (S. Schipani[95]), the scientific production has focused mainly on procedural profiles (Zhu Yikun[96]) and on administrative activity while the theme of organization is starting to arouse interest on significant issues such as the articulation of the public sphere, and state-society relationship (Liu Xin[97], Li Shuzhong[98], Wang Jianquin[99], R. Cavalieri, I. Franceschini[100]). The theoretical horizon in which Chinese jurists move, however, indicates that administrative law is destined to play a major role and that the process of juridicalization of power development can

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92 Luo Haocai, *A theory of balance of contemporary administrative law*, (1997).
93 Wang Mican, Zhang Shangshuo, *Xingzhengfa Gaoyao*, (1893).
94 Zhu Weijiu, Wang Chengdong, *Xingzhengfa Zanlun*, *Teoria fondamentale del diritto amministrativo*, (2005).
95 S. Schipani, *Il diritto romano in Cina, Diritto cinese e sistema giuridico romanistico*, contributions by L. Formichella, G. Terracina, E. Toti, (2005).
96 Zhu Yikun, *China's procedural law*, (2004).
97 Liu Xin, *Le organizzazioni non governative in Cina*, in G. Rossi (edited by), *Stato e società in Cina. Comitati di villaggio, organizzazioni non governative, enti pubblici*, , 25 (2011).
98 Li Shuzhong, *La relazione tra i comitati dei villaggi e i governi locali in Cina*, in G. Rossi (edited by), *Stato e società in Cina. Comitati di villaggio, organizzazioni non governative, enti pubblici*, cit., 13.
99 Wang Janquin, *Explanation on the Theory of NGO*, (2004).
100 R. Cavalieri, I. Franceschini (edited by), *Germogli di società civile in Cina*, (2010).

be found more quickly than those that have occurred in Western countries.

Currently there are forms of protection against prejudicial acts adopted by a public administration.

The choice made in order to the judicial review on the public administration acts has been that of specialized sections of the "people's courts", the ordinary courts. There are also three special judges, regulated by specific laws: military courts, maritime and rail (Zhang Baifeng[101]). However in the legal system, the principle of separation of powers does not exist, and judges are political appointees, and this inevitably affects the appearance of the judicial system.

The administrative litigation law (1989) governs the claim at the people's courts for the annulment of an unlawful administrative act which violates a protected interest of the private, but identifies a list of contestable acts, on which mandatory meaning there is a very strong doctrinaire debate. It is admitted, in alternative to claims to the people's courts, the claim to the same administrative body which has adopted the act or to the superior hierarchic body.

The claim for damages produced by the state (Law 1994) is recognized for any miscarriage of justice (for personal injury) and in case of injury to property and to a business activity. The asset of the sources that govern the relationship between peripheral and top administrative bodies has been defined by law on legislation adopted by the ninth National People's Congress March 15, 2000. The laws approved by the National People's Assembly have higher-level character to those that are approved by the Standing Committee of the Assembly (F.R. Antonelli[102]). Subordinate to the law are the regulations of the State Council, the body at the vertex of central administration, the regulations of the ministries and all the legal sources at the local level (A. Rinella[103]).

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101 Zhang Baifeng (eds), Current judicial system in China, (2005).

102 F.R. Antonelli, *La legge sulla legislazione ed il problema delle fonti nel diritto cinese*, in *Mondo Cinese*, n. 119 (2004).

103 A. Rinella, *Cina*, (2006); Id., *L'attività legislativa in Cina. L'obliquità dell'ordinamento costituzionale cinese tra* rule of law *e pragmatismo*, in *Dir. pubbl. comp. eur.*, 199 (2007).

3. The evolution of administrative law

3.1. The three phases of evolution and scientific elaboration

Each evolutionary process takes place with timescales that can only be distinguished in retrospective and with a good degree of approximation.

However, it is possible to identify, with partially different modalities, in all administrative law countries, three stages in the evolution of the discipline and the scientific development that accompanies it.

a) The initial *juridicalization*

During the nineteenth century, the *juridicalization* of public power was produced through the affirmation of certain principles that have represented a revolution with respect to the previous assets and conceptions.

The innovative principles were those of: a) legality, b) articulation of public power, c) judicial protection of the citizen against illegitimate acts. The essential profiles of the system that are derived reflect the initial, gradual *juridicalization*.

The power of the sovereign outside the law has been increasingly subjected to the principle of legitimacies, even using, as has been seen, the theory of juridical personality of the state. This fact allowed to considered heads of the organs of the state subject to law. The same "sovereign" has become so a part of the state, a part of a larger whole.

The power remains unitary but only in reference to the state, and it is internally articulated. The theory of the tripartite division of powers into legislative, executive and judiciary (Montesquieu[104]) resulted in the breaking of the unitary nature of power: the parliament has the legislative power, but not the enforcement, the government shall implement, through public administration, the laws passed by parliament, the judges, in a position of independence with respect to the government, apply the laws to specific cases.

The "*provvedimento*", the act of public administration, which has authoritative character and therefore imposes to recipients without their consent or against it. It remains effective even if invalid, it is not ever void but only voidable because you cannot

[104] Montesquieu, *Lo spirito delle leggi*, (1748).

prevent or delay the exercise of administrative function; the act that constitutes the exercise of public power has therefore inherited characters of the *actum principis* but is subject to the principle of legitimacy.

The protection of rights against the public administration is theoretically left to the ordinary courts. However, the idea that the administrative power prevails over private rights was so strong that the judges refrained from the application of the norm adducing a pre-textual argument: the subjective right affected by an administrative act, even if illegitimate, ceases to exist, by failing the competence of judges.

The solution to establish a special judge had to be adopted then, after several decades, following the French example, in the Italian case the IV Section of the State Council (l. n. 5982/1889), which then followed the V and VI, attributing to them the competence to decide on claims of incompetence, abuse of power and violation of the law against administrative acts prejudicing "legitimate interests". The claims had to be presented in a short time limit (60 days) under penalty of decadence. Although with different timing and organizational solutions the evolution was similar in all European countries. The main variable was the configuration of the administrative judge as a special judge separate from the "ordinary" (as in France, Germany and Italy) or the attribution of jurisdiction to judge public administrative acts to a specialized section of the ordinary courts (as in England and Spain, where these exist and regulate conflicts of jurisdiction, as well as competence (Title III, Ley Organica No 6/1985).

The control of legality of the act has a formal nature, it is aimed to verify compliance with the scheme established by law, as the judge cannot substitute himself to the administration in the evaluation of the merit of the act. The discretion of administration is a reserved sphere, not under judge's review power.

Contracts of public administration are governed by rules which derogate significantly to those of civil code. In various administrative law countries (e.g. Germany) the notion of "public-law contract" has been developed.

The few public services are organized according to the model of authoritative public functions; the organizational structure of education is ministerial, schools are local offices of the Ministry, teachers are public officers and adopt administrative

acts. More generally, the provision of public service is qualified as administrative performance, admission to the service is an administrative act, and the user fee is a tax.

The administrative organization is based on "ministries", offices organized on military models, according to a "hierarchical principle"; the ministers are placed at the head of them who not only has the political responsibility, but the command of management.

It has to be kept in mind, moreover, that the "liberal" state as was defined the form of state characterizing western countries during the 19th century, had very limited functions compared to those that it has subsequently adopted and which correspond to the needs of a society based on agricultural and commercial economy.

The prevalent setting of the doctrine has reflected and rationalized its characters building on administrative law out of public law, based on the subjective profile, namely on the public nature of the subject of which correspond a different and prominent position to that of the private.

The first administrative law texts were published from the early 1800: in Italy Gian Domenico Romagnosi[105] (1814), in France L.A. Macarel[106] (1818). In Germany, the German school of public law (G. Gerber[107], P. Laband[108], O. Mayer[109]) based dogmatic categories of administrative law in the second half of the 1800. In Spain there are works of various authors: Posada Herrera[110] (1843), M. Colmeiro[111] (1850). In Italy, after valuable works of authors who are defined as pre- orlandian, the academic direction of the German school has been investigated by V.E. Orlando[112], O. Ranelletti[113] and other authors, (of which see S. Cassese[114], A. San-

[105] G.D. Romagnosi, *Principii fondamentali del diritto amministrativo onde tesserne le istituzioni*, Prato (1814).
[106] L.A. Macarel, *Cour de droit administratif*, Paris (1818).
[107] G. Gerber, cit. at 16.
[108] P. Laband, cit. at 17.
[109] O. Mayer, cit. at 18.
[110] J. Posada Herrera, *Lecciones de Administración*, (1842).
[111] M. Colmeiro, *Derecho Administrativo Español*, (1850).
[112] V.E. Orlando, *Principi di diritto amministrativo*, (1915).
[113] O. Ranelletti, Il *concetto di "pubblico" nel diritto*, in *Riv. it. sc. giur.*, 346 (1915).
[114] S. Cassese, cit. at 3.

dulli[115]). The school of Orlando brought to life in Italy the most valuable work inspired by a pluralist approach (Santi Romano[116]), but has prevailed in studies and teaching texts the statalist thesis (G. Zanobini[117]). The French school has focused its elaboration on the concept of public service (M. Hauriou[118], L. Duguit[119]), but it has not derived from it a less authoritative conception of public administration activity. The effect was, rather, to extend to the activity of service the connotations that are of the exercise of authoritative functions.

b) Expansion and consolidation of rights and protections

The second phase of the *juridicalization* of administrative power has origins in the social and political effects consequent of the industrial revolution that led to the formation of a new social class whose needs, especially after the establishment of universal suffrage, have been taken in the public sphere with the consolidation of rights and protections. Democratic constitutions that followed have expanded the rights of citizens and the corresponding duties of public administrations.

In the so-called "welfare state" that has been derived, the activities of public service that are exercised mainly by public institutions and organisms have developed but separate from the state. The public sphere is thus articulated inside not only the governing bodies but in all its organizational structure. Even the autonomy of local authorities has been gradually expanded to arrive to give federal nature to some states.

The services gradually acquire contractual nature and can also be effectuated by private subjects, associations or individuals, leaving to the public power the task of verifying the attainment of social goals. It is formulated then the objective conception of public service that connects the notion not to the subject carrying out the activity but to its finality (U. Pototschnig[120]).

The use of private law by public subjects found further impulse by state intervention in the economy, partly as a result of

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115 A. Sandulli, *Costruire lo Stato. La scienza del diritto amministrativo in Italia (1800-1945)*, (2009).
116 Santi Romano, *Principi di diritto amministrativo*, (1901).
117 G. Zanobini, *Corso di diritto amministrativo*, (1936).
118 M. Hauriou, *Prècis de droit administratif*, (1892).
119 L. Duguit, *Traitè de droit constitutionel*, (1911).
120 U. Pototschnig, *I pubblici servizi*, (1964).

the economic crisis of 1929, which was developed with appropriate public economic entities that manage company activities directly or through the creation of specific public holding companies.

The contractual activity of public administration acquires, above all in Italy, a prevalent civil character with a reduction of public profiles that interfere especially in terms of choice of contractors, to ensure competition amongst these.

The *juridicalization* of administrative power overtakes the first stage of mere submission to law and acquires the characters of duty and functionalization, as have been seen that characterize its *juridicalization*, (F. Benvenuti[121]). Even an administrative organization is legalized and now it is object of study by the doctrine (E. Fortshoff[122], M. Nigro[123], R. Chapus[124]).

This discretional power consists in balancing interests involved in the act of administration (M.S. Giannini[125]) and should be exercised according to a series of acts which the law rules to acquire for the decision. It so passes from attention to the act and from its formal assessment to the relevance of whole administrative activities: the administrative procedure is the normal modality to exercise public power (A.M. Sandulli[126], F. Benvenuti[18]) and in various countries general laws are approved on administrative procedure that introduce or strengthen institutions of transparency and participation in administrative activities of the interested parties (access, head of the procedure, the notice of the proceedings).

The act of administration must be motivated and the judge not only verifies the existence of motivation but also its fairness and congruity. The judicial review of the administrative judge on the excess of power extends the control to keep it very penetrating on the basis of evaluation parameters of the exercise of power (such as equality in treatment, manifested injustice) more similar to those of equity than to those of formal compliance with the law.

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121 F. Benvenuti, *Funzioni amministrative, procedimento, processo*, in *Riv. trim. dir. pubbl.*, 358 (1952); Id., *Appunti di diritto amministrativo*, (1987).
122 E. Forsthoff, cit. at 29.
123 M. Nigro, *Studi sulla funzione organizzatrice*, (1966).
124 R. Chapus, *Droit administratif général*, (1985).
125 M.S. Giannini, cit. at 69.
126 A.M. Sandulli, *Il procedimento amministrativo,* (1967).

The circumstance that the administrative act maintains its efficacy even if invalid and becomes incontestable after the short decadent term has led the Supreme Court and the doctrine to introduce, next to the legality of the act, the figure of "lack of power" that determines the inexistency (or, for others, the nullity) of the Act: in substance, in relation to the most severe forms of illegitimacy such as the absolute lack of power, the situation of the private remains that of the subjective right, and not of legitimate interest, with jurisdiction of ordinary courts and the subsequent, longer decadent times.

For the doctrine, the very notion of legitimate interest acquires the character of a substantial legal situation, the same kind of subjective right, a legal sphere of the private that the legal system intends to protect as such (M. Nigro[127], M.S. Giannini[22]).

In the late 80s the conceptual framework of the *juridicalization* of public power has come to maturity and a series of laws (including, in 1990, No. 142 on the local level, and the Administrative Procedure No. 241) have consolidated the acquisitions of the doctrine and in the decisions of the courts.

c) Ulterior strengthening of protections, disarticulation of power and emphasis of private law

Successively, the third distinguished stage of administrative law, is recorded, on one side, 1) ulterior strengthening of the *juridicalization* of power and the protection against the abuse and inadequacies of public administration, and from the other side, 2) it has been determined the phenomenon of disarticulation of administrative power, of marked suffering towards manifestations and of preference for the use of civilistic instruments in the activity of public administration and in their relationship with the recipients.

c.1) The liability of the administration and the influence of European law

The extension of protection concerned some specific legislative interventions that have strengthened the procedural and proceedings protections (with the Italian code of administrative process in 2010) and the introduction, initially by the work of courts, of civil liability of public administration for damage unjustly caused in the exercise of power. This process also

[127] M. Nigro, *Giustizia amministrativa,* (1973).

concerned a series of institutions related to the consolidation of the European Union and its administrative and judicial institutions.

Most of the administrative law profiles are now disciplined by European Union sources that have overtook the stage of mere realization of the "common market" and sets goals for the modernization of institutions, to protecting the environment, for the harmonization of social and economic development in an entire "community space". The process of harmonization has been accelerated with entry into force of the Treaty of Lisbon (2009), that, while maintaining the character of the European Union as a union of states, increases the scopes, the objectives and the powers of Community bodies (F. Bassanini-G. Tiberi[128], R Bifulco, M. Cartabia, A. Celotto[129]). The "treaties" of European administrative law are now superimposable to those of internal law being largely the same institutes on which they have been found (M.P. Chiti, G. Greco[130]). However, significant differences in the legal systems of all the states remain and it is therefore correct to affirm that there is an European administrative law, yet not an administrative law, common to all European states (M. Almeida Cerreda[131]; see in this matter: v. P.M. Huber[132]) just as, there is an European private law but there is not a "European common law as law in force in the states of the Union" (C. Castronovo, S. Mazzamuto[133]).

The institutions and dogmatic categories of administrative law are not modified significantly by the happenings of European institutions, which, on the contrary, utilize the organizational and procedural instruments drawn from member states legal systems. Rather the need of greater integration between the various economic and social systems provokes the formation of new cases or generalization of those gained in some of the states orders (G. Falcon[134]). For some profiles it causes a more pronounced

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128 F. Bassanini, G. Tiberi (edited by), *Le nuove istituzioni europee,* (2008).
129 R. Bifulco, M. Cartabia, A. Celotto (edited by), *L'Europa dei diritti*, (2002).
130 M.P. Chiti, G. Greco (edited by), *Trattato di diritto amministrativo europeo*, 2th ed., (2007).
131 M. Almeida Cerreda, *La construcción del Derecho Administrativo Europeo*, in *Scientia Iuridica*, vol. 314 (2008).
132 P.M. Huber, *Le istituzioni nazionali nell'architettura europea: Il caso della Germania*, in G. Guzzetta (edited by), *Questioni costituzionali del Governo europeo*, (2003).
133 C. Castronovo, S. Mazzamuto, *Manuale di diritto privato europeo*, III ed. (2007).
134 G. Falcon (edited by), *Il diritto amministrativo dei paesi europei*, (2005).

objectification of administrative law, which is more focused on the pursuing functions rather than on the public nature of the administration. As, for the pursuit of communitarian aims, it is indifferent the public or private law discipline in force in the states. So the organisms that must select contractors through tendering procedures may be public or private if this corresponds to a public substance arising from their particular relationship with public power. Thus, again, publicly or privately owned companies cannot determine different regimes that are not closely related to the functions to be performed.

c.2) Technological evolution, multiplication of rights, privatization, "escape" from administrative law

The phenomenon of disarticulation of administrative power and pressures in favor of private law found their underlying reasons in the technological evolution resulting mainly from the development of electronics and computer science. The speeding-up of relationships put into crisis defined ambits, starting from the states, and thus the institutional context on which administrative law is based.

The size of the market fleeing a territorial delimitation has hence the possibility of control of territorial authorities that suffer an erosion of competences, or even just the ability to exercise them effectively. The erosion is upwards (supranational bodies) and simultaneously downward, i.e. toward minor dimensions, able to express and preserve the most reassuring local specificities.

As the public sphere is itself impervious to the market, the further enlargement of the market will result in a reduction of the public sphere that is achieved through privatization policies.

In almost all countries, public enterprises of management of productive activities and bodies that manage public services have been subject to privatization, mostly transformed into holdings. The "formal privatization" is not always accompanied by the effective one, in the sense of transference of ownership to private individuals ("substantial privatization") which has led parts of the doctrine (G. Rossi[135]) and the courts, initiating from the Constitutional Court (No. 466/1993) to qualify as a public holding company the company that had only undergone an organizational

[135] G. Rossi, *Enti pubblici*, (1991).

transformation from public entity to holding while maintaining other public profiles.

Rarely, the exercise of public functions has been privatized. Furthermore, the decline of the public sphere has paradoxically corresponded to an increase of political bodies and administrative offices. This is due to several circumstances:

a) a rise of regulation functions corresponded to the decrease in management activities with the creation of special bodies (independent administrative authorities);

b) the transfer of functions to local authorities was carried out mostly with overlapping of skills, without the assignment of each of these to a single territorial authority, and with an increase of political representation bodies;

c) there has been a multiplication of the interests, whose satisfaction is deemed necessary, starting by the doctrine and the courts, to be configured as true and real rights. So it increased the quantitative dimensions of the bodies designed for their satisfaction and the spending of public powers, resulting in a structural condition of deficits in public budgets.

The "multiplication of rights" received a decisive contribution by the doctrine of constitutional law and the studies of general theory that have drawn mandatory consequences by the principles contained in the constitution in which rights are broadly stated (A. Cassese[136]).

Even in the minor normative sources such as regional statutes, and even municipal and provincial ones, there are often emphatic declarations.

To the prevalent orientation of the doctrine that underlines how rights are also factors of development (M.U. Hesserlink[137]) have been opposed other neo-liberal inspired theories (H. Bull[138]).

Other authors, while agreeing with the ethical value of the statement of rights, have observed that the rights are met only through appropriate organizations and resources, and are sometimes in conflict with other rights; these are then not multipliable to infinity, with the risk of, in reality, a depletion of

[136] A. Cassese, *I diritti umani oggi*, (2009).
[137] M.U. Hesserlink, *La nuova cultura giuridica europea*, edited by G. Resta, trans. to it. (2005).
[138] H. Bull, *The Anarchical Society*, (1997).

the same notion of right (N. Bobbio[139], S. Holmes e G.R. Sustein[140], G. Sartori[141]).

Even so called "fundamental rights", justly considered as a cornerstone of modern civilization, have gradually multiplied with the risk of removing from the notion any major characterizing significance (L. Ferrajoli[142], A. Cassese [33], A. Sen[143]).

In the administrative doctrine, some scientific works, understandably rare, have demonstrated that certain interests, even if abstractly deserving of protection, are not, in this legal order, a subjective right (see T.R. Fernandez Rodriguez[144]).

The spread of the market and the progressive affirmation of the rights have resulted in the administrative doctrine a clearly favorable orientation to the market and privatizations and also to a narrowing of the public power at least in management activities (G. Corso[145]), but so to the use of private instruments in the exercise of administration functions.

There has been a "flight from administrative law" or at least from the public profiles that have characterized it, upon which broad debate in all countries were opened (C. Marzuoli[146], E. Schmidt Assmann[147], S.M. Retortillo Baquer[148], J. Bermejo Vera[149], J. Barnes[150]).

The process of objectification of administrative law, regardless of the importance of the public nature of the parties forming public administration, has led many authors to deny any

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139 N. Bobbio, *L'età dei diritti*, (1990).

140 J. Holmes, C.R. Sunstein, *The Cost of Rights, Why liberty depends on taxes*, (1999).

141 G. Sartori, *Democrazia. Cosa è*, (1993).

142 L. Ferrajoli, *Diritti fondamentali*, (2001).

143 A. Sen, *Choice, Welfare and Measurement*, (1982).

144 T.R. Fernández Rodríguez, *Demasiados derechos*, in *Derechos fundamentales y otros estudios, Homenaje a L. Martín-Retortillo*, I, 131 (2008).

145 G. Corso, *Manuale di diritto amministrativo*, 4th ed., (2008).

146 C. Marzuoli, *Le privatizzazioni fra pubblico come soggetto e pubblico come regola*, in *Dir. pubbl.*, 392 (1995).

147 E. Schmidt Assmann, *Verwaltungslegitimation als Rechtsbegriff*, in *Arc. Adm. pubbl.*, 140 (1996).

148 L. Martín-Retortillo Baquer, *Reflexiones sobre la "huida del derecho administrativo"*, in *Rev. Adm. Pubbl.*, 140 (1996).

149 J. Bermejo Vera, *El declive de la securidad jurídica en el Ordenamiento plural*, (2005).

150 J. Barnés, *Innovación y reforma en el derecho administrativo*, (2006).

relevance to the subjective profiles, to support namely that the public nature of the subject does not imply any legal consequence. The orientation to challenge the need of a specific jurisdiction by authoritative acts of the public administration is diffuse, as well as the authoritative character of the acts or even the need of public law.

3.2. The roots of the crisis. The problem of adequacy

The context in which the crisis of the state and authority is determined is not only related to the development of the global market but has earlier and deeper roots over which reflections of political science have been exercised.

The fall of rationality, diffuse subjectivism, the loss of the securities that were tied to the more static nature of society, have resulted in a phenomenon of fragmentation in all the arts and sciences. In philosophy and architecture deconstructionism has been affirmed, in music the dodecaphony, in painting abstract art, in physics quantum physics; sociology, in particular with structuralism, has sought to identify the criteria for simplification of complex systems, even mathematics has abandoned the deductive method and adopted a probabilistic approach or has sought, through set theory, rational models to compose the differences and complex relationships; through topology, now geometry studies continuous transformations.

Even legal science finds no exception to fragmentation in act. In all its disciplines, the so called "*mega-concepts*" are in crisis, such as "contract" or "legal person", or sharp distinction between private law and public law, because the articulation of cases erode the legal concepts.

The thesis of the "death of contract" for example, has been advanced (G. Gilmore[151]) on the basis of the decisions of the U.S. courts that declared «what may be good for General Motors does not have sense when applied to non-profit organizations, Pre-marital conventions and the constitutions of file annuities».

The notion of "legal personality", after the end of the dispute about whether it has fictional or substantial character, is to be reduced by many authors to a phenomenon of simple

[151] G. Gilmore, *The Death of Contract*, (1974).

imputation of legal effects of various bodies endowed with various forms of subjectivity (M.S. Giannini[22], R. Orestano[152]).

The articulation between "public" and "private" based on individual-state bipolarity is substituted by the idea that in the generality of cases mixed elements are found, in figures that have in themselves elements of both poles. It is common observation that the instability of social relations and institutional assets determine the constitutional crisis of legal certainty (see, for example, Vera J. Bermejo[153]).

Public law, in particular, is the branch most exposed to change of economic, social and cultural contexts, it is that most hit by changes related to the development of information technology which has brought a different dimension to space and time, reducing or eliminating their relevance. The derived global economy precludes to the states the possibility of governing the financial flow, the resource allocation and environmental protection that is marred by events not constrained in a single territory.

The systems of membership to delimited territorial collectives, from which comes the satisfaction of necessary protected interests, have inevitably entered into a condition of suffering.

The states have lost '"full self-sufficiency," which, since Aristotle, was considered as its essential characteristic.

Some key concepts that underline them have lost their relevance since the notion of "sovereignty" that, however defined, implies self-sufficiency, the ability to govern collective phenomena that affect the community and people.

The term "sovereignty" is still used in the constitutional texts, and even in scientific elaborations, which very often, in recent times, are used to highlight the crisis of the notion (G. Zagrebelsky[154], S. Gambino[155], R. Ferrara[156], G. Ferrajoli[157]) but do not

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[152] R. Orestano, cit. at 25.
[153] J. Bermejo Vera, *El declive de la securidad jurídica en el Ordenamiento plural*, cit.
[154] G. Zagrebelsky, *Il diritto mite*, (1992).
[155] S. Gambino, *Stato e diritti sociali*, (2009).
[156] R. Ferrara, *Introduzione al diritto amministrativo*, (2002).
[157] G. Ferraioli, *La sovranità nel mondo moderno: nascita e crisi dello stato nazionale*, (1997).

emerge the consequences that should be derived and new notions that can replace it.

More in general it is in crisis the same notion of "*ente territoriale*", which is the territorial authority endowed with the capacity to give itself general aims and to make the syntheses of interests of sectoral character. Since there is a misalignment between the territorial levels and the phenomena that should be governed (such as finance and the environment), territorial authorities are not able to govern them (literature is now limitless, v. B. Badie[158], G. Arrighi[159], J.B. Auby[160], M. D'Alberti[161], P. Shankar Jha[162]).

The problem of adequacy has always been the basis of the political systems evolution because the failing of the self-sufficiency requirement has determined their crises. The development of the economy and technologies has gradually changed the areas of communication and thus the spatial aggregation between populations, in a way to extend them until they reach a new level of adequacy.

The crisis of self-sufficient territorial levels has been produced several times when the force of the cycles of economic growth has gone beyond the capacity of what the authors call the "container": the political institution able to regulate it. This kind of crisis marked, firstly, the end of communes, then Italian maritime republics, then the provinces of the Netherlands, the principalities and now determines the crisis of the states (P. Shankar Jha[59]). Taking into account any area of the world, it confirms that the smaller towns were engulfed by larger ones, then these by lordships and principalities, and those by states.

Often, as new phenomena arise from society and economy, and only after institutions adapt to it, the field of functions to be absolved expands faster than that of territorial authorities.

It may therefore happen that a new necessary field to perform the functions does not match to a territorial authority; new complex phases of adjustment derive from it.

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158 B. Badie, *La fin des territoires*, (1995).

159 G. Arrighi, *Il lungo XX secolo*, trad. it. (1999).

160 G.B. Auby, *La globalisation, le droit et l'Etat*, (2003).

161 M. D'Alberti, *Poteri pubblici, mercati e globalizzazione*, (2008).

162 P. Shankar Jha, *Il caos prossimo venturo. Il capitalismo contemporaneo e la crisi delle nazioni*, trans. to It. (2007).

In these cases three alternatives can be determined:

- the first is that the competence is shifted to a broader territorial level: as it was, for example, the shift of sanitary competencies from the municipalities to regions;

- the second is that new specific bodies of a broader level are created: it is the case of the European Union and supranational bodies;

- the third is that the competencies gap remains, even for a long period.

Machiavelli observed in "*Il Principe*", that, unlike other European countries, Italy had not yet been unified, and therefore was not able to express a strong economic and military comparable to that of other nations. It happened due to an authority, the Papacy, too weak to unify but strong enough to prevent others. In fact, the unification has occurred after several centuries.

This process can occur even for minor issues. An evident case is represented as example by such so called metropolitan areas. The large cities absorb a daily flow of people higher than the population residing in the territory of their municipality, with consequent difficulty in regulating the traffic, trade and services. The institutional response, made in various countries, is that of a broader administrative authority, the metropolitan area, corresponding to the basin of the communications that normally take place there. In Italy the solution was established by Act n° 142/1990 and also accepted in the Title V of the Constitution. None have yet been realized because agreement between the municipality of the city and surrounding smaller ones has not yet been found.

4. New perspectives and problems of method

4.1. Beginning of new assets

Every period of crisis prepares future assets. While not accessing the thesis of the inevitable progressive improvement of mankind, expressing a hope often contradicted by history, we can nevertheless understand the beginnings of new assets.

The main ones are:

a) From citizenship to human rights

A shift from the rights of citizenship, connected to

membership in a state, to human rights is occurring.

The Universal Declaration of human rights approved by the UN General Assembly on 10 December 1948, appeared, at first, as a statement of ethical principles with no legal value, but the principles then penetrated into the constitutions of almost all countries. The rules of the Treaties of the European Union, through Art. 6 par. 1, 1 ° C. of the Treaty of Lisbon, have given "the same value as the Treaties" to the Charter of fundamental rights of the European Union (2007) which transposed, with few modifications, the Charter of Nice (2000). The special European Court of Human Rights (ECHR) has so achieved tangible results especially in the area of compensation for the excessive duration of proceedings. Aside this norm, the protection of human rights is destined to increase. The jurisprudence of Italian courts has given a broad interpretation to the constitutional requirements (such as Constitutional Court No 43/2005) and has started to apply the principle of equality to non-citizens. The constitutionalism of rights is taking a transnational dimension, some argue that it is establishing *ius gentium*, which does not derive from agreements between states (international law) but has supranational character. This refers, however, to the thesis that captures an undergoing evolution, yet tends to consider acquired the results of a process that is still in its infancy (v. I Trujillo[163], J. Habermas[164], H. Arendt[165]);

b) the strengthening of supranational bodies; from sovereignty to interdependence

An ongoing strengthening of the supranational bodies is placing and in some cases acquires competences that disregard the consent and intermediation of the states: the UN exercises in a growing manner, going beyond the limits of domestic jurisdiction, military functions to control the armed conflicts or to defend the inviolable rights of man. Supranational bodies have been multiplied even if their powers, when they go beyond treaties

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[163] I. Truyillo, *Ius gentium e ius communicationis*, in *Materiali per una storia della cultura giuridica* (2006) which reproposes the thesis of F. de Vitoria, *Relectio de iudicis* (1539), trans to it., (1996) e di I. Kant, *Per la pace perpetua* (1795), trans. to It., (2002).

[164] J. Habermas, *La costellazione postnazionale. Mercato globale, nazioni e democrazia* (1996), trans. to it., (2002).

[165] H. Arendt, *Vita activa. La condizione umana* (1958), trans. to it., (2001).

between states, are very fragile (Bobbio[166]). The financial crisis has determined a widespread awareness of the need for effective regulation at a worldwide level, the first steps are having place with obvious difficulty.

There is a clear tendency to an aggregation between the states, which is replying an inverse tendency towards a disarticulation of those existing. It is likely that the asset that will determine the next centuries will not be that of a world state which, amongst other things «would run the risk of breaking up for the lack of a cohesive force» (B. Russell[167]), but that of sub-continental states that will try to check the world equilibrium in a multilateral way. This is however, a boundary thematic, on which «futurists find abundant pastures» (M.S. Giannini[168]).

Part of the doctrine sustains that already exists a global legal system, endowed, like all legal systems, power to make law (those derived from international treaties), organization (supranational bodies) and multi-subjectivity (states that compose it) (S. Cassese[169], applying the notion of legal order of Santi Romano).

This thesis reflects an effective need, but it anticipates the timescale of evolution of positive law. The "*teoria della pluralità degli ordinamenti*" (theory of plurality of legal orders) in Santi Romano responds to a substantialistic and anti-formalistic approach and therefore cannot be used without a verification of substantial effectiveness. Santi Romano had addressed the issue of relations between states and had applied his theory to the "international" and not "supranational" law. In more recent work S. Cassese[7] examines in depth a number of interesting sectoral cases of global governance and concludes that «there is not a body of general rules. Hence a weakness of the global legal order, or, rather, of the many global legal orders, not connected into a single system » (see v. J.B. Auby[170], S. Battini[171], G. Della Cananea[172]).

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166 N. Bobbio, *L'età dei diritti*, cit.
167 B. Russel, *Autorità e individuo*, trans. to it., (1949).
168 M.S. Giannini, *Il pubblico potere*, (1986).
169 S. Cassese, *Oltre lo Stato*, (2006); Id., *Il diritto globale*, (2009).
170 G.B. Auby, *La globalizzazion, le droit et l'Etat*, cit.
171 S. Battini, *Amministrazioni senza Stato. Profili di diritto amministrativo internazionale*, (2003).
172 G. della Cananea, *Al di là dei confini statuali*, (2009).

A certain fact is that the disappearance of sovereignty corresponds to the birth of a new asset, still an embryo characterized by interdependence among states. The state carries out a non-sovereign attribution but primary, as subrogation, in the internal legal order that impute to it for the safeguard necessary protected interests even when this is followed by other agencies which fail to exercise them. Consider, for example, the international responsibility of states for marine pollution (act. No. 979/1982) and for the breaches of European Community obligations, or to the set of replacement power foreseen by the Constitution. It must be retained that the state maintains the ultimate responsibility within its territory to protect the community and its components. It remains to the national entities a competence, of primary importance that consists in the power to determine the field of the public sphere and the interests to be protected.

c) The environmental value

The environmental emergency has evidenced, well before the economic crisis the phenomenon of misalignment between the dimensions of the problems and the ambit of institutional assets that should solve them. The value of the environment, which before had only aesthetic character, as in "clear, fresh and sweet waters" sung by Francesco Petrarca, gains legal value over time and determines an inversion in the kinds of interests to be protected, placing the quality of life before those of competition and quantitative increase of goods to be consumed.

New environmental law raises important issues for the established legal categories because:

- it was produced largely from extra-legislative sources (its principles have always been established by case law before it by the Norms);

- it has given rise to "common" interests (not related to determined social bodies) and rights of which cannot belong to only a defined subjects (as the environmental interest belongs to everyone and no-one in particular);

- it has induced organizational solutions that are not complimentary to those already established, but intersect them transversely.

Operational and scientific problems are evident and solutions are still being sought (G. Rossi[173]). A master of administrative law, Feliciano Benvenuti[174] observed that «the theme of the environment is simply fascinating if you want to study law not in its static but in its dynamic properties that is in fact the essence and value».

d) The potentials of information technology

The new systems of communication have changed time and space, have opened new perspectives for human and trade relationships between nations and people and permit to predict new forms of democracy and institutional assets. As observed by St. Thomas, «*communicatio facit domum et civitatem*», the new forms of communication expand the ambit of relations between humans and encourage new forms of connection between people. The produced effects are evident at this stage for trade but not yet for institutional responses (H. Rheingold[175], M. Castells[176]).

Therefore the previous order is in crisis and it is not yet consolidated the next one.

4.2. The essential and gradualist method. The use of set theory

In this context, legal science, and in particular administrative law, faces a problem of method, because the inadequacy of merely deductive approaches and of a mere analysis and exposition of norms is evident (see G. Rossi[177] and vast cited doctrine).

The research of new reconstructive parameters cannot even be founded, as has been seen, on the progressive enlargement of previous concepts that, expanding, become more and more evanescent.

Some German and Spanish authors, for example, have extended the concept of administrative proceedings, till referring it to material activity of public administration, business

[173] G. Rossi (edited by), *Diritto dell'ambiente*, (2008).
[174] F. Benvenuti, *Studi dedicati all'ambiente*, in *Arc. giur.*, 3-6 (1982).
[175] H. Rheingold, *Comunità virtuali*, trans to it., (2008).
[176] M. Castells, *La nascita della società in rete* (1996), trans. to it., (2008).
[177] G. Rossi, *Método jurídico y Derecho Administrativo: la investigación de conceptos jurídicos elementales*, in *Der. publ.*, n. 21 (2004).

performance and private processes (E. Schmidt-Assmann[178], J. Barnes[179]).

The observation from which they move is certainly exact: the traditional notion of procedural (the set of acts that precede and prepare the adoption of administrative act) is now too narrow if compared with the wide variety of legal instruments used by administrations. However, the consequences are questionable. The expansion of material activities and services should lead to reduce rather than enlarge the fields of application of procedural instruments and, otherwise, could lead towards an incorrect use of the notion and draw into areas that are outside the public categories profiles of authoritivity that are their own.

The same observation should be made to the use of the notion "Administrative relationship" so much widely expanded by the doctrine, especially by the German (on which see M. Protto[180]), to become inconsistent.

The comprehensive unitary approach is the least suitable for encompassing the elements of novelty and articulation.

There is rather the necessity to go back to the essential elements of coexistence, the relationship between people and communities, of these functions in relation to other individuals and other communities.

How is common to all scientific disciplines, the method can only be that consists in the identification of problems, in their analytical breakdown as simple as possible, of data and of the reconstruction of the concepts and elementary notions. «All things must be studied first of all in its most simple elements » (Aristotle, Pol. I, 3, 5); must «take into consideration the easier things before the more difficult, the common before one's own, the minor before the major» (F. Bacone[181]); «starting from the simplest and easiest objects to know, to climbing gradually, in steps, to the knowledge of more complex» (R. Cartesio[182]); «rest the entire building on the

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[178] E. Shmidt-Assmann, *Pluralidad de estructuras y funciones de los procedimientos administrativos en el Derecho alemán, europeo e internacional*, in J. Barnés (edited by) *Las trasformationes del procedimiento administrativo*, 1 (2008).

[179] J. Barnés, *Reforma e innovación del procedimiento administrativo*, in Id (edited by), *Las trasformationes del procedimiento administrativo*, cit., 11.

[180] M. Protto, *Il rapporto amministrativo*, (2008).

[181] F. Bacone, *Compendium studii philosophiae* (1267).

[182] R. Cartesio, *Discorso sul metodo* (1637).

most simple foundations» (A. Einstein[183]).

For legal science this signifies starting with the analysis of the underlying interests of the legal framework (M.S. Giannini[184]) and for acquisitions that are derived from other social sciences of which have always been tributary (G.D. Romagnosi[185]).

The simplicity of the facts on which the legal dynamics are engaged does not deplete but rather consolidate the analyses in with respect to a defined and assured framework. The best jurists have warned that we should not fear the objection to the excess of simplicity because it requires «to elevate science to the easier views» (G.D. Romagnosi[23]), «true simplicity is mistaken for an indication of low merit ... forgetting that simple are the most perfect artistic and scientific works » (S. Romano[186]).

The few concepts that can be taken with a sufficient degree of objectivity should be fixed (such as freedom, membership, powers, the value of the "territory", individual, collective and general interests), as common and differentiated profiles of groups and of the different polarities that make up the complex phenomena (such as "public" and "private", "administrative act " and "contract", inherent organizational units and articulation and efficiency and participation). It can precede then to breakdown the gradation of one and the other pole that compose them according to the effectuated choices of positive law.

A more ideal approach can be adopted to grasp the elements of systems that are not stable but open and in transformation (E.A. Hayek[187], N. Bobbio[188]), and recompose the groups of cases using logical acquisitions created by new methods of mathematics that consent "system making" without absolutizing the relativity of each one of the elements object of reflection. The essential and gradualist approach treated by set theory can offer suggestions of particular methodological interest, being the most likely to capture the common profiles of different

[183] A. Einstein, cit. at 14.
[184] M.S. Giannini, *Profili storici della scienza del diritto amministrativo*, in *Studi sassaresi* (1940).
[185] G.D. Romagnosi, *Prospetto delle materie insegnate nelle scuole di alta legislazione* (unpublished) (1810).
[186] Santi Romano, *Frammenti di un dizionario giuridico*, (1947).
[187] E.A. Hayek, *La società libera*, trans. to it., (1969).
[188] N. Bobbio, *Dalla struttura alla funzione*, cit.

cases, the "lowest common denominator" that unites them and then rationalize articulated events without simply recording the disarticulation of the cases.

In a context of dematerialization, mobility and crushing, it is the use of the notion of system often implicitly used by legal science, which lends well to individualize ordering criteria (A. Falzea[189], F. Modugno[190], H.L.A. Hart[191], R. Orestano[192], E. Schmidt Assmann[193], R. Barra[194]). The system is based on complexity because it identifies the interrelationships between figures, events, happenings that, due to particular profiles, are part of it and, due to other profiles, comprise other systems. The system does not necessarily converge to a single point and is able to combine the complexity as much as possible in the given context (J.P. Zbilut, A. Giuliani[195]).

4.2.1. Value and limit of the theory of the plurality of legal orders

The essential and gradualist method, which uses the logical system of set theory, lends itself to capture the complex and dynamic sets more than the theory of the plurality of legal orders. This theory refers to social bodies that tend to be stable: the "legal order" implies a sense of fullness, self-sufficiency, and therefore stability and closure; "relations" can be between legal orders but not interrelations, integrations.

It is merit of the theory of the plurality of legal orders (S. Romano[196]) to have given a dogmatic contribution to the theory of pluralism, founded, as has been seen, on the idea that law derives not only from the state but from all the social bodies. There is a legal order (even in the *societas latronum* in the illegal group for the state legal order) each time that there are three elements (as

[189] A. Falzea, *Le istituzioni del diritto privato verso l'età contemporanea*, in *Riv. dir. civ.*, I, 1 (1998).
[190] F. Modugno, *Sistema giuridico*, in *Enc. giur. Treccani*, (1993).
[191] H.L.A. Hart, *Il concetto di diritto*, trans. to it., (1965).
[192] R. Orestano, *Introduzione allo studio del diritto romano*, (1987).
[193] E. Schmidt-Assmann, *La teoría general del derecho administrativo como sistema*, trans. to sp. (2003).
[194] R. Barra, *Temas de Derecho Público*, (2008).
[195] J.P. Zbilut, A. Giuliani, *L'ordine della complessità*, (2009).
[196] S. Romano, *L'ordinamento giuridico* (1918), 2th ed., (1962).

specified by P. Gasparri[197] and then by M.S. Giannini[198]): a social body (and therefore a "multi-subjectivity") that is organized ("organization") and which has its own power making norms ("power to make law").

The theory had the merit to underline the inadequacy of the exclusivity reduction of the law to that produced by the state, which cannot explain the articulation of legal phenomena that occur in society, as trade, the religious confessions, sports associations, cultural and other types of systems.

However, the limit of this theory is the same as that which is just of the opposite statist explanation. If this explains these phenomena only under the point of view of the state legal order, the theory of the plurality of legal orders explain these only in terms of associations, which are seen "as itself", and not in a relationship with a positive legal order that is a qualifying part of their case and that does not remain only external to it.

In reality, the relationship state-associations influences their way to be as they are transformed by their interactions. In simpler terms, the theory of the plurality of legal orders fail to account for the character of legal order (and how it is and functions), which result from the interweaving between different legal orders and interrelations between them.

4.2.2. Applicative examples of the essential and gradualist method

The essential and gradualist method is, in effective, the best way to reap the profiles that characterize cases and differentiate them from those related. Some examples of application confirm this.

a) The concept of a public body

The fragmentation of the cases of public bodies has led a large part of the doctrine to renounce the research for a notion of public entity and to theorize that a unitary concept cannot be individualized. The thesis has the merit of not bringing to a single

[197] P. Gasparri, *Le associazioni sindacali riconosciute*, (1939).

[198] M.S. Giannini, *Prime osservazioni sugli ordinamenti giuridici sportivi*, in *Riv. dir. sport.*, 10 (1949); Id., *Gli elementi degli ordinamenti giuridici*, in *Riv. trim. dir. pubbl.*, 219 (1958).

concept forcibly cases too different amongst them. It does not exist, in effect, only one way to be "public": a public subject can be a manifestation of a territorial authority or of a different social body and may exercise authoritative powers or manage a service or an enterprise. This should not imply, however, to surrender to understand the reason behind the public nature of the entities, because the law often uses the concept of a public body, connecting a series of consequences, and it is therefore necessary to have a parameter to determine if a body must be characterized as public or private.

The analyses of the figures that lead back to this notion show that, despite their differentiation, they are significant profiles common to each of these: the public entities cannot be auto-dissolved, if they exercise a commercial activity they cannot fail, they have a criminal law regime somewhat different and strengthened, their property is destined for a public service, cannot be taken away from their destination, there is always a political responsibility in terms of their operation if not in the manner prescribed by law, and at least a supervisory power is expressed in their existence.

It can be inferred, and this is the essential profile characterizing them, that "they have necessary character according to the local body legal order of reference" and this character is well explained by the fact that the legal order considers as necessary protected the interests that they safeguard.

The different type of activities, and thus the aims, affects the gradation of public profiles that concern them, which are only those compatible with the type of activity (it is wrong for example, the orientation of the decision of the Italian courts, which, unlike other countries, applies the administrative liability to public entities that manage competing economic activities).

b) The protected subjective legal situations

The civil doctrine has led back to the notion of subjective right all legal situations eligible to receive protection by the court. The existence of a subjective right activates a series of legal and operational consequences that guarantee its satisfaction. Interests are then either unprotected or protected, and these are qualified as rights. This approach has made difficult to qualify the subjective legal situations that occur on the exercise of power.

The analyses of cases demonstrate, however, that the protection is more articulated and not reducible to the dichotomy of protected or unprotected interests because there are various gradations in the protection and various circumstances that affect such.

In reality, subjective legal situations are all "relational", they involve other people, with their own subjective inverse, homogeneous or complementary legal situations. Who is alone in the desert has neither rights nor duties. To take a simple example: the right of owner of a house or of a ground lives with the rights of spouses and children, with the right of a bank that has made a mortgage loan, with any rights of servitude, with rights of others to transit and hunt, with the power of the municipality to change the type of availability through planning instruments or change the value by passing or not close to a road or a railroad, or expropriated in whole or in part to build a public work if it is true that the expropriation is only possible, it is eventual to expropriate the property.

The knowledge of the relational character of subjective legal situations consents a unitary essential construction: they are interests protected by the legal order.

The protection, however, has several gradations depending on the type of relationships that they hold. The subjective legal situations have prismatic character: the same relationship between a subject and a good assumes then different qualifications according to the reports that others have with the same good; it is "legitimate interest" the interest protected when it takes into account the profile that relates this to the exercise of power.

c) Administrative act and contract. The gradation of cases

The set of relations (the term used here is in a non-legal sense) between the public administrations and the recipients of their activities, records two cases that consist of two totally different polarities: on one hand there is the administrative act, on the other there is the contract.

The administrative act is a unilateral act that produces effects on third parties. In this definition the core of the case is condensed.

The contract, however, is «the agreement of two or more parties to establish, adjust or settle a legal patrimonial relation» (art. 1321 c.c.)

The typical acts, the administrative act and the contract, are both in the panorama of legal instruments utilized by public administrations and maintain the characters to each one of them. On one side, we have the unilateralism, the production of effects even in the event of invalidity, the effect on recipients without the concurrence of their will, the short limit terms for appeal, the competence of administrative courts; from the other instead, however, we have the agreement of wills, the production of agreed effects, the competence of civil courts.

The law serves in the first case as a source of power and, together, as a binding and parameter of legitimacy, that in the latter gives legal effect to the agreement of wills, and sets limits to the transformation of the freedom of choice.

In reality these characters so definite and opposite each to one another are two borderline cases, that in most cases all of these profiles that characterize them are not found. In many cases the administrative acts are taken at the request of the interested party (e.g a permit), the decision to launch a tender gives rise to a potential competitor a series of rights (to participate in, to access acts, to not be discriminated against).

The types of administrative orders are then articulated and have in common only the unilateral nature and the production of effects that are not derived from the will of the recipients.

The notion of "authoritative act" was formed in the dialectic authority-freedom to be otherwise configured and understood as an act in which is concretized the exercise of power directed towards satisfying necessary protected interests, not being satisfied by individuals and therefore does not require consent to be effective.

In this sense, also binding acts have "authoritative" nature, in which the administration has no discretionary power of choice (such as in the assignment of a contribution to those who have the requirements or enrollment in a public school for those who have applied). Even acts that lead to the selection of the contractor are in this sense authoritative, expression of the exercise of a power that ensures equal treatment of participants in a tender (after all, it is not a coincidence that European Community law has contributed to accentuate the procedure for the choice of a contractor).

The same phenomenon of articulation of cases was verified even regarding the "contract" for a process of objectification of exchange that marginalizes the profile of the will. The acceleration of the relationship has favored the general application to inter-private relations of legal institutes drawn from commercial law aimed at protecting above all the certainty of relations. There are authors who have questioned the possibility of maintaining a general theory of the contract or envisage the necessity to proceed to a decomposition of this notion. However, it still remains, even here, an essential core of the case consisting at least in the freedom "if" to contract and the impossibility to produce effects against third parties.

Administrative act and contract are therefore cases, each of which is divided within itself, and, while remaining distinct and identifiable figures in their core, they include various types of cases, characterized by different degrees of unilateral-consent.

Moreover mixed cases are on the increase, which including profiles of both: the law of procedure provides the possibility of agreements that substitute or integrate the administrative acts; for some administrative acts the discipline of the relationship is left to a contract that accesses to the administrative act, a series of laws provide consensual forms that are sometimes of uncertain legal status (program agreements, program contracts, area contracts, etc..), and finally the contracts are preceded by a procedural phase above all for the choice of the contractor.

With some simplification the mixed cases can be grouped into two categories, according to criteria of prevalence, often used by the legislature:

a) those with a public base, with elements of bilateralism;

b) those with a civil base, with elements of public law.

The distinction is relevant because, even though there remain some margins of interpretation of the border figures once identified the prevalent discipline, the other type of discipline takes special character and should be applied only in as much compatible and in strict terms. A significant example is constructed by the relationship of users of public services that put into crisis the rigid distinction between administrative act and contract.

The nature of the relationship may be different depending on the ways in which the legislature disciplines it. The European

legislation recognizes to the national legal orders the possibility of disciplining it in one way or another (Court of Justice C-254/08 of 2009 on matter of waste). However, the total application of one of the two regimes to this type of case leads to paradoxical results.

Emblematic of this paradox have been two recent sentences by the constitutional court which described the relationship as inherent in the water service as contractual (No. 335/2008) and that concerning the collection and disposal of waste as a tax (No 238/2009). The consequence that the Court has concluded that in the first case the enterprises that managed the service had to return to the users a quote of the price, relating to water purification, because extraneous to the contractual relationship, in the second case, companies had to instead give the paid VAT back to users, as it was not due in a relation that has tributary character.

The solution must be researched starting from the awareness that the administrative act contract dichotomy reflects "limit notions", none of which fully corresponded to the rendering and use of public services. In fact, it is not about authoritative activities but they are always dutiful for the manager of the service and sometimes even for the user. The price is established by administrative act, and often does not match the value of the service. This is not a *tertium genus* because it can be variously disciplined by the norms and there is no clearly identifiable intermediate category between price and tax.

Here too it must be thought of in terms of compression and of gradation of public and private profiles avoiding to apply *in toto* one or the other discipline.

d) The importance of legal personality: legal subjectivity and degrees of autonomy

Another dichotomy that is, together, important and valid, and at the same time, is inadequate is that which distinguishes bodies as having or not having legal personality. After aged disputes on real or fictitious legal entities that at the end of the 1800's have engaged the supporters of institutional pluralism and those of statalism, the issue of legal personality has lost importance, to the point that many people reduce it to a mere question of imputation of legal acts.

That the question still maintains a great importance, though symbolic, is confirmed for example by the fact that, in the intention to reinforce the European institutions, was established in

the new Treaty (Art. 47) that «the European Union has legal personality».

Even in terms of choice of models of public bodies, often the legislator confers legal personality when it intends to allocate a greater autonomy.

The analysis of this case shows, however, that there are entities without legal personality (such as independent administrative authorities) which have a highly accentuated autonomy and others, however (such as primary and secondary education institutions) who have legal personality but little autonomy (except, for example, in teaching).

Here again it is useful to identify a restricted based notion, that of legal subjectivity, and note that the quantity of attributions can receive and autonomy of which can disposal is variously graduated. It is wrong to think that bodies are autonomous or not; they have, however, different degrees of autonomy that may be more or less wide, and that results from a variety of organizational rules (on the statutes and regulations, the appointment of office holders, the duration in office, etc.) and procedural (approvals, estimate or successive authorizations, budget regimes, controls of various kinds).

The fear of part of private law doctrine to legitimize a substantial diversity among human beings, accepting the notion of a legal subjectivity that does not coincide without residue with the legal personality, it does not find a mechanical application in administrative law, where the gradation of *the* ways to be of the subjectivities is completely evident.