

# THE PERPETUATION OF AN “ ANCIENT PREJUDICE ” : PUBLIC SERVICES AND LOCAL GOVERNMENT IN ENGLAND

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## *Abstract*

The article deals with public services in England. More specifically, moving from an analysis of both the legal foundation and the main features of public services, the article gives an overview of the area's evolution from its origins until the present day. In so doing, the research pays particular attention to the role played by local government in both the management and supply of public services. To this end, the waste-management service has been chosen for a case study.

Indeed, the study highlights that local authorities have been gradually losing their powers, while the central Government has augmented its role and expanded its powers. The analysis therefore confirms the endurance of an ancient "prejudice against localism" that, as the legal theorists show, has its roots in the United Kingdom's constitutional tradition.

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## 1. Preliminary considerations

From an Italian administrative-law perspective, the English experience of public services is of interest because it presents peculiar and anomalous features when compared with the domestic and, more generally, the continental European experience<sup>1</sup>. More specifically, the main difference between the English and the Italian approach to public services stems from the absence, in England, of both a legal theory and a general legislative framework, directed, respectively, at defining and regulating the subject-matter<sup>2</sup>.

However, these “lacunae” are not so marked as to justify a negative opinion of the English system of public services. On the contrary, in many respects (e.g. the distinction between regulatory activities and supply activities, or the spread of the Citizens' Charters), England constitutes a sort of pioneer among the European Countries. Indeed, it has been able to anticipate trends that have emerged only several years later not just in Italy but also in other EU Member States and even the European Union<sup>3</sup>.

It would therefore be fairer to say that most of the peculiarities in the English system of public services are closely linked to certain features of England itself, such as its constitutional tradition<sup>4</sup> and the role traditionally accorded local

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<sup>1</sup> G. Morbidelli, *Introduzione: i servizi pubblici locali in Europa*, 3, *Dir. pubbl. comp. eur.*, 783 et seq. (2001). More generally, with regard to the importance of a comparative study of administrative law, see G. della Cananea, *Administrative Law in Europe: a Historical and Comparative Perspective*, 2, *IJPL*, 162, (2009).

<sup>2</sup> See, *inter alia*, C. Graham, *Regulating public utilities. A legal and constitutional approach* (2000); C. Harlow, *Public service, Market Ideology, and Citizenship*, in M. Freedland - S. Sciarra (eds.), *Public services and citizenship in European Law*, (1998); L. Bonechi, *Il servizio pubblico locale in Gran Bretagna*, *Dir. pubbl. comp. eur.*, 3, 788 (2001) and R. Rinaldi, *Citizen's Charter e servizi pubblici in Inghilterra*, in A. Torre - L. Volpe (eds.), *La Costituzione Britannica. Atti del convegno dell'Associazione di Diritto pubblico comparato ed europeo*, Bari, 29 - 30 May 2003 (2005).

<sup>3</sup> T. Prosser, *Regulation, public service and competition law*, P. Chirulli - R. Miccù (eds.), *Il modello europeo di regolazione. Atti della giornata di studio in memoria di Salvatore Cattaneo* (2011).

<sup>4</sup> First of all, see A. V. Dicey, *Introduction to the study of the law of the Constitution*, 10 ed. (1985). See also, more recently, A. Biondi, *Principio di supremazia e "Costituzione" inglese*, in [www.forumquadernicostituzionali.it](http://www.forumquadernicostituzionali.it) (2003); C. Harlow, *Disposing of Dicey: from legal autonomy to constitutional discourse*, in *Political Studies*, 356 (2000); C. Harlow - R. Rawlings, *Law and Administration*, III ed.,

government<sup>5</sup>, as well as the country's approach to the process of European integration<sup>6</sup>.

This paper therefore seeks to study English public services in a manner that takes these peculiarities fully into account. More specifically, moving from an analysis of both the legal foundation and the main features of public services, the article will give an overview of the area's evolution from its origins until the present day. In so doing, the research will pay particular attention to the role played by local government in both the management and supply of public services. To this end, the waste-management service has been chosen for a case study, as analysis can clearly demonstrate the parabolic trajectory traced by local government in England over the last few decades.

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(2009); P. Leyland, *The constitution of the United Kingdom: a contextual analysis*, (2007); A. Torre, *Regno Unito* (2005) and Id., *Interpretare la Costituzione britannica* (1997).

Moreover, the distinction between public and private law is also closely connected to the English constitutional tradition. In this respect see, for instance, C. Harlow, “Public” and “Private” law: definition without distinction, *MLR*, 241 (1980); M. Taggart, *The peculiarities of the English: resisting the public/private law distinction*, P. Craig – R. Rawlings (eds.), *Law and Administration in Europe*, 107 (2003).

<sup>5</sup> S. Troilo, *Il local government britannico: l'ente locale tra rappresentanza della comunità e amministrazione dei servizi pubblici* (1997). See also, R. Hazell – R. Rawlings, *Devolution, Law-making and the Constitution* (2005).

<sup>6</sup> As pointed out by A. Biondi et al. (eds.), *EU Law after Lisbon* (2012), the United Kingdom joined the EEC only in 1972, by way of the European Communities Act. Moreover, as regards the most current aspects of the relationship between the UK and the European Union see, for instance, M. P. Chiti, *Il tramonto della sovranità europea? Il caso esemplare dell'European Union Act 2011 britannico*, 11, *Giorn. Dir. Amm.*, 1228 (2011); M. Elliott, *Constitutional Legislation, European Union Law and the Nature of the United Kingdom's Contemporary Constitution*, 10 *Eu. Const. Law Rev.*, 2, 379 - 392 (2014) and E. A. Imparato, *Il rapporto tra fonti interne ed europee nel British context: luci e ombre della sovereignty of Parliament nella visione giurisprudenziale inglese in alcune note di comparazione con l'Italia, Federalismi.it* (2015). Finally, see also *Dossier sui rapporti tra il Regno Unito e l'Unione europea*, in *Federalismi.it* (2015); M.E. Bartoloni, *La disciplina del recesso dall'Unione europea: una tensione mai sopita tra spinte “costituzionaliste” e resistenze “internazionaliste”*, 2, *RivistaAIC* (2016); C. Curti Gialdino, *Oltre la Brexit: brevi note sulle implicazioni giuridiche e politiche per il futuro prossimo dell'Unione europea*, 13, *Federalismi.it*. (2016); B. De Witte, *The United Kingdom: Towards exit from the EU or towards a different kind of membership?*, 3, *Quad. cost.*, 581 (2016); A. Torre, *In difesa del Parlamento. La High Court of Justice britannica entra in campo sul Brexit*, 53, *Eticaeconomia* (2016).

Indeed, the study highlights that local authorities have been gradually losing their powers, whilst the central Government has augmented its role and expanded its powers. The analysis therefore confirms the endurance of an ancient “prejudice against localism”<sup>7</sup> that, as the legal theorists show, has its roots in the United Kingdom’s constitutional tradition<sup>8</sup>.

## 2. Public service: its legal foundation, features and consequences

Although the term “public service” (and “public utilities” even more so)<sup>9</sup> has long been used in the British legal world, it has no juridical value and is, according to the scholars, merely descriptive,<sup>10</sup>. This is because (and in this it differs from the Italian concept of “*servizio pubblico*”<sup>11</sup>) it has no legal theory underpinning it<sup>12</sup>. This means that “the idea of public service as a basic legal

<sup>7</sup> L. J. Sharpe, *Regionalism in the United Kingdom. The role of social federalism*, H. Wollmann - E. Schroter (eds.), *Comparing the Public Sector Reform in Britain and Germany* (2000).

<sup>8</sup> L. J. Sharpe, *Regionalism in the United Kingdom. The role of social federalism*, cit. at 7. See, also, P. Leyland, *Introduzione al diritto costituzionale del Regno Unito* (2005) and A. Torre, *Regno Unito*, cit. at 4.

<sup>9</sup> For a definition of both “public service” and “public utility” see L. Bonechi, *Il servizio pubblico locale in Gran Bretagna*, cit. at 2 and H. Wollmann - G. Marcou, *The Provision of Public Services in Europe. Between State, Local Government and Market* (2010).

<sup>10</sup> D. Minussi, *Affidamento in-house di servizi pubblici locali: Regno Unito e Italia a confronto*, 4, *Dir. Pubbl. Comp. Eur.*, 1661 (2012) and I. Harden, *The Contracting State* (1992).

<sup>11</sup> See, first of all, A. De Valles, *I servizi pubblici* and G. Zanobini, *L'esercizio privato di pubbliche funzioni*, V. E. Orlando (ed.), *Trattato di diritto amministrativo* (1920). See, in addition, G. Miele, the entry “*Servizio pubblico*”, *Enc. it.* (1936); R. Alessi, *Le prestazioni rese ai privati* (1956); U. Pototshing, *I servizi pubblici* (1964); F. Merusi, *Servizio pubblico*, *Noviss. Dig. It.*, XVII (1970). See also more recently, L. De Lucia, *La regolazione amministrativa dei servizi di pubblica utilità* (2002); G. Piperata, *Servizi pubblici locali*, S. Cassese (ed.), *Dizionario di diritto pubblico* (2006); E. Scotti, *Il pubblico servizio. Tra tradizione nazionale e prospettive europee* (2003); Id., *Servizi pubblici locali*, *Dig. disc. pubbl.*, updated version (2012).

<sup>12</sup> G. Marcou, *I servizi pubblici tra regolazione e liberalizzazione: l'esperienza francese, inglese e tedesca*, 1, *Riv. It. Dir. Pubbl. Comunit.*, 342 (2000). See also P. Birkinshaw, *Servizi pubblici e diritto nel Regno Unito. La fornitura di servizi essenziali di natura economica e non economica. Servizi di interesse generale*, E. Ferrari (ed.), *Attività economiche e attività sociali nei servizi di interesse generale*, 179 et. seq. (2007); P. Craig, *Constitution, Property and Regulation*, 3, *Public Law*, 110 (1991);

concept can be found only in French [and Italian] public law”<sup>13</sup>. In England, on the other hand, “the wording «public service» is not used in legal language and it has a merely descriptive significance. «Public service» indicates the civil service, or its ethics (e.g. the ethics of public service)”<sup>14</sup>.

Nevertheless, from the nineteenth century onwards and like the majority of the other European countries, England has witnessed the emergence and spread of public services. Indeed, according to British scholars, public services “have been developing faster and more incisively than in other European States where the concept has been studied in depth (...)”<sup>15</sup>. But, unlike the experience of the continental EU Member States, in England public services have mainly been understood in a “material sense”<sup>16</sup>, meaning simply services provided for the benefit of citizens. Furthermore, citizens have no rights in relation to whether a service is provided, simply being allowed to criticize the way in which a given service is supplied<sup>17</sup>.

Such a concept of public services has at least three consequences. First of all, the British system of public services is highly flexible. According to some scholars, it is this flexibility that has made possible England’s greater predisposition for “sweeping changes concerning the organization, functioning, purposes and (...) even the very existence of services”<sup>18</sup>.

Secondly, the role of citizens in their engagement with public services has never been properly placed within the public-

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T. Prosser, *Regolazione dei servizi di pubblica utilità: l’esperienza anglosassone*, G. Tesouro - M. D’Alberti (eds.), *Regolazione e concorrenza* (2000) and R. Rinaldi, *Citizen’s Charter e servizi pubblici in Inghilterra*, cit. at 2.

<sup>13</sup> G. Marcou, *I servizi pubblici tra regolazione e liberalizzazione: l’esperienza francese, inglese e tedesca*, cit. at 12.

<sup>14</sup> G. Marcou, *I servizi pubblici tra regolazione e liberalizzazione: l’esperienza francese, inglese e tedesca*, cit. at 12.

<sup>15</sup> R. Rinaldi, *Citizen’s Charter e servizi pubblici in Inghilterra*, cit. at 2.

<sup>16</sup> G. Marcou, *I servizi pubblici tra regolazione e liberalizzazione: l’esperienza francese, inglese e tedesca*, cit. at 12.

<sup>17</sup> G. Di Gaspare, *Quadro economico del diritto dell’economia tra Common Law e Civil Law*, G. Falcon (ed.), *Il diritto amministrativo dei Paesi europei tra omogeneizzazione e diversità culturali* (2005).

<sup>18</sup> G. Marcou, *I servizi pubblici tra regolazione e liberalizzazione: l’esperienza francese, inglese e tedesca*, cit. at 12.

law framework<sup>19</sup>. Indeed, the citizen is usually qualified as a consumer, i.e. a “customer” who has expectations about the purchased service, especially as far as both its quality and efficiency are concerned. This way of understanding the relationship between citizens and public services is probably the main reason why England was able to draw up the Citizens' Charters so much earlier than the other Member States or even the European Union itself<sup>20</sup>.

Finally, the main features of public services have been defined in purely functional terms, in keeping with a vision that focuses on their material nature. Thus the distinction between a public service and a private activity usually lies “in a political choice of the Westminster Parliament: an activity can be considered «private» if its existence depends on «consumer sovereignty» (...); whereas the same activity must be qualified as a «public service» if it is carried out by virtue of an «authoritative decision»”<sup>21</sup>.

The foregoing would therefore explain the fact that, in England, public services have never had “a unitary legal framework, nor general legislation conferring powers, nor measures directed at establishing general principles for the management of services”. On the contrary, they have been regulated by autonomous Acts of Parliament that establish and govern every single service separately, on the basis of similar principles (such as efficiency, a high level of quality and safety, etc.), but without creating identical provisions<sup>22</sup>. Moreover, until

<sup>19</sup> G. Di Gaspare, *Quadro economico del diritto dell'economia tra Common Law e Civil Law*, cit. at 17.

<sup>20</sup> R. Rinaldi, *Citizen's Charter e servizi pubblici in Inghilterra*, cit. at 2. See, in addition, M. Calabrò, *La Carta dei servizi italiana e la Citizen's Charter britannica. Due modelli a confronto*, 3, *Dir. Proc. Amm.*, 823 – 830 (2014); G. Drewey, *Citizen's Charters: Service quality chameleons*, 7 (3), *Publ. Manag. Rev.*, 321 (2005) and, as far as the Italian experience is specifically concerned, F. Giglioni, *Le garanzie degli utenti dei servizi pubblici locali*, 2, *Dir. Amm.*, 353 – 389 (2005); Id., *Le carte di pubblico servizio e il diritto alla qualità delle prestazioni dei pubblici servizi*, *Pol. del dir.*, 405 – 431 (2003).

<sup>21</sup> D. Minussi, *Affidamento in-house di servizi pubblici locali: Regno Unito e Italia a confronto*, cit. at 10. See, in addition, L. Bonechi, *Il servizio pubblico locale in Gran Bretagna*, cit. at 2.

<sup>22</sup> L. Bonechi, *Il servizio pubblico locale in Gran Bretagna*, cit. at 2; C. Graham, *Regulating public utilities. A legal and constitutional approach*, cit. at 2. On the relevance of principles in English public law, see, for instance P. Cane, *Theory*

the European Union required its Member States to define the scope of the concept of “service of general interest”, national provisions have only very rarely defined the tasks that a service is required to ensure, since such subject-matter falls within the public administration's discretion<sup>23</sup>.

In fact and as pointed out by the legal theorists, the need to “ensure that services were available to all members of society, including the most vulnerable, on the basis of fair conditions”<sup>24</sup> has only been considered since the 1990s. Therefore, an awareness that social duties attach to the supply of every public service has led England also to formalize the concept of social solidarity in the Citizens' Charters<sup>25</sup> and has, at the same time, helped to reduce the gap between the English and the continental idea of a public service a little<sup>26</sup>. In fact, both in Italy and in the majority of the

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*and values in Public Law* and P. Craig, *Theory and values in Public Law: a response*, P. Craig – R. Rawlings (eds.), *Law and Administration in Europe. Essays in honour of Carol Harlow*, 3 and 23 (2003).

<sup>23</sup> P. Craig, *Constitution, Property and Regulation*, cit. at 12. Moreover, concerning the concept of “service of general interest” and the influence of the EU policy on the national legal orders, see *amplius* E. Ferrari, *I servizi pubblici in Europa* and M. Vanrey, *Servizi di interesse economico generale e regolazione nel Regno Unito*, E. Ferrari (ed.), *Attività economiche ed attività sociali nei servizi di interesse generale*, cit. at 12.

<sup>24</sup> T. Prosser, *Regolazione dei servizi di pubblica utilità: l'esperienza anglosassone*, cit. at 12. See also C. Graham, *Socio-economic rights and essential services: a new challenge for the regulatory State*, D. Oliver – T. Prosser – R. Rawlings (eds.), *The regulatory State: constitutional implications*, 157 (2010).

<sup>25</sup> See, for instance, M. Calabrò, *La Carta dei servizi italiana e la Citizen's Charter britannica. Due modelli a confronto*, cit. at 20 and T. Prosser, *Regulation and Social Solidarity*, 33, *J.L. Soc'y*, 3, 364 (2006).

<sup>26</sup> T. Prosser, *Regulation, public service and competition law*, cit. at 3. Moreover, according to the A.: “even the economic regulators established on privatization of the public utilities have some social responsibilities set out in their secondary statutory duties, and have been expected to undertake regulation which is clearly social”. And, then: “I mentioned [the] principle of social solidarity. This is similar to the Continental concept of public service; rather than starting from individual rights, this principle starts from the duty of the community to secure inclusiveness, resting both on a moral sense of equal citizenship and on a more prudential goal of minimizing social fragmentation. One function of this principle in regulation is to create and support the essential social underpinning of trust which is necessary for markets to function; (...). The second role is to prevent or limit the socially fragmenting role of markets. (...) As I mentioned above, with the development of something resembling public

other European countries, the purpose of responding to a community's need constitutes the core of the institution of public service and it is the main reason why Governments originally took upon themselves the task of providing services for the benefit of their citizens<sup>27</sup>.

### 3. Local government

The centrality of Parliament (clearly expressed in the wording *the Crown in Parliament*)<sup>28</sup> - and, more generally, England's peculiar constitutional regime<sup>29</sup> - also influenced both administrative organization and the allocation of functions between the different levels of government<sup>30</sup>.

Such fact has had two main consequences.

First of all, "for centuries, no territorial form of government operated at the middle level, between local government and central government. This means that, traditionally, «regionalism» has never been successful either in England or, more generally, in the United Kingdom"<sup>31</sup>. Nor have greater successes resulted from the recent attempts at devolution<sup>32</sup>.

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service law in the UK solidarity has become a legal as well as political norm, once more influenced by Continental European developments".

<sup>27</sup> See, first of all, A. De Valles, *I servizi pubblici*, cit. at 11 and R. Alessi, *Le prestazioni amministrative rese ai privati*, cit. at 11. See, also, M. Nigro, *L'edilizia popolare come servizio pubblico*, 1, Riv. Trim. Dir. Pubbl., 118 (1957) and - more recently - G. Caia, *L'organizzazione dei servizi pubblici locali. Figure, regimi e caratteristiche*, 9, Foro amm., 3167 (1991) and E. Scotti, *Servizi pubblici locali*, cit. at 11.

<sup>28</sup> A. Torre, *Regno Unito*, cit. at 4.

<sup>29</sup> A. V. Dicey, *Introduction to the study of the law of the constitution*, cit. at 4, but also P. Carrozza - A. Di Giovine - G. F. Ferrari (eds.), *Diritto costituzionale comparato* (2013); I. Jowell - D. Oliver, *The Changing Constitution*, 7th ed. (2011); P. Leyland, *The constitution of the United Kingdom*, cit. at 4; A. Young - P. Leyland - R. Rawlings, *Sovereignty and the Law* (2013) e A. Torre, *Interpretare la Costituzione Britannica* (1997).

<sup>30</sup> S. Troiolo, *Il local government britannico tra devolution interna e integrazione europea*, A. Torre - L. Volpe (eds.), *La Costituzione Britannica*, Atti del convegno dell'Associazione di Diritto pubblico comparato ed europeo, cit. at 2.

<sup>31</sup> A. Torre, *Regno Unito*, cit. at 4. See also, G. Caravale, *Unelected, unaccountable and unloved. Il fallimento del regionalismo inglese*, Federalismi.it (2012).

<sup>32</sup> See *amplius* R. Hazell - R. Rawlings, *Devolution, Law-making and the Constitution*, cit. at 5; P. Leyland, *La Multi-Layered Constitution e il tentativo di devolution nelle Regioni inglesi*, 1, Le Regioni, 10 (2006); Id., *L'esperimento della*

Secondly, as a result of a sort of “prejudice against localism”<sup>33</sup>, the Government has traditionally tried to maintain a very centralized control, only allowing the existence of local authorities closely dependent on the central Government and lacking any “general administrative competence”<sup>34</sup> or form of coordination between themselves<sup>35</sup>.

More specifically, English local authorities came into being spontaneously, as mechanisms of self-government for local communities<sup>36</sup>. In the very beginning, therefore, they enjoyed some degree of autonomy<sup>37</sup>. In fact, lacking any constitutional basis, they came into being principally to meet the concrete needs arising at a local level and their functions could not properly be said to have been “devolved from or delegated by” the central Government. Thus, their history was, for some time, marked primarily by pragmatism and their evolution driven mainly by events, without following any clear constitutional blueprint<sup>38</sup>.

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devolution nel Regno Unito: uno sconvolgimento dell'assetto costituzionale, 2, *Le Regioni*, 2, 341 (2000); I. Ruggiu, *Aspetti recenti della devolution nel Regno Unito: uno Stato territoriale “a metà” tra occasionalismo riformista, asimmetria e pax partitica*, 6, *Le Regioni*, 1157 (2005); R. Rawlings, *Delineate Wales: Constitutional, Legal and Administrative Aspects of National Devolution* (2003); A. Torre, “On Devolution”. *Evoluzione e attuali sviluppi delle forme di autogoverno nell'ordinamento costituzionale britannico*, 2, *Le Regioni*, 203 (2000). Moreover, as far as Scotland is concerned see, *inter alia*, G. Caravale, *La devolution in Gran Bretagna: il caso scozzese*, *Federalismi.it* (2002); G. Poggeschi, *La Devolution in Scozia*, 3, *Ist. Federalismo*, 937 (1998); E. Mainardi, *Il referendum in Scozia: tra devolution e indipendenza*, *Federalismi.it* (2014); I. Ruggiu, *Le politiche della devolution scozzese: unus rex, unus grex, una lex?*, 6, *Le Regioni*, 1267 (2004); A. Torre, *Scozia: devolution, quasi-federalismo, indipendenza?*, 2, *www.rivistaaic.it* (2013). Finally, for a comparative study, see M. Mazza, *Federalismo, regionalismo e decentramento nella prospettiva della comparazione tra i sistemi di amministrazione (o governo) locale*, 4, *Ist. Federalismo*, 829 (2012).

<sup>33</sup> L. J. Sharpe, *Regionalism in the United Kingdom. The role of social federalism*, H. Wollmann – E. Schroter (eds.), *Comparing the Public Sector Reform in Britain and Germany*, cit. at 7.

<sup>34</sup> S. Troilo, *Il local government britannico tra devolution interna e integrazione europea*, A. Torre – L. Volpe (eds.), *La Costituzione britannica*, cit. at 2.

<sup>35</sup> J. A. Chandler, *Local Government Today*, III ed. (2001). See, also, D. Wilson – C. Game, *Local Government in the United Kingdom*, IV ed. (2006).

<sup>36</sup> A. Torre, *Regno Unito*, cit. at 4.

<sup>37</sup> A. Torre, *Regno Unito*, cit. at 4.

<sup>38</sup> G. G. Sturmeck, *Il nuovo welfare locale: dal Compulsory Competitive Tendering al Best Value Regime*, 2, *Le Regioni*, 209 (2007) and S. Troilo, *Il local government*

Fairly early on, however, the principle that local authorities should draw their legal legitimacy from the Crown (i.e. Parliament) came to prevail<sup>39</sup>. Local authorities consequently became increasingly dependent on the central Government. Furthermore, this gradual process of centripetal attraction went hand in hand with a slow but inevitable reduction of the functions originally performed by the local authorities, including decision-making regarding expenditure<sup>40</sup>. That divestment became even more significant in the mid-twentieth century, when a series of reforms aimed at rationalizing the system of local government<sup>41</sup> were launched.

Thus, from the seventeenth century onwards, both “the lack of a constitutionally based autonomy and the subjection of local authorities to the law of Parliament gradually resulted in the inability of local government to decide autonomously what organizational arrangements were necessary for the meeting of a local community's needs”<sup>42</sup>. And this assertion still holds true

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*britannico: l'ente locale tra rappresentanza della comunità e amministrazione dei servizi pubblici, cit. at 5.*

<sup>39</sup> A. Torre, *Interpretare la Costituzione britannica*, cit. at 29.

<sup>40</sup> F. Guella, *L'autonomia finanziaria del Local Government nel Regno Unito. Un'evoluzione dei modelli giuridici di controllo, standardizzazione e responsabilizzazione della spesa pubblica*, 1, *Dir. Pubbl. Comp. Eur.*, 145 (2014). In addition, as far as the financing of local government is concerned, see S. J. Bailey, *Local Government Finance in Britain*, R. Paddison - S. J. Bailey (eds.), *Local Government Finance*, 230 (1989); F. Ciatarà, *Cronache dai Paesi europei: i sistemi di finanziamento delle Amministrazioni locali in Francia, Germania federale e Regno Unito*, 1, *Econ. pubbl.*, 118 (1981); A. Fraschini, *Il finanziamento degli enti locali: il caso inglese*, 2, *Riv. Dir. Fin. e scienza delle finanze*, 318 (1987); A. Lucarelli, *La finanza locale in Gran Bretagna. Decentramento, politiche redistributive e Welfare State*, V. Atripaldi - R. Bifulco (eds.), *Federalismi fiscali e costituzioni*, 316 et seq. (2001); D. Parker, *Recenti sviluppi nella politica finanziaria degli enti locali nel Regno Unito*, 2, *Eco. pubbl.*, 2, 305 (1991); T. Travers, *An Honourable Draw? Local versus Central Government in the 1970s and 1980s*, in *Public Money*, 1, 48 (1986) and, more recently, S. Cimini, *Politiche di coesione e finanziamento degli enti locali nel Regno Unito*, S. Cimini - M. D'Orsogna (eds.), *Le politiche comunitarie di coesione economica e sociale*, 79 et seq. (2011).

<sup>41</sup> A. Torre, *Regno Unito*, cit. at 4.

<sup>42</sup> L. Bonechi, *Il servizio pubblico locale in Gran Bretagna*, cit. at 2. See, also, M. Hill, *Understanding Social Policy*, VII ed, (2003).

today, since both the «compulsory and permissive functions» of local authorities need to be provided for by Acts of Parliament<sup>43</sup>.

It therefore follows (as certain scholars have stated) that the wording “*servizio pubblico locale* (local public service)” loses any specific legal connotation in the British legal environment and acquires a non-technical, all-encompassing descriptive value. That is to say, a meaning capable of referring indiscriminately to all the services provided to a local community, regardless of how the competences are distributed between the different levels of government (...)<sup>44</sup>.

#### 4. Local government and public services

For the purposes of an in-depth study of the part played by local government in the management of public services, it must first be observed that if the nineteenth century was a sort of “golden age” (especially as far as autonomy regarding expenditure is concerned<sup>45</sup>), the beginning of the twentieth century marked the onset of a gradual decline. Indeed, the “centralist spirit” referred to above acquired great force around the 1930s and even more so around the 1940s, when a process directed at the nationalization of several sectors of public interest<sup>46</sup>

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<sup>43</sup> S. Troilo, *Il local government britannico tra devolution interna e integrazione europea*, cit. at 34.

<sup>44</sup> L. Bonechi, *Il servizio pubblico locale in Gran Bretagna*, cit. at 2.

<sup>45</sup> H. Wollmann, *Local Government Reforms in Great Britain, Sweden, Germany and France: Between Multi-function and Single-purpose Organisations*, 4, *Local Government Studies*, 643, (2004). See, also, A. Lucarelli, *La finanza locale in Gran Bretagna. Decentramento, politiche redistributive e welfare state*, V. Atripaldi – R. Bifulco (eds.), *Federalismi fiscali e Costituzioni* (2001) and F. Guella, *L'autonomia finanziaria del Local Government nel Regno Unito*, cit. at 40, 145.

<sup>46</sup> Including, for example, the energy sector. In 1947, the Electricity Act passed the powers and the structures that until then belonged to a plurality of subjects to a single industry owned by the central State. In 1957, the Central Electricity Generating Board was established with the purpose of creating a single system for the production and supply of energy across the entire British territory. *Amplius*, see P. D. Cameron, *Legal Aspects of EU Energy Regulation. Implementing the New Directives on Electricity and Gas Across Europe* (2005); T. Prosser - N. Boeger, *United Kingdom*, M. Krajewski et al. (eds.), *The Changing Legal Framework for Services of General Economic Interest in Europe*, 357 - 382 (2009); E. Wollaman - G. Marcou, *The Provision of Public Services in Europe*, cit. at 9, exp. pp. 168 et seq. and, finally, C. Feliziani, *The Impact of EU Energy Policy on Member States' Legal*

was launched in England and many other countries, including Italy<sup>47</sup>.

The turning point came after the Second World War, when the Government firmly changed tack and set course for a model of the *welfare state*. Local authorities consequently lost most of their powers in the field of public services, whilst the central Government and the political bodies most closely connected to it, increased theirs<sup>48</sup>. At the same time, however, local authorities' duties were extended in relation to education and housing<sup>49</sup>. Thus, according to certain scholars "they moved from being producers of public utilities to being providers of social services", and, in so doing, to supporting and reinforcing political decisions adopted by the Government<sup>50</sup>.

As far as the management of public services is specifically concerned, this initially took the form of a sort of anticipation of "in-house providing". It was called *Direct labour organisation* or *Direct service organisation*, according to whether the service consisted "in building (or maintenance) works or the supply of a service"<sup>51</sup>.

At the end of the 1970s, however, when the Conservative Party took over the country's government, the "in-house model" was replaced by measures aimed at opening up the sector to competition. In fact, inspired by the goal of minimizing public expenditure, the new era of English Government was characterized by certain public-sector reforms directed both at reducing the role of the State in the economic field and leaving more room for the market<sup>52</sup>.

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*Orders. State of Art and Perspectives of Renewable Energy in Italy and Great Britain*, 5 *Rev. Eur. Studies*, 2, 67- 81 (2013).

<sup>47</sup> M. S. Giannini, *Diritto pubblico dell'economia* (1988).

<sup>48</sup> M. Loughlin, *The demise of Local Government*, V. Bogdanor (ed.), *The British Constitution in the Twentieth Century* (2003).

<sup>49</sup> See S. Troilo, *Le funzioni*, Various Authors, *Il Governo locale in Francia, Gran Bretagna e Germania*, in *Arc. Isap*, 258 e ss. (1998).

<sup>50</sup> H. Wollman - G. Marcou, *The Provision of Public Services in Europe. Between State, Local Government and Market*, cit. at 9.

<sup>51</sup> D. Minussi, *Affidamento in-house di servizi pubblici locali: Regno Unito e Italia a confronto*, cit. at 10.

<sup>52</sup> G. Di Gaspare, *Quadro teorico del diritto dell'economia tra common law e civil law*, G. Falcon (ed.), *Il diritto amministrativo dei Paesi europei tra omogeneizzazione e diversità culturali* (2005); A. Gamble, *Privatization, Thatcherism and the British*

Thus, in 1980, the legislator imposed the use of Compulsory Competitive Tendering (CCT)<sup>53</sup>, i.e. an instrument designed to break the local authorities' monopoly in the supply of public services by gauging the competitiveness of the services they provided<sup>54</sup>. According to some scholars, the CCT was a means by which the Government tried to regulate the action of local authorities<sup>55</sup>.

The abovementioned pro-competition principles were subsequently reaffirmed in the Local Government Act 1988<sup>56</sup>. Then, through the 1993 Regulations<sup>57</sup>, they were applied to all public services provided by local authorities. Thus, by virtue of that legal framework, whenever a local authority decided not to outsource a service it was obliged to hold a tender competition directed at verifying the efficiency, competitiveness and effectiveness of its choice by “a comparison between direct management and the market”<sup>58</sup>.

Despite criticism<sup>59</sup>, Compulsory Competitive Tendering was applied for about two decades. Then, in 1997, the newly

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*State*, A. Gamble - C. Wells (eds.), *Thatcher's Law* (1989); T. Prosser, *Law and the Regulators* (1997) and R. Rhodes, *The hollowing out of the State: the changing nature of the public service in Britain*, 12 *Political Quarterly*, 2, 138 (1994).

<sup>53</sup> D. Minussi, *Affidamento in-house di servizi pubblici locali: Regno Unito e Italia a confronto*, cit. at 10.

<sup>54</sup> J. Fenwick – K. Harrop, *Servizi pubblici locali nel Regno Unito. Privatizzazione e concorrenza*, 1, *Dir. Econ.*, 55 (2000); see, also, R. Rinaldi, *Citizen's Charter e servizi pubblici in Inghilterra*, cit. at 2.

<sup>55</sup> R. Rinaldi, *Citizen's Charter e servizi pubblici in Inghilterra*, cit. at 2. In a similar sense, see also, J. Fenwick – K. Harrop, *Servizi pubblici locali nel Regno Unito. Privatizzazione e concorrenza*, cit.; C. Graham – T. Prosser (eds.), *Waiving the rules. The Constitution under Thatcherism* (1988); M. Guicciardi, *La struttura del governo locale in Gran Bretagna: individuazione delle linee teoriche di tendenza e delle loro prospettive politiche*, 3, *Dir. Soc.*, 443 (1985) and S. Troilo, *Il local government britannico tra devolution interna e integrazione europea*, cit. at 34.

<sup>56</sup> M. Radford, *Competition rules: the Local Government Act 1988*, 51 *Modern Law Rev.*, 747 (1988).

<sup>57</sup> P. Vincent Jones, *The Regulation of Contractualization in Quasi-markets for Public Services*, 2 *Publ. Law*, 314 (1999) and K. Walsh, *Competitive Tendering for Local Authority Services: Initial Experiences* (1991).

<sup>58</sup> L. Bonechi, *Il servizio pubblico locale in Gran Bretagna*, cit. at 2.

<sup>59</sup> T. Prosser, *The Limits of Competition Law. Markets and Public Services* (2005). See, also, P. Vincent Jones, *The Regulation of Contractualisation*, cit. at 57 and G. Jones, *Local Government in Great Britain*, J.J. Hesse, *Local Government and Urban Affairs in International Perspectives*, (1991).

elected Labour Government introduced the “Best Value Regime”<sup>60</sup>, a new system designed to promote the efficiency and cost-effectiveness of services and one that was based on principles quite different from those underpinning CCT.

In fact, the Best Value Regime “was designed to guarantee not only the efficiency and good value, but also the effectiveness and - above all - the quality of services. Moreover, it aimed at restoring the local authorities' autonomy (...)”<sup>61</sup>. For this reason, “the Government’s power of intervention, although still extensive, now tend[ed] not to suppress [*in toto*] the local authorities’ discretionary power regarding both evaluation and choice”<sup>62</sup> insofar as it related to the management of services<sup>63</sup>. In fact, working on the assumption that “*what matters is what works*”<sup>64</sup>, the Labour Government did not express any aprioristic preference for either the privatization or the direct management of public services (i.e. *in-house providing*).

This programme went through several rounds of consultation and was finally defined in a White Paper entitled “*Modern Local Government: In Touch With People*”. The Paper focused principally on three important themes: 1) community leadership; 2) democratic renewal; and 3) improving performance<sup>65</sup>. As far as the latter point is specifically concerned, the Government outlined the need to modernize the English local

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<sup>60</sup> R. Footitt, *From Competitive tendering to Best Value for Local Government Services*, 2, Riv. Trim. Dir. Pubbl., 515 (1999); G. Gosetti, *Il nuovo welfare locale: dal Compulsory Competitive Tendering al Best Value regime*, 1, Le Regioni, 209 (2007); F. Guella, *L'autonomia finanziaria del Local Government nel Regno Unito* cit. at 40; C. Painter, *Public Service Reform from Thatcher to Blair: A Third Way*, 52, Parliamentary Affairs, 94 (1999).

<sup>61</sup> L. Bonechi, *Il servizio pubblico locale in Gran Bretagna*, cit. at 2. See, also, T. Prosser, *The Limits of Competition Law. Markets and Public Services*, cit. at 59.

<sup>62</sup> L. Bonechi, *op. ult. cit. Ex multis*, see P. Vincent Jones, *Central-Local Relations under the Local Government Act 1999. A New Consensus?*, 12, The Modern Law Rev., 1, 84 (2000).

<sup>63</sup> For a different opinion, see R. Rinaldi, *Citizen’s Charter e servizi pubblici in Inghilterra*, cit. at 2.

<sup>64</sup> G. G. di Sturmeck, *Il nuovo welfare locale: dal Compulsory Competitive Tendering al Best Value Regime*, cit. at 38.

<sup>65</sup> *Amplius*, cfr. G. G. di Sturmeck, *Il nuovo welfare locale: dal Compulsory Competitive Tendering al Best Value Regime*, cit. at 38.

government system as, in its opinion, “modern local authorities can play a vital role in improving citizens’ quality of life”<sup>66</sup>.

The Local Government Act 1999 was the first piece of legislation to implement this programme which, in theory, “should have offered considerable advantages in terms of local-authority autonomy”<sup>67</sup>. Nevertheless, some scholars immediately pointed out a continuity with the previous system<sup>68</sup> and others have since pointed out that the new model did not concretely produce the desired results<sup>69</sup>.

Thus, under the Labour Party’s reform, local authorities did not regain their autonomy<sup>70</sup>. On the contrary, from the 1990s onwards, they have progressively lost more and more of their powers and not even the most recent reforming legislation (e.g. the Localism Act 2011) has succeeded in strengthening their role<sup>71</sup>. And yet, at least in principle, the importance of local authorities continues to be emphasized: they are seen as the best vehicle for

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<sup>66</sup> V. J. Stewart, *Modernising British Local Government. An Assessment of Labour’s Reform Programme*, 1 (2003).

<sup>67</sup> G. G. di Sturmeck, *Il nuovo welfare locale: dal Compulsory Competitive Tendering al Best Value Regime*, cit. at 38 and P. Leyland, *The Modernisation of Local and Regional Government in the United Kingdom: Towards a New Democratic State?*, C. Bologna (ed.), *Europa, Regioni ed Enti locali in Italia, in Spagna e nel Regno Unito* (2003).

<sup>68</sup> P. Vincent Jones, *Central Local Relations under the Local Government Act 1999: A New Consensus?*, cit. at 62.

<sup>69</sup> G. G. di Sturmeck, *Il nuovo welfare locale: dal Compulsory Competitive Tendering al Best Value Regime*, cit. at 38 and S. Troilo, *Il local government britannico tra devolution interna e integrazione europea*, cit. at 34.

<sup>70</sup> S. Troilo, *Il local government britannico tra devolution interna e integrazione europea*, cit. at 34.

<sup>71</sup> P. Leyland, *The Localism Act: Local Government Encounters the “Big Society”*, in *Ist. del federalismo*, 2012, 4, 767. In addition, for a comment on the Localism Act see F. Guella, *L’autonomia finanziaria del Local Government nel Regno Unito*, cit. at 40 and A. Layard, *The Localism Act 2011: what is “local” and how do we (legally) construct it?*, 14, *Env. Law Rev.*, 134 – 144 (2012). In particular, the latter author wrote: “analyzing the legal provisions demonstrates that the Localism Act is as much about philosophy as concrete change”.

Furthermore, before considering the Localism Act 2011, one should mention the “Local Government Act 2000” and the “Local Government Bill of 2003”. As regards those pieces of legislation, see *amplius* S. Cimini, *Politiche di coesione e finanziamento degli enti locali nel Regno Unito*, cit. at 40, 93; V. Jenkins, *Learning from the Past: Achieving Sustainable Development in the Reform of Local Government*, 1, *Public Law*, 138 (2002), P. Leyland, *Introduzione al diritto costituzionale del Regno Unito*, cit. at 8.

guaranteeing both the efficiency of public administration and the meeting of citizens' needs. Such fact is proved, for instance, by the programming documents regarding waste management published on the Government's official website<sup>72</sup>.

In short, it may be said that the English local authorities have been subjected to two opposing forces since the mid-1990s. The first, centripetal, has sought to give them back their autonomy. The second, centrifugal, has sought to drive the provision of public services onto the market and subject it to free competition. That is mainly because the European Union considers public services to constitute a relevant sector in the construction of the single market<sup>73</sup>.

However, it may be that since the reforms adopted between the 1970s and 1980s, aimed at "shifting the service-provision duties to the local level, whilst keeping the regulatory functions at the central level"<sup>74</sup>, they irreparably "compromised the idea of local administration as a self-sufficient entity (...)"<sup>75</sup>. Thus, on the basis of the then-existing legal framework, it is arguable that the European push towards liberalization has prevailed<sup>76</sup>.

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<sup>72</sup> See the "Government Waste Policy Review" available at [www.defra.uk](http://www.defra.uk).

<sup>73</sup> G. Marcou, *I servizi pubblici tra regolazione e liberalizzazione*, cit. at 12; but also M. Varney, *Servizi di interesse economico generale e regolazione nel Regno Unito*, cit.. Moreover, on the relevance of public service in the construction of the European single market, see M. Clarich, *Servizi pubblici e diritto europeo della concorrenza: l'esperienza italiana e tedesca a confronto*, 1, Riv. Trim. Dir. Pubbl., 91 (2003); E. Picozza, *I servizi pubblici locali e le loro forme di gestione con riguardo al regime di diritto comunitario, nazionale e regionale*, N. rass. leg., 1005 (1995); G. M. Racca, *I servizi pubblici locali nell'ordinamento comunitario*, G. Pericu - A. Romano - V. Sapgnuolo Vigorita (eds.), *La concessione di pubblico servizio* (1995); E. Scotti, *Servizi pubblici locali e ordinamento comunitario*, S. Mangiameli (ed.), *I servizi pubblici locali* (2008); D. Sorace, *I servizi "pubblici" economici nell'ordinamento nazionale ed europeo alla fine del primo decennio del XX secolo*, 1, Dir. Amm., 8 (2010).

<sup>74</sup> S. Troilo, *Il local government britannico tra devolution interna e integrazione europea*, cit. at 34.

<sup>75</sup> L. Bonechi, *Il servizio pubblico locale in Gran Bretagna*, cit. at 2. The same opinion is also expressed by P. Craig, *Constitution, Property and Regulation*, cit. at 12.

<sup>76</sup> T. Prosser, *The Limits of Competition Law. Markets and Public Services*, cit. at 59. See, also, Id., *Public Utilities*, [www.ius-publicum.com](http://www.ius-publicum.com) (2011), where the Author writes: "the public utilities in the UK are different from those in many other countries. They had been publicly owned, but under the Thatcher and Major Governments from 1979 -1997 were privatized; now the only substantial

Furthermore, according to some scholars, the prevalence of this process of deregulation has been to the detriment of other principles (social solidarity, first and foremost)<sup>77</sup>; principles that, as the European and continental concepts of public service also testify, are deemed to be core principles of public-service provision.

In other words, having undertaken the liberalization journey before other European countries, England has been a pioneer<sup>78</sup> and (in some respects) even a source of inspiration to the European Union. Thus, it is clear that the EU found a “fertile ground” in England when, at the end of 1980s, its institutions began to press for a reconsideration of State intervention in the economic field<sup>79</sup>.

As some scholars have observed, such fact demonstrates that, in Europe, “the answer to the challenge of opening up markets to competition has depended on the legal system

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enterprises in public ownership are the Royal Mail and Scottish Water, and the former is now being prepared for privatization. Government has not retained any shareholdings in the privatized enterprises, and regulation takes place through the independent regulatory authorities (...).”

<sup>77</sup> T. Prosser, *The Limits of Competition Law. Markets and Public Services*, cit. at 59; Id., *Regulation and Social Solidarity*, 33, *J. Law & Society*, 364 (2006), and more recently Id., *Regulation, public service and competition law*, cit. at 3. See, also, C. Graham, *Regulating public utilities. A legal and constitutional approach*, cit. at 2; Id., *Socio – economic rights and essential services: a new challenge for the regulatory State*, cit. and R. Rawlings, *Law, society and economy* (1997).

<sup>78</sup> S. Troilo, *Il local government britannico tra devolution interna e integrazione europea*, cit. at 34. See, also, T. Prosser, *Regulation, Public Service and Competition Law*, cit. at 3, according to which: “it was the British use of [independent regulatory agencies] as a means of regulating the public utilities that really brought the role of the agencies to the forefront of European legal and political debate. (...) The general success of the UK model of independent regulator is, of course, a major influence on a broader European model of regulation. (...) We can see the influence in both national systems, including of course Italy, and at the European Union level”.

<sup>79</sup> T. Prosser, *Regulation, Public Service and Competition Law*, cit. at 3, and, more recently, Id., *The Economic Constitution* (2014). Furthermore, on the role of the State in the economy at the end of the twentieth century from the Italian perspective, see F. Bilancia, *Modello economico e quadro costituzionale* (1996); R. Caranta, *Intervento pubblico nell'economia*, Dig. disc. pubbl., updated version, (2000); S. Cassese, *La nuova Costituzione economica* (2012); R. Miccù, *Lo Stato regolatore e la nuova costituzione economica: paradigmi di fine secolo a confronto*, P. Chirulli - R. Miccù (eds.), *Il modello europeo di regolazione*, cit. at 3, 140.

operating in each country". Of course, it has also depended on the "domestic" understanding of the idea of "public service"<sup>80</sup> and precisely this point is one of the main reasons why the study of public services is still relevant today.

### 5. A case study: the waste-management service

The local authorities' parabolic trajectory may be clearly inferred from an analysis of the waste-management service.

For the purposes of regulating management of the urban waste service, the Environment Protection Act 1990 identified three *ad hoc* categories of authority: a) the "Waste Regulation Authorities"; b) the "Waste Disposal Authorities" and c) the "Waste Collection Authorities", to which must then be added the "Waste Disposal Contractors".

The first category, i.e. the "Waste Regulation Authorities", carried out administrative and regulatory functions at a "regional" level, although in compliance with national provisions, especially as far as the environment and urban planning<sup>81</sup> were concerned.

Subsequently, however, the Environment Act 1995 abolished the "Waste Regulation Authorities" and replaced them with two newly established national bodies: a) the "Environment Agency", which has competence in relation to England and Wales, and b) the "Scottish Environment Protection Agency" (SEPA)<sup>82</sup>,

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<sup>80</sup> G. Marcou, *I servizi pubblici tra regolazione e liberalizzazione*, cit. at 12 and E. Ferrari, *Attività economiche ed attività sociali nei servizi di interesse generale*, cit.. Moreover, as far as the case law is concerned, see Supreme Court of the United Kingdom 9 November 2011, *Brent London Borough Council and a. c. Risk Management Partners Limited* and Italian Constitutional Court Judgment. no. 325 of 3 November 2010. For a comment, see D. Minussi, *Affidamento in-house di servizi pubblici locali: Regno Unito e Italia a confronto*, cit. at 10.

<sup>81</sup> The first British urban planning Act dates back to 1909 and is entitled "Housing, Town Planning &c. Act". However, it is only thanks to the *Town and Country Planning Act 1947* that homogenous planning criteria were established. Nowadays - as far as England and Wales are concerned - the legal framework is mainly represented by the *Town and Country Planning Act 1990* which amended and replaced the 1947 Act. As regards the link between planning and waste management service, see *amplius*. D. Pocklington, *The Law of Waste Management*, (1997).

<sup>82</sup> *Amplius* in <http://sepa.org.uk/>.

which carries out the same activities as the Environment Agency, but in Scotland<sup>83</sup>.

Since the mid-1990s, therefore, the tasks of drawing up waste-management plans, granting permits or planning any waste-related activities are no longer performed at a regional level by the “Waste Regulation Authorities”. On the contrary, all these activities have been carried out at a central level by the newly created national Authorities<sup>84</sup>.

At the same time, however, and in accordance with the Environment Protection Act 1990, the “Waste Disposal Authorities” are still responsible “for the disposal of the controlled waste generated within their area”<sup>85</sup> and collected by the “Waste Collection Authorities”<sup>86</sup>. However, the latter bodies’ tasks are sometimes carried out by “Waste Disposal Contractors”, who may be either an “arms-length” company established by the WDAs or a private-sector company<sup>87</sup>.

Recently, the abovementioned legislative framework was partially modified by the Waste (England and Wales) Regulations 2011<sup>88</sup>. These transposed the European directive on waste (Directive 2008/98/EC)<sup>89</sup>. As far as the distribution of functions is concerned, the new Regulations have nevertheless confirmed the key role of national authorities in waste management.

Such fact is demonstrated by several of the Regulations’ provisions. First of all, under Reg. 3 (1) “in these Regulations, appropriate authority means a) in relation to England, the *Secretary of State*; b) in relation to Wales, the *Welsh Ministers*”.

Secondly, as far as England is concerned, under Reg. 4 (1) the Secretary of State must “establish one or more programmes of

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<sup>83</sup> D. Pocklington, *The Law of Waste Management*, cit. at 81, esp. p. 231.

<sup>84</sup> T. Prosser, *Regulation, public service and competition law*, cit. at 3, argues: “in the UK, outside the area of regulation of public utilities, we also have a large number of other independent regulatory bodies which are responsible for aspects of social regulation, some of them much older than the regulators of the public utilities. Examples would include (...) the Environment Agency (...)”.

<sup>85</sup> D. Pocklington, *The Law of Waste Management*, cit. at 81

<sup>86</sup> D. Pocklington, *The Law of Waste Management*, cit. at 81, esp. p. 233.

<sup>87</sup> D. Pocklington, *The Law of Waste Management*, cit. at 81, p. 231.

<sup>88</sup> D. Pocklington, *The Law of Waste Management*, cit. at 81.

<sup>89</sup> E. Scotford, *The New Waste Directive – Trying to Do It All ... an Early Assessment*, 11 ELR, 1, 75 (2009).

waste prevention measures"<sup>90</sup> and, in so doing, he must ensure that such programme(s) meet all the requirements listed in Reg. 5<sup>91</sup>.

Finally, in accordance with Article 28 of Directive 2008/98/EC<sup>92</sup>, Reg. 7(1) states, "the appropriate authority [i.e. the

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<sup>90</sup> According to Reg. 4 (3), "In this regulation, "waste prevention measures" means measures taken before a substance, material or product has become waste that reduce:

- (a) the quantity of waste, including through the re-use of products or the extension of the life span of products;
- (b) the adverse impacts of generated waste on the environment and human health; or
- (c) the content of harmful substances in materials and products".

In the same sense, see Art. 29, Directive 2008/98/EC, named "Waste Prevention Programmes".

<sup>91</sup> According to Reg. 5 "The appropriate authority must ensure that a waste prevention programme:

- (a) is compatible with the objectives in paragraphs 1 and 2 of Schedule 1;
- (b) has as its purpose a contribution towards breaking the link between economic growth and the environmental impacts associated with the generation of waste;
- (c) is expressed in writing and: (i) sets out the objectives of the programme and a description of existing waste prevention measures; and (ii) if it is integrated into a waste management plan or other programme, clearly identifies the programme's waste prevention measures.

In the same sense, see Art. 29, Directive 2008/98/EC, named "Waste Prevention Programmes".

<sup>92</sup> Art. 28 of the Waste Directive 2008/98/EC is entitled "Waste Management Plans". Its paragraph 1 posits that "Member States shall ensure that their competent authorities establish, in accordance with Articles 1, 4, 13 and 16, one or more waste management plans. Those plans shall, alone or in combination, cover the entire geographical territory of the Member State concerned".

Moreover, paragraphs. 3 and 4 subsequently indicate the requirements that plans "shall" or "may" contain. More specifically, according to paragraph 3 "The waste management plans shall contain, as appropriate and taking into account the geographical level and coverage of the planning area, at least the following:

- a) the type, quantity and source of waste generated within the territory, the waste likely to be shipped from or to the national territory, and an evaluation of the development of waste streams in the future;
- b) existing waste collection schemes and major disposal and recovery installations, including any special arrangements for waste oils, hazardous waste or waste streams addressed by specific Community legislation;
- c) an assessment of the need for new collection schemes, the closure of existing waste installations, additional waste installation infrastructure in accordance with Article 16, and, if necessary, the investments related thereto;

*Secretary of State*] must ensure that there are one or more plans containing policies in relation to waste management in England or Wales, as the case may be” and Reg. 9 states that such authority may give directions to the Environment Agency to that end<sup>93</sup>.

Thus, an analysis of the provisions currently in force demonstrates that the English legislator has not left any room whatsoever for local authorities in the matter of waste management; at least as far as policy choices are concerned.

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d) sufficient information on the location criteria for site identification and on the capacity of future disposal or major recovery installations, if necessary;  
 e) general waste management policies, including planned waste management technologies and methods, or policies for waste posing specific management problems”.

Under paragraph 4 “The waste management plan may contain, taking into account the geographical level and coverage of the planning area, the following:

a) organizational aspects related to waste management including a description of the allocation of responsibilities between public and private actors carrying out the waste management;  
 b) an evaluation of the usefulness and suitability of the use of economic and other instruments in tackling various waste problems, taking into account the need to maintain the smooth functioning of the internal market;  
 c) the use of awareness campaigns and information provision directed at the general public or at a specific set of consumers;  
 d) historical contaminated waste disposal sites and measures for their rehabilitation”.

<sup>93</sup> More in detail, Reg. 9 posits: “1) The appropriate authority may give directions to the Environment Agency requiring it: (a) to advise the authority on the measures or policies which are to be included in a waste prevention programme or waste management plan; b) to carry out a survey or investigation into any other matter in connection with the preparation of such a programme or plan or any modification of it, and report its findings to the authority.

2) A direction given under paragraph (1)(b): (a) must specify or describe the matters which are to be the subject of the survey or investigation; (b) may specify bodies or persons to be consulted before carrying out the survey or investigation; and (c) may make provision in relation to the manner in which:

(i) the survey or investigation is to be carried out; or  
 (ii) the findings are to be reported and made available.

3) The Environment Agency must comply with a direction given under paragraph (1).

4) Where a direction is given under paragraph (1)(b), the Environment Agency must also consult any body or person that it considers appropriate but is not specified in the direction.

5) The Environment Agency must make its findings available to the bodies and persons it consults”.

Nevertheless, the “*Government Waste Policy Review*” - a document of programmatic value published on the DEFRA website to explain the main goals of the 2011 Regulations - seems not only to acknowledge but also to emphasize the importance of local authorities for urban waste management.

In fact, in that document the Government declares its willingness “to work in partnership with local authorities and business in all parts of the economy to encourage and spread best practice in waste prevention and resource management, and so reap the economic and environmental benefits for society and the economy. [Consequently] the Government will only intervene where necessary, where there are clear market failures and barriers (...)”<sup>94</sup>.

Moreover, “the Coalition Government wants to empower local communities as part of a power shift away from central Government, reinvigorating local democracy, understanding, accountability and participation. We want to ensure that the barriers to participation are removed and that community and civil-society engagement - the *Big Society* - can occur unhindered”<sup>95</sup>.

Finally, the Review states that, for local authorities, “waste services are a matter of developing fit-for-purpose local solutions”<sup>96</sup>. Thus, one section of the Review is wholly dedicated to explaining the actions that the Government would like to put in practice in order to “[empower] [both] local communities”<sup>97</sup> and citizens. In fact, in the same document the Government holds that guiding individuals' actions in a virtuous direction makes it possible to achieve more and better results (including from the

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<sup>94</sup>See

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/69401/pb13540-waste-policy-review110614.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69401/pb13540-waste-policy-review110614.pdf).

<sup>95</sup>

See

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/69401/pb13540-waste-policy-review110614.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69401/pb13540-waste-policy-review110614.pdf). See also, specifically concerning the “*Big Society*”, P. Leyland, *The Localism Act*, cit. at 71, 767.

<sup>96</sup>

See

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/69401/pb13540-waste-policy-review110614.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69401/pb13540-waste-policy-review110614.pdf).

<sup>97</sup>

See

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/69401/pb13540-waste-policy-review110614.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69401/pb13540-waste-policy-review110614.pdf).

economic point of view) than would be achieved by imposing controls and sanctions. Hence the appropriateness of involving civil society in waste management so as to “turn common problems into common opportunities”<sup>98</sup>.

It remains to be seen, however, whether the intentions expressed in these statements of theory will actually be achieved in practice.

## 6. What is left of local government?

This article has sought to investigate the English approach to public services and the role of local authorities in their management, in particular.

It has taken the notion of public service as its starting point and has offered a brief overview of the phenomenon’s evolution from its origins to the present day. Such analysis has shown, first of all, that there is a close connection between the English constitutional tradition (especially as regards the role of Parliament, i.e. the *Crown in Parliament*) and the main features of public services. Secondly, the study has highlighted that such a connection is especially reflected in the role that local government has traditionally played in the management of services. The paper has further outlined that, in spite of the local authorities' potential, their role appears to be increasingly circumscribed. In order to prove this assertion, the article has chosen the waste-management service as a case study.

In the light of the considerations set out above, the paper has argued that the ancient “prejudice against localism” is still alive and kicking in the English administrative system, even if the reasons for it differ from those of the past.

Indeed, if that prejudice once had a “constitutional” basis<sup>99</sup>, nowadays it is mainly economically motivated<sup>100</sup>. In other words, the idea that local authorities should derive their legitimacy from an Act of Parliament in order to ensure the unity of the Nation (i.e.

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<sup>98</sup> See “*Government Waste Policy Review*” p. 52.

<sup>99</sup> See, *inter alia*, A. Torre, *Interpretare la Costituzione britannica*, cit. at 29.

<sup>100</sup> G. Di Gaspare, *Quadro economico del diritto dell'economia tra Common Law e Civil Law*, cit. at 17.

the *Crown in Parliament*<sup>101</sup>) has evolved into an instrument for regulating the economy; at least in the sector in question.

In fact, from the Government's reforms at the end of the 1970s and the 1980s onwards, it has become the trend to "shift the service-provision duties to the local level, while keeping the regulatory functions at the central level"<sup>102</sup>. This trend has not been reversed subsequently, not even as a result of the European integration process. And this - according to some scholars - is probably due to the fact that "the European administrative system under construction" has clear points of similarity with the tendency just described<sup>103</sup>.

Thus the present study has sought to emphasize that, in England, local authorities have been re-created as bodies entrusted with the daily management of a good number of administrative functions, but (...) without any power to pursue policies that differ from the national ones"<sup>104</sup>, especially as far as the economic regulation and environmental standards of public services are concerned<sup>105</sup>.

In other words, it has been argued that the ability of English local authorities to act as a link between European and national requirements, on the one hand, and civil society, on the other, has not been fully exploited. At least, not as far as the management of public services<sup>106</sup> and environmental protection<sup>107</sup> are concerned.

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<sup>101</sup> A. Torre, *Regno Unito*, cit. at 4. See, also, A. Mastropalo, *La comunità ricomposta. Alle origini dell'idea di nazione nell'Inghilterra del Seicento*, 2, *Dir. Pubbl.*, 427 (2005) and A. Young - P. Leyland - R. Rawlings, *Sovereignty and the Law*, cit. at 29.

<sup>102</sup> S. Troilo, *Il local government britannico tra devolution interna e integrazione europea*, cit. at 34.

<sup>103</sup> S. Troilo, *Il local government britannico tra devolution interna e integrazione europea*, cit. at 34.

<sup>104</sup> S. Troilo, *Il local government britannico tra devolution interna e integrazione europea*, cit. at 34.

<sup>105</sup> See, for example, the recent article by E. Scotford - J. Robinson, *UK Environmental Legislation and Its Administration in 2013 - Achievements, Challenges and Prospects*, 25, *JEL* (2013), which holds that "there are now important questions to be asked about the nature and the legitimacy of the process by which guidance and policy documents are issued".

<sup>106</sup> See, for example, R. Rinaldi, *Citizen's Charter e servizi pubblici in Inghilterra*, cit. at 2.

One of the main reasons for this “inability” is the long-felt need (real or alleged) to reduce local authorities’ public expenditure<sup>108</sup>. In this respect, the financial crisis that has affected the world's most developed economies for several years has prevented any possibility of a rapid change in direction.

Indeed, this crisis has also involved European public finance, having significant effects on Member States<sup>109</sup> and entailing a series of transformations at an institutional level<sup>110</sup>. Several of these changes are specifically affecting local authorities. In some cases (e.g. the Provinces in Italy<sup>111</sup>), they have been

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<sup>107</sup> See F. de Leonardis, *Politiche e poteri dei governi locali nella tutela ambientale*, 4, *Dir. Amm.*, 775 (2012).

<sup>108</sup> F. Guella, *L'autonomia finanziaria del Local Government nel Regno Unito*, cit. at 40.

<sup>109</sup> *Amplius*, R. Baratta, *Legal issues of the Fiscal compact. Searching for a mature democratic governance of the Euro*, 3, *Dir. Un. Eur.*, 647 (2012); F. Bilancia, *La nuova governance dell'Eurozona: alla ricerca del demos*, F. Angelini - M. Benvenuti (eds.), *Il diritto costituzionale alla prova della crisi economica* (2012); E. Chiti, *Le istituzioni europee, la crisi e la trasformazione costituzionale dell'Unione*, 6, *Giorn. Dir. Amm.*, 783 (2012); Id., *Le risposte alla crisi della finanza pubblica e il riequilibrio dei poteri nell'Unione*, 4, *Giorn. Dir. Amm.*, 311 (2011); M. P. Chiti, *La crisi del debito sovrano e le sue influenze per la governance europea, i rapporti tra Stati membri e le pubbliche amministrazioni*, 1, *Riv. It. Dir. Pubbl. Comunit.*, 1 (2013); G. della Cananea, *L'ordinamento giuridico dell'Unione europea dopo i nuovi accordi intergovernativi*, 1, *Comunità int.*, 3 (2012); S. Peers, *The Stability Treaty: Permanent Austerity or Gesture Politics*, 3, *Eu. Const. Law Rev.*, 404 (2012); A. Spadaro, *I diritti sociali di fronte alla crisi (necessità di un nuovo modello sociale europeo: più sobrio, solidale e sostenibile)*, 4, *Rivista Aic* (2011).

<sup>110</sup> N. McGarvey, *Inter - Municipal Cooperation: The United Kingdom Case*, 3, *Ist. del federalismo*, 523 (2012). Moreover, as far as Italy is concerned, see, *inter alia*, P. Bilancia, *L'associazionismo obbligatorio dei Comuni nelle più recenti evoluzioni legislative*, *Federalismi.it* (2012); G. Falcon, *La crisi e l'ordinamento costituzionale*, 1, *Le Regioni*, 9 (2012); F. Merloni, *Il sistema amministrativo italiano, le regioni e la crisi finanziaria*, 3, *Le Regioni*, 599 (2011); G. Piperata, *I poteri locali: da sistema autonomo a modello razionale e sostenibile?*, 3, *Ist. del federalismo*, 503 (2012) and L. Vandelli, *Crisi economica e trasformazioni del governo locale*, *Libro dell'anno del Diritto* (2011).

<sup>111</sup> *Amplius* G. Clemente di San Luca, *Il vero irrinunciabile ruolo della Provincia e le sue funzioni fondamentali*, *Federalismi.it* (2013); F. Manganaro, *La riforma delle Province*, *Giustamm.it* (2014); G. M. Salerno, *Sulla soppressione - sostituzione delle Province in corrispondenza all'istituzione delle città metropolitane. profili applicativi e dubbi di costituzionalità*, *Federalismi.it* (2014); G. Vesperini, *Il disegno del nuovo governo locale: le città metropolitane e le province*, 8-9, *Gior. Dir. Amm.*, 786 (2014) and, finally, C. Feliziani, *Le funzioni amministrative di Province e Città*

abolished or transformed, whilst in others (such as the English one), they have lost most of their powers<sup>112</sup>.

For all these reasons, it would appear that English local authorities are currently only being given the task of providing public services in accordance with the central Government's indications (especially regarding the opening up to competition and environmental protection). Of course, in so doing, local authorities should appropriately combine those indications with the needs of citizens,<sup>113</sup> perhaps by way of new organizational models.<sup>114</sup>

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*metropolitane nella legge Delrio e nel quadro della riforma costituzionale in fieri*, Giustamm.it (2016).

<sup>112</sup> See, *inter alia*, P. Leyland, *The Localism Act*, cit. at 71. More generally, on the impact of the financial crisis in England, see T. Prosser, *The Economic Constitution*, cit..

<sup>113</sup> C. Graham, *Socio Economic Rights and Essential Services: a New Challenge for the Regulatory State*, D. Oliver - T. Prosser - R. Rawlings (eds.), *The Regulatory State: Constitutional Implications* (2010) and T. Prosser, *The Limits of Competition Law. Markets and Public Services*, cit. at 59.

<sup>114</sup> N. McGarvey, *Inter - Municipal Cooperation: The United Kingdom Case*, cit. at 110.