THE INCIDENTAL LEGALITY REVIEW OF REGULATIONS IN ITALY

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Abstract

This article discusses the legality review of secondary rules in Italy. In the era of the vast administrative state there are numerous situations in which some activities are covered by rules emanating from government, departments of state or other governmental agencies. They are like a delegate is invited to stand in the shoes of the legislature. Governmental rules have two-fold nature. Regulations, on the one hand, are sources of law similar to primary legislation. On the other hand, secondary rules are administrative instruments that supplement the executive power, that is, they are an inherent feature of public authority. The two-fold nature affects the legality review. Secondary rules may not be reviewed by the Constitutional Court. Although regulations are legislative instruments, their administrative set-up plays a key role in the application of procedural rules. Indeed, the judicial review of secondary rules is up to administrative courts, which can intervene mainly after a regulation is challenged. Because of this flexibility, administrative judicial proceedings are suitable for challenging regulations on account of the hybrid nature of regulations, which are halfway between legislative instruments and tools inherent in the exercise of public authority. The aim of this article is to demonstrate how administrative law courts seized with the review of regulations. The judicial review by administrative courts appears to be quite similar to that of the Constitutional Court, as it is modeled after an objective approach to jurisdiction. Judges must disapply regulations that infringe laws and they can adjust themselves to and admit of innovative approaches.

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TABLE OF CONTENTS

1. *Foreword: The Judicial Review of Secondary Sources.*

Parliament does not have the monopoly on law-making power. Government, ministerial bodies, Regions, local administrative bodies, and independent authorities are empowered to adopt acts of legislative nature. This means that sources of law do not derive exclusively from representative bodies; norm creation is indeed conferred to various public subjects and is developed through complex processes, in which hierarchical and competence criteria constantly overlap and replace one another. This is an instance of the so-called "legislative polycentrism"[1]. Legislatures delegate power because they cannot possibly fulfill the expectations of the modern citizen through primary legislation[2]. Governmental rules are secondary sources: they are different from primary legislation (i.e. laws and equivalent acts) both in nature and legal status[3].

[1] On the creation of acts of legislative nature by independent administrative authorities see Council of State, regulatory instruments division, decision no. 11603/04, dated to 25 February 2005.

[2] P. Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope*, (2012), 2.

[3] On the controversial nature of regulations and on the difference from general administrative instruments see G. della Cananea, *Gli atti amministrativi generali*, (2000). Considering such different legal status, it is often the Government that

This article is concerned with secondary rules. It does not focus on parliamentary legislation, but on rules emanating from government, that is on the array of rules produced by the departments of state or other governmental agencies. This, necessarily, involves considering how the use of rules «as tools of government» can be gauged[4]. The law-making power of public administrative bodies is currently in a chaotic situation, because of the presence of an irrational and contradictory set of applicable rules. There are numerous situations in which a delegate is invited to stand in the shoes of the legislature. But there is no systematic statutory framework.

This law-making power relies on a general model, composed of governmental regulations combined with special instruments – varying from the regulations issued by local authorities to those of independent authorities. Secondary rules have legal force and are produced in exercise of a power to legislate that is conferred by an act of Parliament.

The government's secondary source legislative power is regulated by Article 17, Law no. 400/1988 that disciplines the type of power and its decisional procedure, above and beyond anything provided for by Constitutional regulations. A government regulation may be proposed by one or more Ministers, but it must be deliberated by the government's collegial

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has to decide - depending on the sector involved - whether to start the procedure for passing a law or to adopt a regulation; this decision ultimately determines the type of jurisdictional protection. On the origins of the Government's regulatory functions see F. Cammeo, *Della manifestazione della volontà dello Stato nel campo del diritto amministrativo. Legge ed ordinanza (decreti e regolamenti)*, in *Primo trattato completo di diritto amministrativo*, edited by V.E. Orlando, (1907), III, 71 and ff. On the secondary sources of law see G. Tarli Barbieri, *Il potere regolamentare del Governo (1996-2006)*, in *Osservatorio sulle fonti 2006*, (2007), 205 and ff.; U. De Siervo, *Il potere regolamentare alla luce dell'attuazione dell'art. 17 della legge n. 400 del 1988*, in *Dir. pubbl.*, 1996, 82. On local (de-centralised) sources of law, see M. Di Folco, *La garanzia costituzionale del potere normativo locale. Statuti e regolamenti locali nel sistema delle fonti fra tradizione e innovazione costituzionale*, (2007). The secondary rules of independent authorities are examined by S. Foà, *I regolamenti delle autorità amministrative indipendenti*, (2002); F. Politi, *Regolamenti delle autorità amministrative indipendenti*, in *Enc. giur.*, XXX, 2001.

[4] On the idea of rules as a governmental tool, and particularly on the creation of different forms of regulatory regimes employing different forms of rule, R. Baldwin, *Rules and Government*, (1995).

body after receiving the State Council's obligatory but not binding opinion. Once this procedure is complete, the President of the Republic issues the regulation as a Presidential Decree Law (*Decreto del Presidente della Repubblica*), submits it to the Court of Accounts for preventive control and filing, and publishes it in the Official Gazette.

Despite a series of legal provisions enshrined in laws, systematic and open consultation of the public on governmental regulatory initiatives is not provided by law. In practice open public consultation, through "notice and comment" procedures, remain seldom used and coexist with traditional forms of closed-door consultation and negotiation. However greater awareness of the necessity to enhance consultation practices as an integral part of decision-making is emerging. The government would devote more attention to public consultation in the preparation of normative acts, and is preparing a new regulation which is expected to cover consultation in *ex ante* and *ex post* evaluation[5].

[5] Oecd, *Better Regulation in Europe: Italy 2012. Transparency through consultation and communication*, revised edition, June 2013, 59. Otherwise United States procedures for developing regulations derive from the U.S. Constitution and the 1946 Administrative Procedure Act (APA). The APA constrains executive rulemaking, not only because the agency can only act within the limits set by statutes, but also because it must follow specified procedures. In particular, it must provide notice to the public of the proposed action and take into consideration public comment before issuing a final rule. The APA describes two types of rulemaking – formal and informal. Formal rulemaking is typically used by agencies responsible for economic regulation of industries, and is only required when a statute other than the APA specifically states that rulemaking is to be done "on the record". Informal rulemaking, or notice and comment rulemaking, is the most common process used in the U.S. by agencies for writing, or "promulgating" regulations. On public involvement, see S.G. Breyer, R.B. Stewart, C.R. Sunstein, A. Vermeule, *Administrative Law and Regulatory Policy: Problems, Text, and Cases*, (2006), 479 and ff. As noted P. Cane, *Administrative Law*, (2004), 139, «the main advantages of a more formal procedure of rule-making are said to be that it gives the citizen a greater chance to participate in decision-making and that it improves the quality of the rules made. However, unless participation leads to greater satisfaction with and acceptance of the rules themselves, it is of doubtful value. If the participants object to the rules made, despite extensive involvement, and feel that participation has only "worked" if the result they favour is reached, then participation by itself is of limited value. The more formal procedures used in the United States do not seem to have reduced dissatisfaction with administrative rule-making. It may be that Americans are much less happy than

Otherwise public consultation practice by regulatory agencies is quite advanced. All of them apply notice and comment and publish the inputs received as well as their general feedback on the consultation findings. Systematic involvement of stakeholders in the adoption of general type acts is required by law.

Administrative bodies' law-making power is free from formal constraints, since the models may be set forth in general terms not only by laws, but also by secondary rules. These latter may also surreptitiously take a different form[6]. In other terms, primary laws usually set out substantive standards applicable to "legislative acts" issued by public administrative bodies. At the same time, *ad-hoc* measures adopted by the Parliament waive these standards, ultimately enabling those bodies to adopt "legislative acts that do not have the force of regulations"[7]. Over the past thirty years, there has been a veritable proliferation of non-typical regulations, which is partly due to the lack of constraints placed by our Constitutional Charter on this subject-matter. This makes it necessary to rely on interpretative approaches, moving from a solid substantial ground, in order to focus on the actual contents of the considered regulatory instruments[8].

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the British about having their lives regulated by government at all, and that this, rather than the actual content of the regulation, is the main source of the discontent. No amount of formalized procedure can overcome this problem».

[6] There is no single system of secondary sources, but rather a system of independent secondary sources of the State, Regions and local bodies. A more thorough analysis of the these briefly examined, but fundamental questions, can be found in L. Carlassare, *Il ruolo del Parlamento e la nuova disciplina del potere regolamentare*, in Quad. cost., 1990, 24 and ff.; G.U. Rescigno, *Note per la costruzione di un nuovo sistema delle fonti*, in Dir. pubbl., 2002, 789 and ff.; N. Lupo, *Dalla legge al regolamento*, (2003); C. Tubertini, *Riforma costituzionale e potestà regolamentare dello Stato*, in Riv. trim. dir. pubbl., 2002, 935 and ff.

[7] On this kind of source see A. Moscarini, *Sui decreti del Governo «di natura non regolamentare» che producono effetti normativi*, in Giur. cost., 2008, 5075 and ff.; G. Sciullo, *Potere regolamentare, potere «pararegolamentare» e pubblica amministrazione: gli orientamenti dopo la l. 400/1988*, in Le Regioni, 1993, 1277 and ff. Decrees without force of regulations that deal with organizational issues are analyzed by L. Torchia, *Il nuovo ordinamento dei ministeri: le disposizioni generali (articoli 1-7)*, in *La riforma del Governo*, edited by A. Pajno, L. Torchia, (2000), 130.

[8] For example, *delegislation* is translated into the adoptions regulations (Article 17, Law no. 400/1988), which substitute a law in the absence of an absolute constitutional statutory limit, giving it an apparent abrogative effect on primary laws. In reality the mechanism is as follows: the law authorises the government

Such a chaotic situation is also a consequence of the two-fold nature of the regulations: on the one hand, they are sources of law similar to statutory laws; on the other hand, they are administrative instruments that supplement the executive power – being an inherent feature of public authority. This two-fold nature, first and foremost, impacts on their legal status. Since the law-making power of administrative bodies is not specifically regulated, it is unclear whether their status should be applied to all sources of law by analogy (inasmuch as they constitute a form of legislation), or whether they should be subject to the rules regarding the forms of exercise of public authority (as they share various features with such exercise, including the fact that they are issued by a public body through identical procedures)[9].

On the other hand, the regulations' two-fold nature affects judicial review. Although they are legislative instruments, their administrative origin plays a key role in the application of procedural rules. Regulations' judicial review is indeed up to administrative courts, which normally intervene after a regulation is challenged. The rules concerning the right of individuals to

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to exercise regulatory power to determine general provisions regulating the subject matter and to abrogate the current law once the regulation enters into effect. This should provide greater flexibility and faster adaptability to the real situation. The relationships with the Italian Costitution and the principle of legality are examined by S. Cassese, *Le basi costituzionali*, in *Trattato di diritto amministrativo*, in *Diritto amministrativo generale*, S. Cassese (ed.), I, (2003), 215 and ff.; G. Amato, *Rapporti fra norme primarie e secondarie (aspetti problematici)*, (1962), 130; G.U. Rescigno, *Sul principio di legalità*, in Dir. pubbl., 1995, 259 and ff.; L. Paladin, *Le fonti del diritto italiano*, (1996), 190.

[9] Is not obvious to show where does legislation stop, and where does administrative action begin. «Surely legislation has certain fundamental characteristics – principally the laying down of rules which are of general application and which can be enforced by courts – that make it readily identifiable. Anything falling short of this paradigm lacks the necessary characteristics of legislation, and is therefore merely administrative in nature. Reality, however, is more complicated; many measures now emanate from government which cannot easily be classified according to a simple legislative/administrative dichotomy», M. Elliot, J. Beatson, M. Matthews, *Administrative Law*, Third edition, (2005), 638. Since no specific legal rule applies to the process of issuing regulations, procedural rules are often debated by legal scholars. See, for instance, Council of State, Division VI, decision no. 1215 dated 2 March 2010 as regards the possibility not to subject proceedings based on regulations to the general rule dispensing from the need to provide the reasons for a decision.

challenge regulations remain unprejudiced. Even the annulment of a regulation (a remedy that typically involves the administrative courts) is adapted in order to rely on a specific legal rule[10].

Thus, there is no clear-cut distinction – unlike, for instance, in the German legal system – between the power of administrative bodies to adopt implementing measures and their law-making powers[11]. Whilst the former is regulated by the Act on administrative procedure, such Act is utterly irrelevant to law-making powers. Invalidity is also regulated differently, depending on whether an administrative measure or an administrative regulation is found to be illegitimate: in the former case, the measure can be set aside, whilst in the latter illegitimacy focuses on nullity and voidness of the secondary rule and setting aside cannot even be conceived. Hence, administrative regulations that are in conflict with primary legislation are null and void.

As regards the review of law-making powers in order to establish consistency with higher-level sources of law, no clear-cut legislative framework is available. In fact, this issue has never been tackled by Parliament, not even on the occasion of the recent re-codification of the legislation concerning the administrative

[10] On the general principles of judicial review, M. Elliot, *The Constitutional Foundations of Judicial Review*, (2001). On procedural rules see G. Morbidelli, *La disapplicazione dei regolamenti nella giurisdizione amministrativa*, in Dir. amm., 1997, 578; F. Cintioli, *Potere regolamentare e sindacato giurisdizionale*, (2007), 98 and ff.; M. Massa, *Regolamenti amministrativi e processo. I due volti dei regolamenti e i loro riflessi nei giudizi costituzionali e amministrativi*, (2011).

[11] The rationale for this distinction can be explained with the different functions fulfilled. Regulations are instances of the legislative powers vested in the executive; accordingly, the relevant law-making process is differently structured from the so-called standard proceeding as set forth in the Act on administrative proceedings. For these proceedings special importance is attached to public participation, decision-making procedures implemented by municipal bodies, or to the fact that the opinion of expert committees is sought. If procedural rights are breached, the flaw(s) which cause(s) nullity and voidness must be evident and essential in nature - this is the case whenever a requirement set forth by the law-maker in respect of the given proceeding in order to ensure that the specific instrument takes shape appropriately is breached to a substantial degree in terms of its function. A necessary referral should be made to the decision of the Bundesverfassungsgericht, dated 12 October 2010, in NVwZ 2011, 289, §128, as quoted by E. Schmidt-Aßmann, *L'illegittimità degli atti amministrativi per vizi di forma del procedimento e la tutela del cittadino*, in Dir amm, 2011, 481.

judicial proceedings. There are no statutory rules for the administrative regulations review through *ad-hoc* measures. Nevertheless, derogations from the general model and specific provisions have been developing over the years, at least through case law and practice, especially with reference to the procedural approach to regulations. The exceptions to standard rules are meant to allow to shape safeguards, which are tailored to the specific type of instrument that is being challenged.

In general, the review of the sources of law different from primary legislation is committed in full to judicial authorities. There is only one statute that explicitly authorizes incidental review. It dates back to 1865, it applies to all administrative instruments, including those different from regulations, and it explicitly refers only to ordinary (i.e. non-administrative) courts. For the remainder, safeguards against illegitimate regulations have been developed through case law. The applicable rules in challenging regulations derive from judicial decisions, which have expanded or reduced the scope of judicial review on a case-by-case basis[12].

The purpose of this article is to examine the judicial review of secondary rules. It begins by drawing a general distinction between *direct* review of secondary rules and *indirect* (or *incidental*) review. The decision to focus on incidental review stems not merely from a concern to impose limits on this essay but from a special interest in the problems of legitimating incidental judicial controls over administrative rule-making processes.

2. *The Judicial Review of Secondary Rules.*

2.1. *The Lack of Constitutional Review.*

Secondary rules cannot be reviewed by the Constitutional Court. Under Article 134 of the Constitution, the Court has jurisdiction – and may be incidentally seized by citizens – exclusively over the instances of primary legislation (i.e. Acts

[12] See, in this respect, E. Cannada Bartoli, *L'inapplicabilità degli atti amministrativi*, (1950); A. Romano, *La pregiudizialità nel processo amministrativo*, (1958); G. Morbidelli, *La disapplicazione dei regolamenti nella giurisdizione amministrativa*, cit. at 10, 665; F. Cintioli, *Giurisdizione amministrativa e disapplicazione dell'atto amministrativo*, in Dir. proc. amm., 2003, 95. See generally C. Forsyth (ed.), *Judicial Review and the Constitution*, (2000).

passed by Parliament, regional laws, decree-laws, and legislative decrees); the Court cannot review the legitimacy of regulations[13]. This is the reason why the Constitutional Court can be defined as the "judge of laws" rather than the "judge of constitutional compliance". The Court has applied this rule by drawing a unique clear-cut distinction between laws and regulations, based on formal criteria such as sources, decision-making process, and the formal features of the regulation. The Court has never relied on substantial criteria, which might have resulted into different outcomes about the acts to be reviewed by the Constitutional Court; this has factually limited the scope of the Court's jurisdiction to laws, except for particular cases[14].

Conversely, ordinary judges have jurisdiction over regulations. In this context, a general distinction between *direct* review and *indirect (incidental)* review must be drawn.

2.2. *Direct Review by Administrative Courts.*

The legislative nature of regulations enables all courts to deal with interpretative issues; conversely, the direct review of regulations is exclusively reserved for administrative courts, since regulations emanate from administrative entities[15]. Secondary legislation is subject to judicial review under the Article 113 of the

[13] During the meetings of the Constituent Assembly, Costantino Mortati and Egidio Tosato were in charge of drafting the text of Article 134; they clarified that the members of the Constituent Assembly meant to rule out that the Constitutional Court could review the legitimacy of regulations. The incidental review of regulations by the Constitutional Court is supported by C. Mortati, *Atti con forza di legge e sindacato di costituzionalità*, (1964).

[14] A particular case concerns the direct review conducted by the Constitutional Court: if a regulation – like any administrative instrument or measure – encroaches upon the State's or a Region's scope of competences as set forth in the Constitution and/or other constitutional acts, it is open to direct review by the Constitutional Court, when the State or a Region were to claim a conflict of competences. In the latter case, the Court's decision on the conflict in question is not to be complied with by ordinary judges.

[15] In the legal systems of Western countries, the competence to annul regulations is frequently devolved to administrative courts: see M. Fromont, *Droit administratif des Etats européens,* (2006), 274. In France, regulatory instruments may be challenged on grounds of *excès de pouvoir*. On incidental review models see B. Marchetti, *L'eccezione di illegittimità del provvedimento amministrativo. Un'indagine comparata,* (1996).

Constitution, just as all the other acts adopted by public administrative bodies. If a regulation is found to be illegitimate, the court annuls it – i.e., sets the regulation aside, and declares its effects null and void from inception (*ex tunc*).

A regulation may be challenged *per se*, if it is immediately detrimental, that is, if the negative impact on certain interests is to be traced directly back to a provision contained in that regulation[16]. If this is not the case, the regulation must be challenged together with the implementing measure thereof[17]. In general, the direct challenge of regulations is the exception, whilst the joint challenge of a regulation and the relevant implementing measure(s) is the rule.

Thus, in order to challenge a regulation before an administrative court within the applicable deadline, regardless of any related implementing measures, two conditions have to be fulfilled: a) it produces detrimental effects on third parties' legal interests; b) the detrimental effects in question are produced despite the implementing measures adopted by an administrative

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[16] In literature, a distinction is drawn between "volition-action" regulations, that is, regulations that can be challenged directly, and "preliminary volition" regulations. Whilst the former have an impact on the personal sphere of the individuals concerned, the latter need an implementing instrument. This widely-received definition was coined by A. Romano, *Osservazioni sulla impugnativa dei regolamenti della pubblica amministrazione*, in Riv. trim. dir. pubbl., 1955, 882; reference has often been made to it in case law as well: see Regional Administrative Court, TAR Lombardia, Milan, 17 June 2009, decision no. 4056; TAR Puglia, Lecce, 6 May 2008, decision no. 1290.

In the Italian legal system it is still necessary to prove that harm was caused to the individual petitioner/claimant. This is not in line with the approach developed in EU law, which regulated the admissibility of individual claims for annulment via the Lisbon Treaty, by mitigating the stringent provisions that were previously in force. Under the current text of Article 263 of the TFEU, any legal or natural person lodging a judicial claim for annulment of "regulatory provisions [....] that do not entail any execution measures" has only to show that he is "directly" affected, without any consideration being given to individual harm.

[17] Since the right to directly challenge a regulation is closely related to the principle of the individual's interest to take legal action, an individual is to lodge a two-fold claim in order to have both the implementing measure and the relevant regulation reviewed judicially; indeed, the implementing measure specifies the detriment caused to the individual and, thereby, accounts for the individual's interest in taking legal action. On this issue see Council of State, Division VI, decision no. 663 dated 12 February 2001.

body[18]. This circumstance has to be factually established considering both the contents and the nature of the regulatory provision in question, and the effects produced.

When an illegitimate regulation directly challenged is annulled by the administrative court, its effects, as said, are declared null and void from inception (*ex tunc*) and *erga omnes*. Since any measure or act inherent to the regulation is inseparable from the latter, the annulment of the regulation "is binding on the administrative body with regard to all the entities to which the measures or acts in question are addressed and accordingly pre-empts and makes unsubstantiated any claim possibly made by the said administrative body on the same matters through a separate judicial proceeding"; "on the other hand, annulment of the regulation entails that the latter instrument is cancelled from the realm of the law, so that no other court may ever be seized to rule on the legitimacy of the said regulation"[19].

If a regulation is annulled, the effects already produced are null and void too: this occurs with regard to the whole gamut of the specifically addressed rights and interests, as well as to the rights and interests already come into existence – providing they have not yet been defined[20]. Unlike what is generally the case, these consequences are not limited to the parties in the relevant litigation. By derogating from the general rule, whereby the judgment is only enforceable between the litigating parties, judicial annulment of a provision contained in a regulation applies to all potential addressees of the said provision – that is, it should be classed as a judicial decision of general reach, and not a case-specific one[21]. Even when the requirements of publicity are not met, such as those concerning Constitutional Court's decisions, the ultimate effects are similar to those produced by a judgment setting aside a specific piece of legislation. Public authorities are under the obligation to inform the citizens on the annulment of

[18] TAR Lazio, Rome, Division II *ter*, 25 February 2008, decision no. 1685.

[19] Council of State, Division IV, 19 February 2007, decision no. 883; Id., Division IV, 12 May 2006, decision no. 2671. An interim order issued by the court to stay application of a regulation is also enforceable in general, still on account of its "ontological inseparability": see Council of State, Division VI, 6 September 2010, decision no. 6473.

[20] Council of State, Division VI, 12 March 1994, decision no. 332.

[21] Council of State, Division IV, 23 April 204, decision no. 2380.

legislative instruments, even if nothing is specifically provided to that end[22].

Considering the general and non-specific nature of such decisions, annulment of "general regulations, which are a source of law and, accordingly, are legislative in nature", is different from the annulment of "individual acts of administrative and judicial authorities, which should be regarded as executive and judicial in nature"[23]. The decisions in question are enforceable *ultra partes* [i.e. beyond the parties concerned], because the legal obligation originating from the source of law at issue is related to the exercise of authority – that impacts also on the entities unrelated to the considered judicial proceeding.

2.3. *Incidental Review of Regulations.*

Judicial review of regulations is often contained in a special discipline, which marks a clear distinction from general procedural provisions. Because of the peculiarities of these acts, which are "legislative by nature", though "administrative by set-up"[24], it is generally accepted that the legitimacy of secondary legislation can be reviewed on an incidental basis, even *ex-officio*. In such case, the litigation is not necessarily devolved to administrative courts, as also ordinary judges may be seized of an incidental claim. The reason of this rule is that not the regulation's legitimacy is at stake, but a different *petitum*, which involves the regulation's legitimacy assessment as preliminary question.

Lower courts are empowered to review, on an incidental basis, the legitimacy of a regulation in both civil and criminal proceedings under section 5 of Act no. 2248, "*on setting aside*

[22] There is no provision that specifies publicity arrangements. By analogy, section 14 of Presidential decree no. 1119 dated 24 November 1971 (on the lodging of extraordinary complaints with the Head of State) is considered to be applicable. Accordingly, if general administrative instruments of a legislative import are annulled, the administrative body has to publish such annulment "according to the same publication arrangements as applied to the instruments that were annulled". The issue of extending these provisions to the decisions that grant claims on conflicts of jurisdiction is addressed in Council of State, Division VI, 30 November 1993, decision no. 954.

[23] C. Esposito, *La validità delle leggi*, (1964), 119.

[24] This definition was devised by E. Cheli, *Potere regolamentare e struttura costituzionale,* (1967), 436.

litigations", dated to 20 March 1865 (Annex E thereof). Should the judge, in adjudicating the main litigation, find that the regulation is illegitimate – regardless of whether the said regulation was challenged or not – it shall refrain from applying it and decide as if such a regulation was non-existent[25]. This shows how incidental ruling is exclusively functional to adjudicating the case under scrutiny; accordingly, the decision is not regarded as final, and may only be enforced against the parties; indeed, the regulation is not set aside *per se*. Such a ruling does not produce any specific legal effects – in particular, it does not start up a new time limit period to challenge the given regulation, nor does it allow to lodge a claim for annulment of the said regulation[26].

[25] In civil proceedings the judge refrains from applying an illegitimate regulation, if assessing legitimacy of such regulation is part of the issues that the judge has to settle before adjudicating the case and declaring whether a given claim is to be granted or not. Conversely, in criminal proceedings consideration is given to an administrative instrument to insofar as the latter is part of the statutory definition of the criminal offence at issue. The lenient approach to such cases only allows to refrain from the application of the given regulation *in bonam partem*, that is, for the defendant's benefit, in order to avoid imposing criminal punishments. However, part of the case-law (see Court of Cassation, Criminal Law Division III, 17 February 2004, decision no. 1443; Division III, 24 February 2001, decision no. 1537) also admits to refrain from the application of a flawed regulation *in malam partem* – whereby the statutory definition of the offence is amended and the illegitimate instrument is equated to a non-existent instrument. See, in this regard, C. Franchini, *Il controllo del giudice penale sulla pubblica amministrazione*, (1998), 75.

[26] As clarified by the Joint Divisions of the Court of Cassation in decision no. 22217 dated 28 September 2006, "in the context of setting aside administrative litigations, refraining from the application of illegitimate administrative measures was justified by the prohibition for judicial authorities to revoke, amend, or annul administrative measures – such power being conferred exclusively on the competent administrative authorities that received the claim lodged by the party concerned. Together with the consequent introduction of administrative jurisdiction, aiming to protect the citizens' legitimate interests, the power in question only exists with regard to litigations between individuals – if the administrative measure at issue does not underlie the judicial claim made and is only relevant in terms of logical sequence, so that it gives rise to a preliminary question of a technical nature, which can be assessed on an incidental basis". Other decisions by the Court of Cassation followed this approach (no. 2588 dated 22 February 2002; no. 18263 dated 10 September 2004; no. 1373 dated 25 January 2006). However, there are also decisions upholding the incidental review performed by non-administrative courts, which accordingly refrained from applying illegitimate administrative instruments in

Specifically, administrative courts are empowered to refrain from applying any administrative act to the extent that they take review of the administrative instrument as an underlying assumption rather than as the material object of the decision, which, conversely, consists in the legal relationship between the parties[27]. However, a non-administrative court may only refrain from applying an illegitimate regulation, if the administrative instrument does not impact directly on the legal relationship submitted to the court's scrutiny and is only a precondition thereof, without making up the judicial claim. This means that the non-administrative court reviews the legitimacy of the instrument in question on an indirect, incidental basis rather than directly[28].

The incidental evaluation before administrative courts follows the same rules, although no legislative provision allows these courts to carry out such a review[29]. Even the recent

connection with actions instituted against public administrative bodies, if the judicial claim made concerns a right and the latter remains so, because the regulatory instrument at issue is not such as to turn the right in question merely into a legitimate interest, which is the case if the regulatory instrument must be compliant with specific legal requirements and, accordingly, does not represent an instance of authoritative, discretionary powers. This was the decision made in cases brought by users of public facilities that challenged the amount charged to them (see decision no. 4584 dated 2 March 2006 by the Court of Cassation).

[27] See M.S. Giannini, *Discorso generale sulla giustizia amministrativa,* part. II, in Riv. dir. proc., 1964, 14. The power to refrain from applying regulatory instruments as part of administrative proceedings is addressed by R. Dipace, *La disapplicazione nel processo amministrativo*, (2011), 149 and ff.

[28] See Joint Divisions of the Court of Cassation, decision no. 22217 dated 28 September 2006. Alternatively, the criterion consists in the protection of individuals' rights; indeed, a court that has to decide on an administrative measure that impacts on individuals' rights is certainly empowered to perform an the incidental review of the instrument underlying the measure that is being challenged, without acting *ultra vires* (see Joint Divisions of the Court of Cassation, decision no. 20125 dated 18 October 2005).

[29] On the application of section 5 of the Act setting aside litigations to administrative proceedings, see E. Cannada Bartoli, *L'inapplicabilità degli atti amministrativi*, cit. at 12, 192.

Conversely, the following judicial decisions ruled out the possibility to refrain from applying a regulatory instrument in administrative proceedings: Council of State, Division IV, 11 June 1909; Id., Division V, 14 February 1941, decision no. 93; Id., Division V, 10 July 1948 decision no. 500; Id., Division V, 28 June1952 decision no. 1032; Council of the Region of Sicily 30 September 1965 decision no. 130; Council of State, sitting in plenary, 8 January 1966, decision no. 1; Council of the Region of Sicily 21 February 1968 decision no. 49; Id., Division

consolidation of the rules applying to judicial administrative proceedings, based on the legislative decree no. 104, dated 2 July 2010, fails to address the power to refrain from applying illegitimate regulations. The decree does not refer to the incidental review of legality, nor to the possibility, for a court, to declare that the instruments adopted by a public authority are null and void for the purpose of adjudicating a case – without exceeding the scope of the specific claim[30].

The possibility for administrative courts to review the legality of regulations on an incidental basis is taken into consideration in judicial decisions dating back to 1992. Before that period, judges were not empowered to intervene, if a regulation was not challenged within the sixty-day deadline from its adoption – as the expiration of such deadline barred any further challenging of the instrument[31]. Starting from the early 1990's, however, administrative courts were allowed to refrain from applying a regulation incompatible with higher-level legislation, irrespective of whether the regulation in question had been expressly challenged or not. This was due to a change in the stance taken by the Council of State on this subject-matter, such as to attach the appropriate importance to the legislative force of regulations.

IV, 20 April 1971 decision no. 463; Id., Division IV, 2 October 1989 decision no. 664; TAR Sicily, Catania, 6 June 1986, decision no. 625; Council of State, Division V, 12 September 1992 decision no. 782; TAR Veneto 16 February 1995 decision no. 300; TAR Abruzzo, Pescara, 20 July 1995 decision no. 263; Council of State, Division V, 24 May 1996 decision no. 597; Court of Cassation, Employment Division, 14 February 1997, decision no. 1345.

[30] Comments on the recent legislation can be found in A. Pajno, *La giustizia amministrativa all'appuntamento con la codificazione*, in Dir. proc. amm., 2010, 119; L. Torchia, *I principi generali (Il nuovo Codice del processo amministrativo, Decreto legislativo 2 luglio 2010, n. 104)*, in Giorn. dir. amm., 2010, 1117. With the new Consolidated Statute, administrative proceedings are no longer limited to protecting legitimate interests - pursuant to the principle that multiple actions may be appropriate to grant the petitioner's claim; to this regard, see Council of State, sitting as a plenary, 23 March 2011, decision no. 3. As regards the actions that may be brought in court, see L. Torchia, *Le nuove pronunce nel Codice del processo amministrativo*, in Giorn. dir. amm., 2010, 1319.

[31] Over the years, the stringent requirement of complying with the deadline in question led administrative courts to limit their reliance on this tool as for regulatory provisions; by doing so, they played down the executive functions of such provisions whilst emphasizing their legislative nature.

The stringent requirement of complying with the deadline for challenging regulations – that is, with the so-called "precondition" – led administrative courts to limit their reliance on this tool; by doing so, they played down the executive functions of such provisions whilst emphasizing their legislative nature.

The regulation must not be the main subject of the litigation; rather, it should be an obstacle to the appropriate establishment of the parties' legal standing. The administrative court finding an illegitimate regulation may refrain from applying it, without annulling it. Pursuant to the principle of hierarchy within the sources of law, an administrative court may directly assess the possible conflict between an administrative measure and primary norms, irrespective of whether the regulation has been challenged[32].

In any case, being sources of law, regulations are subject to the hierarchical principle as well as to the procedural principle known as *iura novit curia* [i.e. the court knows the law]. Accordingly, in case of conflicts between different sources of law, the administrative court must be in the position to refrain from applying a regulatory instrument that is in conflict with a higher-level source, even if such instrument has not been expressly challenged. In this way, it can determine, by its own motion, the legal rule applicable to the case under scrutiny, without any constraint whatsoever[33]. This is also allowed by the circumstance

[32] Council of State, Division VI, 3 October 2007, decision no. 5098; Council of State, Division VI, 12 April 2000, decision no. 2138. Conversely, challenging of the provision by the petitioner in the first-instance proceeding is necessary according to Council of State, Division V, 1 September 2009, decision no. 8387.

[33] The possibility to refrain from applying a legal rule could, therefore, be introduced into administrative proceedings thanks to the peculiar legal features of regulations. For the same reason, such a possibility was not admitted by courts with regard to case-specific administrative provisions, because it would have jeopardized the continuity of administrative activities, the rule whereby an administrative measure is assumed to be legitimate, and the soundness of legal relationships - even if the breach at issue concerned an EU instrument. The most significant decision in this regard is the one by the Council of State, Division V, dated 10 January 2003 (no. 35), whereby refraining from applying the regulatory provision in such cases would undermine "the soundness of legal relationships based on public law along with the principles of stability, reliability, and continuity of administrative activities and the presumption of legitimacy principle"; Council of State, Division IV, 21 February 2005, decision

that the respect of the established deadline to challenge the regulation – which is formally an administrative instrument – is irrelevant in such cases.

Having established that a regulation is illegitimate in relation to higher-level legislative provisions, whether issued by the State or by the EU, the decision adopted by the court is not considered final, is only enforceable in respect of the litigation at issue and only between the concerned parties. Actually, cancelling the legal effects produced by the regulation in question might be prejudicial to third parties' interests.

In this way, the judicial review by administrative courts appears to be quite similar to that of the Constitutional Court, as it is modeled after an objective approach to jurisdiction. This is all the more true in peculiar cases such as those concerning delegated regulations – i.e. those cases where Parliament delegates the executive power to lay down the rules applying to a specific case, without adequately setting out the reference benchmarks. In spite of their being instruments of secondary legislation, delegated regulations set provisions that are independent from specific legislative constraints. Accordingly, their functions are distant from the typical ones of executive instruments; this means that they should be classed as regulations exclusively from a formal standpoint.

3. *The Review Process by Public Administrative Bodies.*

Let us now consider the *role played by public authorities* in applying a secondary source of law breaching a higher-level rule. An administrative body required to apply a regulation considered to be illegitimate pursues different lines of conduct, depending on whether it *fathered* the regulatory instrument at issue or not.

An administrative body called for the implementation of its own regulatory instrument may not refrain from applying it automatically, because it is obliged to rely on self-protection tools – in particular, the remedy of *ex-officio* annulment – in order to introduce any modification. Indeed, only after instituting the relevant proceeding and having checked the interests vested in the

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no. 579. See also M.P. Chiti, *L'invalidità degli atti amministrativi per violazione di disposizioni comunitarie e il relativo regime processuale*, in Dir. amm., 2003, 687.

addressees and counterparts, may an administrative body, by its own motion, set aside a regulatory instrument in conflict with higher-level norms (including the effects that it produced since inception). Pursuant to the *contrarius actus* principle, the formal and procedural rules that apply to an annulment proceeding are the same as those that apply to the adoption of the instrument that should be set aside[34].

An administrative body may find that a regulation is null and void *ex officio* also when it is supposed to implement such a regulation; however, that administrative body is obliged to abide by the self-protection regime in order to legally set aside a flawed regulation. As already pointed out, it may not simply refrain from applying it. Nor may an Italian administrative body – contrary to the German or Spanish cases – act on the assumption of a sort of unlawfulness exception. Indeed, in Germany and Spain illegitimate regulations are considered *per se* null and void, whilst in our legal system they must be set aside[35]. Accordingly, textual conflicts between a regulation and higher-level legislation may be claimed by public administrative bodies at any time (in line with the approach to nullity and voidness), since administrative regulations inconsistent with the law are generally null and void *ex lege*.

It is unclear whether the role played by involved the administration can be analogous to the one a court – that is, whether it may "sort out" the sources of law just as a court and find that a regulation conflicting with a higher-level legislation is

[34] Council of State, Division V, decision no. 7218, dated to 12 November 2003; TAR Abruzzo, L'Aquila, decision no. 603, dated to 2 October 2007. The application of this principle is not without exceptions, because it does not concern procedural requirements that are irrelevant to the review procedure.

[35] On the legal status of regulations in Spain see E. Garcìa de Enterrìa, T.-R. Fernàndez, *Curso de derecho administrativo*, I, (2006), 227 and ff. A decision, which finds that an illegitimate regulation is null and void, is enforceable *erga omnes* and retroactively, whilst the same publicity rules apply, as in the case of a measure that is set aside. On Germany see F. Hufen, *Verwaltungsprozessrecht*, (2003), 391; E. Schmidt-Aßmann, *L'illegittimità degli atti amministrativi per vizi di forma del procedimento e la tutela del cittadino*, cit. at 11, 481. In particular, public authorities are not empowered in the German system to autonomously refrain from applying illegitimate instruments. This is the reason why they rely on an *ad-hoc* procedure – called *Normenkontrollverfahren* – in which the main cause of action consists in assessing the legitimacy of the regulation issued by the Länder or the local authorities.

null and void. An interesting development occurs in France, where an administrative body is required to repeal any regulation found null and void from its inception, in front of a claim lodged by a subject legally interested in avoiding the regulation's application[36].

An administrative body is required to set aside a regulatory act (relying on the *ex-officio* annulment procedure, under section 21-*nonies* of Act no. 241/1990) even if it has already been declared illegitimate by an incidental decision of either an ordinary judge or an administrative court – because, as already pointed out, this form of incidental decision would not produce the annulment of the regulatory instrument in question. In any case, the administrative body is not really obliged to do so, since no clear-cut legal requirement is applicable in this regard: rather, it will have to assess the available options on a discretionary basis, by balancing public and private interests. If the administration opts for the setting aside, relying on the self-protection regime it will consider requirements such as cost-containment, efficacy, and effectiveness of administrative activities: in this way, it will avoid the adoption of further administrative measures liable to be challenged by third parties because of their contrast with a general rule.

Conversely, if an administrative court has directly (not incidentally) set aside a regulation with a final decision, an administrative body is obliged to refrain from applying such regulation to any pending cases, under penalty of incurring liability[37].

On the other hand, if the regulation originates from an administrative body different from the one responsible for its implementation, the latter seems required to apply the regulation in question – but nothing is expressly provided in this regard. This

[36] *Conseil d'État*, 3 February 1989, *Compagnie Alitalia*.

[37] See TAR Emilia-Romagna Region, Bologna, 8 June 1984, decision no. 334; Court of Cassation, Division III, 25 November 2003, decision no. 17914, a decision which concerned a regulation set aside by a decision that had not yet become final, whereupon the Court ruled out any liability as vested in an administrative body that had applied such regulation. The latter decision fails to take into due account the uncertainty arising from applying or refraining to apply a regulation whose illegitimate nature has not yet been established finally.

is due to the fact that our legal system does not consider administrative bodies as entities empowered to review the legitimacy of the regulations that they are expected to apply (except for EU law)[38]. Nevertheless, if an incidental decision finds that the given regulation is illegitimate, the administrative body might refrain – in a collaborative perspective – from applying it, and thereby abstain from issuing a measure that would be invalid from the start. The literature on this matter is rather scarce, since this is not a topic addressed neither in jurisprudence, nor in case law; consequently, there is no argument that supports a different approach.

Against this backdrop, one should consider two major *derogations* from the stance described above. First, when the higher-level legislation is part of the EU law, since refraining from application is an obligation imposed on public authorities - as repeatedly affirmed by the EU Court of Justice[39]. Second, when the conflict with the higher-level legislation entails an *ultra vires* decision of the administrative body in issuing that regulatory act, then the regulation is declared null and void rather than being set aside; in this case, having the regulation been found null and void, it would not be capable to produce valid effects, with the consequence that any administrative body, as much as any private subject, might autonomously refrain from applying it.

It is questionable whether applying an illegitimate regulation gives rise to *liability* as vested in administrative body. Here one should return to the already drawn distinction between

[38] The innovative features of the European administrative framework and the composite mechanisms relied upon by the EU to achieve the relevant objectives are addressed by C. Franchini, *Autonomia e indipendenza nell'amministrazione europea*, in Dir. amm., 2008, 87 and ff.

[39] The obligation to refrain from applying domestic legislation that does not conform with the EU law has been imposed on administrative bodies since the well-known decision in the *Fratelli Costanzo* case (case C-103/88), dated to 22 June 1989, paragraph 30. The conflict between domestic and EU sources of law can be reconciled through two legal approaches that rely on a hierarchy criterion. On the one hand, national administrative authorities are required to refrain from applying domestic rules that do not conform with EU law; on the other hand, EU legality generally takes priority over domestic legality. In this way, the principle is reaffirmed whereby the legality rule entails that administrative authorities' activities are subject, first, to EU law and, second, to domestic law, providing the latter is in conformity with the former.

the case where an administrative body adopts an illegitimate regulation and the one where it merely implements such an illegitimate regulatory instrument. If an incidental decision has found the regulation to be illegitimate, the administrative body that adopted it may be liable under tort law - when the relevant preconditions are met. However, this liability only arises because it has *adopted* the illegitimate regulation, not because it has *applied* it[40]. Conversely, if a different administrative body is involved, it is hard to imagine that tort liability may arise, considering that there is no legal obligation to refrain from applying a regulation found to be illegitimate but not set aside – not even if the parties concerned notify this circumstance to the administrative body that applies such regulation. Since no obligation exists, no unjust harm may be caused in breach of legal rules – and thus the precondition for tort liability would lack. This holds true regardless of the nature of the instrument at issue, and whenever a court has already found it to be illegitimate; conversely, the mere circumstance that a regulation was challenged before a court assuming its illegitimacy is utterly irrelevant.

Like administrative bodies, private bodies may not refrain from abiding by an regulation found to be illegitimate by a court - unless they are parties to the proceeding.

4. *The Sources Relied upon As Benchmarks.*

In the context of a regulation's incidental assessment, the judicial review may focus on compliance with any item of primary legislation, including decrees that have the force of laws and legislative decrees, or, conversely, with EU law, applicable international law or immediately enforceable international law provisions.

[40] In recent plenary sittings too, the Council of State re-affirmed that challenging an illegitimate regulation is an appropriate remedy to establish a legal claim, even if seeking its annulment is legally barred. This means that the conventional approach, whereby annulment was indispensable if a regulatory instrument had been found to be illegitimate, has been overcome and a flexible system of safeguards, which allows establishing the illegitimate nature of a regulatory instrument with a view to claiming damages (Council of State, Plenary sitting, decision no. 3 dated 23 March 2011), has been developed.

In doing so, the court has to consider the multiple sources which set the boundaries of administrative activities - such as the provisions contained in Treaties, sometimes subject to diverging interpretations, the judgments of the Court of Justice, which go in several directions and are sometime interpreted in a way that gives rise to slightly diverging rules, and so on[41]. If jointly applied, these sources may fail to point to the same legal rule. In such a case, to assess compliance of a regulatory instrument with a legislative benchmark, i.e. reviewing compliance with the legality principle, is a daunting task, given that no unified guidance can be identified.

From this perspective, one could argue that legality may take the form of "reviewing the criterion for selecting the right law"[42]. The focus is not so much on establishing compliance with laws that impose limitations on public authority, but on reviewing the assessment made by the public administrative body in order to determine the applicable rule. The mechanistic view of the legality principle, whereby public administrative bodies only execute the intent of the law, is no longer true. If one endorses this extension of the scope of the legality principle, the benchmark applied by administrative courts needs to be different. The Courts search for the law in case law, based on the *stare decisis* principle, rather than in law, and "scholars' activities contribute to giving form to the law", so that "the law grows and slowly evolves"[43].

The review applies to all instruments of regulatory nature adopted by the Government, individual Ministers, or other administrative bodies, at State or local level – including municipalities – as much as by independent authorities. The scope of the review also includes by-laws or other sources of secondary

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[41] That the judgments by the EU Court of Justice are sources of law was ruled by the Constitutional Court since its decisions no. 113, dated to 23 April 1985, and no. 389, dated to 11 July 1989. As consistently found by administrative courts, the judgments of the EU Court of Justice are directly enforceable in Member States' legal systems like regulations, directives and Commission's decisions; accordingly, they are binding on domestic courts, which are required to refrain from applying any domestic provisions that are in conflict with them. See, in this connection, Cons. giust. amm. Sicilia, decision no. 470 dated 25 May 2009; Council of State, Division V, decision no. 4440 dated 13 July 2006.

[42] S. Cassese, *Alla ricerca del Sacro Graal. A proposito della rivista* Diritto pubblico, in Riv. trim. dir. pubbl., 1995, 796.

[43] All the quotations are from S. Cassese, *Le basi costituzionali*, cit. at 8, 222.

legislation. "Regulation" actually means an instrument that sets forth rules – which should be as general and theoretical as possible – adopted by any public administrative body[44]. Conversely, Parliamentary rules of procedure fall outside the scope of this definition, since they are peculiar sources of law that take priority over primary legislation.

The incidental review is strictly limited to administrative instruments of regulatory nature; in no case may such a review be performed in respect of laws or instruments that have the force of law, which may only be checked by the Constitutional Court on the basis of constitutional principles – pursuant to Article 134 of the Constitution. On the other hand, incidental review is an alternative to direct assessment, because, if no direct evaluation is permitted, the court is empowered under procedural rules to rely on incidental review as a remedy. Indeed, the Constitutional Court clarified that it is unquestionable that any court that is expected to apply regulatory provisions that are found to be illegitimate, because they are in conflict with the Constitution may, indeed must refrain from applying them – for instance, whenever such provisions are found to be illegitimate on account of their being in conflict with primary legislation – in pursuance of section 5 of Act no. 2248 (annex E), dated to 20 March 1865[45].

The *modus operandi* is also different. Whilst the Constitutional Court relies on parliamentary records to review all the instruments having the force of law, administrative courts are not required to rely on the regulatory impact assessment – where this is available – to establish whether regulations are legitimate. This entails that there is a wide gap between impact assessment and the reasons underlying legal instruments. Relying on impact assessment would translate into conferring a two-fold role on the tools that are meant to ensure the quality of law-making, which

[44] A peculiar case is that of legislative simplification regulations, which are substantively enforceable as laws, although they are not formally considered instruments that have the force of laws. If the Article 134 of the Constitution is to be construed extensively, these instruments might fall under the scope of the Constitutional Court's review, namely because of their peculiar features.

[45] Decision no. 72 by the Constitutional Court dated 27 June 1968, as commented by V. Onida, *Sulla «disapplicazione» dei regolamenti incostituzionali (a proposito della libertà religiosa dei detenuti)*, in Giur. cost., 1968, 1031.

would cease being tools to merely check the draft instruments, and become tools to also check the instrument *per se*[46].

The incidental review of legality may be carried out both by ordinary and administrative courts, in accordance with the current mechanism for the distribution of jurisdiction, which is based partly on the right or interest at stake, and partly on the subject of the claim. Accordingly, administrative courts have jurisdiction over all the disputes that involve public administrative bodies exercising public authority[47].

There is not a defined list of regulations subject or undergone to judicial review – their number cannot be determined. Only courts verify – on a case by case basis – whether a regulation is compliant with the higher-level legislation that applies to the case under scrutiny. No derogation from or exception to the rule of the incidental review of legality is envisaged, either based on legislative instruments or on case law;

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[46] B.G. Mattarella, *Analisi di impatto della regolazione e motivazione del provvedimento amministrativo*, paper from the Observatory on Regulatory Impact Assessment, www.osservatorioair.it, September 2010 (also published in *Astrid Rassegna*, no. 123/2010). Indeed, as shown by administrative provisions, providing the reasons for a legal instrument pursues several objectives. This is meant not only to enable judicial review, but also to ensure transparency and public scrutiny. Regulatory Impact Assessment (RIA) can lend itself very well to fulfilling this objective; as well as being helpful to courts, it could be relied upon by Parliamentary opposition and, in general, the public opinion. Thus, it should be included in the preamble to all legislative instruments as part of the underlying reasons, but it should also be published without being regarded as an internal step in governmental law-making. The concept that regulatory options should rely on regulatory impact assessment is examined in Council of State, Division VI, decision no. 5026, dated to 16 October 2008.

[47] In general, jurisdiction falls to ordinary or administrative courts as follows: if the claim made concerns a right, ordinary courts have jurisdiction; if the claim made concerns legitimate interests, administrative courts have jurisdiction – without prejudice to specific issues over which administrative court has exclusive jurisdiction.

On the issue of civil law courts refraining from the application of regulatory instruments see A. Romano, *La disapplicazione del provvedimento amministrativo da parte del giudice civile*, in Dir. proc. amm., 1983, 22; S. Cassarino, *Problemi della disapplicazione degli atti amministrativi nel giudizio civile*, in Riv. trim. dir. proc. civ., 1985, 864; G. De Giorgi Cezzi, *Perseo e Medusa: il giudice ordinario al cospetto del potere amministrativo*, in Dir. proc. amm., 1998, 1023. On the issue of criminal law courts refraining from the application of regulatory instruments, see R. Villata, *Disapplicazione dei provvedimenti amministrativi e processo penale*, (1980); C. Franchini, *Il controllo del giudice penale sulla pubblica amministrazione*, cit. at 25, 77.

consequently, that rule is applicable to any and all regulatory instruments.

As already clarified, the incidental review of legality is in full committed to the courts, which bear overall responsibility for it. There is no relationship between the framework of regional authorities and the incidental review of legality.

5. *Sanctions Relating to the Incidental Review of Legality.*

If during an incidental review a higher-level legislative instrument is breached, the remedy consists in refraining from applying the regulatory measure; this means that a court may decide on the validity of a regulation exclusively to settle the dispute between the parties involved, without affecting the act *per se*. As already pointed out, refraining from the application of a regulatory instrument is a power vested in judicial authorities whereby an illegitimate - though enforceable - administrative instrument is "devitalised"; and this power concerns exclusively the effects related with the object of the judicial claim[48].

The declared invalidity implies the refrain from applying a regulatory instrument, which will not produce any effect in the individual case; this situation is different from the case in which the competent subject *fails to apply it* – where the refusal to apply the instrument could be irrespective of whatever assessment or evaluation[49]. After declaring the invalidity, the court decides on the case as if the regulation did not exist, *tamquam non esset*. This might also entail enforcement of a previous regulatory measure – which would be almost resuscitated – if one desists from applying the provisions that repealed the previous regulatory measures.

Two fundamental reasons allow to rely on this measure, which can be considered exceptional in the context of the administrative process. Both reasons permit the non-application of the standard rule, which provides a deadline of 60-day in order to

[48] A. De Roberto, *Non applicazione e disapplicazione dei regolamenti nella recente giurisprudenza amministrativa*, in *Impugnazione e disapplicazione dei regolamenti. Atti del convegno organizzato dall'Ufficio studi e documentazione del Consiglio di Stato e dall'Associazione studiosi del processo amministrativo*, (1998), 21.

[49] According to E. Cannada Bartoli, *L'inapplicabilità degli atti amministrativi*, cit. at 12, the power not to apply an instrument results from the invalidity of that instrument, just as the power to declare it null and void.

challenge a regulatory instrument - since that rule, in the considered grounds, would not allow achieving the purposes for which it is intended[50].

The first ground concerns the hierarchical structure of the sources of law, and the legislative nature of regulatory instruments. Refraining from the application of a regulation is allowed because a private subject's legitimate expectations cannot rest on an act not compliant with higher-level sources of law but fit to produce repeatable effects. Consequently, a regulation only produces effects when it is valid. There is no need for enhancing the stability of the exercise of public authority along with its effects, because the secondary norm will be liable to new applications, as it will be challengeable by an indefinite number of affected subjects. Thus, the "principle" of equivalence – whereby an illegitimate measure is evaluated as a legitimate one in terms of the produced effects – does not apply to regulations, as it happens with administrative measures, since a secondary rule conflicting with primary norms does not produce effects of loss, extinguishment or modifications to the rights vested in private individuals, and thus cannot be legitimately relied upon by these latter[51].

The second ground concerns the predicate instrument criterion. The judicial system admits this extraordinary remedy as far as the flaw that affects the regulation challenged results from another act that has not been challenged yet[52]. A judicial authority may decide on a case *incidenter tantum*, if there is an act on which that case can be predicated – that is to say, if the claimed violation is related to a specific regulation and can be traced back to another different instrument, on which the former is predicated, i.e. to a predicate instrument. From this perspective, refraining from applying a regulatory instrument on an incidental basis is

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[50] The relationship between refraining from application of administrative measures and claims for damages is addressed in F. Francario, *L'inapplicabilità del provvedimento amministrativo e azione risarcitoria*, in Dir. amm., 2002, 23.

[51] This shows that "the rules on jurisdiction and decision-making powers (that is, the way in which a judicial proceeding is structured), cannot be consistent with the claim made in such a proceeding as much as with the relevant purposes" – see F.G. Scoca, *Sulle implicazioni di carattere sostanziale dell'interesse legittimo*, in *Scritti in onore di Massimo Severo Giannini*, (1988), III, 674.

[52] C.E. Gallo, *Questioni pregiudiziali*, in Enc. giur., 1991, XIX.

grounded in the existence of a predicate instrument. Overall, such predicate instruments are general in scope.

This is basically the "illegality exception" mechanism, whereby illegality results from a flaw affecting the predicate instrument and may generally be claimed without any time constraints, that is, it is *perpétuelle*[53]. The possibility to claim illegality of regulations incidentally allows the judicial authority to take full cognizance of the specific legal relationship; on the other hand, this results into a judicial decision, whose effects go beyond the parties to the specific dispute[54].

Whenever instruments of a different hierarchical level are found to be in conflict, refraining from application allows one to give priority to the higher-level instrument in pursuance of the hierarchical structure of sources of law – that is, it works as a mechanism to declare the lower-level provisions invalid as much as being a de-centralized mechanism to settle the conflicts between sources of law, since every judge involved in the relevant case is empowered to do so. This approach to judicial review is the ultimate outcome of the lack of a centralized system for settling such conflicts, possibly grounded in the initiative of a single court empowered to declare a given instrument invalid on account of its being in breach of constitutional provisions. That is to say, refraining from application is meant to fill the gap resulting from the lack of an incidental review of constitutionality as for the justiciability of regulations.

The operational features of the decision to refrain from applying a regulatory instrument are straightforward. The judicial

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[53] In the French legal system there is the *exception d'illegalité*, which is considered to be receivable only with regard to regulatory measures containing general provisions (R. Chapus, *Droit du contentieux administratif*, (2006), 667). It is unclear whether granting this illegality exception is a decision that is final in nature, so as to prevent challenging anew the illegitimate nature of the regulation as established by the court, or it has only relative value and, therefore, allows new determinations in respect of the relevant regulation.

[54] Council of State, Division V, 26 February 1992, decision no. 154, as commented by S. Baccarini, *Disapplicazione dei regolamenti nel processo amministrativo: c'è qualcosa di nuovo oggi nel sole, anzi d'antico*, in *Foro amm.*, 1993, 466. By refraining from applying a regulatory instrument, administrative courts exercise their power to trace back the instruments on which the challenged instrument is predicated, whereby they are enabled to probe into the features of the dispute between individual citizen and public administrative body.

authority establishes, on a preliminary basis and by its own motion, that the lower level source of law is illegitimate, because it is not in conformity with the higher level one; the case is consequently decided, as if the invalid piece of legislation did not exist and could not be enforced in the dispute at issue. Although this power is exercised *ex officio*, the principle of actionability on request is not breached, because the judicial authority steps in on the basis of the *iura novit curia* principle and the rule that the higher-level source is to be prioritized. If the court did not refrain from applying the regulatory instrument, there would be no other way to ensure that the higher-level source of law takes priority.

Where the judicial review finds that a regulation is in breach of either the Constitution or primary legislation, that regulation is not applicable; however, it remains in force because the judicial decision rendered incidentally only applies to the dispute at issue and is not to be regarded as a final judgment[55]. Nevertheless, it is necessary to ensure that legal relationships are straightforward; therefore, our legal system seems to prefer – albeit non-specifically – to timely set aside illegitimate instruments for the sake of the legality principle as it is set forth in Article 97 of our Constitution as much as in pursuance of the rule of law principle, so that private entities and individuals are not required to defend themselves against multiple instances of application of an illegitimate regulation.

As for the effects produced on the legal situation that applies to the entities addressed by the administrative instruments at issue, it should be clarified that refraining from applying a regulation based on an incidental review may entail annulment of the administrative measure implementing such regulation, because the invalidity of the illegitimate legislative instrument (that is, the regulation) attracts invalidity of the measures grounded in it. The annulment in question may be ordered by an administrative court at the instance of the party concerned; alternatively, it may be ordered by the public authority that had adopted the unlawful regulation *ex officio.*

[55] A. Lugo, *La dichiarazione incidentale d'inefficacia dell'atto amministrativo*, in Riv. trim. dir. proc. civ., 1957, 646 and ff., believes that refraining from application is not suitable for meeting the public interest in setting aside an instrument that is illegitimate.

The flawed use of regulatory powers – due to the adoption of a regulation in breach of higher-level legislation – may give rise to the administrative body's tortious liability. However, there is no legislative framework; indeed, there is no single legal provision to rely upon in order to regulate this subject matter; moreover, there is not even case law to be used in this regard. One can unquestionably argue that the type of tortious liability ("*aquiliana*"), mentioned in Article 2043 of the Civil Code, may be invoked – whereby an administrative body's liability may be said to arise if regulatory powers are exercised illegitimately so as to cause unjustified harm to citizens. Starting from these assumptions, one can appreciate that the negligence element would appear to be the most difficult one to outline. Negligence, in this case, may not be construed as negligent conduct by the civil servant that drafted the illegitimate legislative instrument; rather, one should envisage a specific instance of negligence. Drawing upon the model of the lawmaker's liability for breach of EU law, negligence here might be related to the unquestionable existence of a severe violation, or to the violation of rules of law intended to protect rights vested in individuals[56]. Criminal liability is obviously out of the question, because the facts at issue do not amount to any criminal offence.

In refraining from applying a regulation, the court acts as if the illegitimate regulation did not exist. One may argue that the legislative instruments previously in force have to be applied – providing they are in conformity.

The mechanism which consists in the court's refraining from application of an illegitimate regulation does not deprive the petitioner of any procedural safeguard; in fact, it may allow the petitioner to lodge a judicial claim for the annulment of the measure that implements the regulation which was found to be illegitimate on the basis of its incidental review. It is actually

[56] An overview of the liability vested in lawmakers can be found in A. Barone, R. Pardolesi, *Il fatto illecito del legislatore*, in Foro it., 1992, IV, 148. Regarding the individual issues, see R. Bifulco, *La responsabilità dello Stato per atti legislativi*, (1999), 127 and ff.; E. Scoditti, *La responsabilità dello Stato per violazione del diritto comunitario*, in Danno resp., 2003, 5 and ff.; V. Roppo, *Appunti in tema di illecito «comunitario» e illecito «costituzionale» del legislatore*, in Danno resp., 1998, 970 and ff. Reliance on *aquiliana* tortious liability is addressed in C. Castronovo, *La nuova responsabilità civile*, (2006), 235 and ff.

unquestionable that an implementing measure – despite not being challenged within the relevant deadline – may not be regarded as legitimate per se, since it is issued on the factual and the legal assumption of the existence of an instrument that does no longer produce legally enforceable effects, because it has been found to be illegitimate[57]. At all events, no mechanisms are available in our legal system to allow to turn an incidental finding that a regulation is illegitimate into the annulment of such regulation.

Under certain circumstances, the illegitimate nature of a regulation found by a court on an incidental basis might be also claimed by the entities addressed by such regulation, if they are aware of that finding, as a reason to elude enforcement of an administrative measure. However, it is up to the administrative body in charge to assess the relevant reasons and possibly terminate the enforcement of the measure on the basis of such reasons.

6. *The Value of an Incidental Finding of Illegality.*

An incidental finding of illegality does not take on *res judicata* value. Since its boundaries with the fact of refraining from application of an illegitimate regulation are blurred, the finding in question has a relative value – that is, it only applies to the parties to the given proceeding – rather than being absolute in nature. The finding of illegality leaves the regulation in place and does not impact directly on third parties' rights as far as they are concerned by the application of the illegitimate regulation on any other grounds.

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[57] According to A. Amorth, *Impugnabilità e disapplicazione dei regolamenti e degli atti generali*, in *Problemi del processo amministrativo*, (1964), 574, as regards the entities that are not involved in the specific action, it would not be utterly groundless to argue that, since they had failed to challenge the implementing measures that violated legal interests vested in them, or to challenge the direct application of the regulation that violated such legal interests, they had consented to them and thereby exempted the administrative body from any obligation to do away with the effects produced by the measures or application in question. Hence, as regards such entities, setting aside the regulation does not restore the previous situation, which only occurs once the administrative body is no longer in a position to apply the annulled regulation in pursuance of the relevant judicial decision.

Conversely, the Council of State has consistently ruled that judicial *annulment* of a regulation by an administrative court is enforceable *erga omnes*. This means that, contrary to the general rule, the judicial decision is not enforceable only with regard to the litigants, as its effects include all the addressees of the regulation considering the factual components of the judicial decision – that is, its operative part, the underlying reasons, and the claim made before the court[58].

The only piece of legislation that empowers judicial authorities to refrain from applying illegitimate regulations (i.e. section 5 of Act no. 2248, dated to 20 March 1865, Annex E) does not refer in any way to the *res judicata* concept. Both jurisprudence and case law agree that the effects produced by an incidental finding only apply to the parties to the given proceeding.

The fact that such decisions should be regarded as *res judicata* is unrelated to the type of decision; however, it may be necessary to extend the scope of effectiveness of such judicial decisions to the entities concerned, since regulations are involved. These decisions, whether rendered by standard or administrative courts on any issue, and whether they are rendered on a preliminary basis or not, only produce their effects within the framework of the specific dispute.

This is due to various reasons. First, since justiciability is meant to afford protection to individual parties – so that refraining from application is merely a tool to afford full protection to the rights vested in such individual parties – there is no reason for extending the scope of the decision to entities that

[58] Council of State, Division IV, 23 April 2004, decision no. 2380; Council of State, Division VI, 26 June 1996, decision no. 854; TAR Lazio, Division I, 12 May 2000, decision no. 3918, where it is clarified that judicial annulment of a regulatory instrument is enforceable *erga omnes* and applies from inception (*ex tunc*), since it impacts on the regulation as a whole, that is, as it is also related to the entities that are not directly concerned by the judicial decision and with regard to their respective rights. Consequently, if a regulatory instrument, whose contents can be considered general and indivisible, is challenged and the court subsequently annuls it together with either the predicate instrument(s) or the implementing measure(s), the annulment in question will quash the instrument as a whole – so that it will have to be regarded as non-existent both by the petitioner(s) and by any other entity.

are not concerned by it[59]. On the other hand, the petitioner's interest is protected by recognizing the right vested in him/her, or, otherwise, by annulling the instrument violating that interest and establishing that it is illegitimate. This is the part of the judicial decision setting out the appropriate interpretation of the law; thus, apparently there is no need to annul (where this is possible) a regulatory instrument that does not immediately violate any interest. Second, one can unquestionably argue that the lawmaker has failed to take in due account this incidental remedy, given that the only applicable piece of legislation dates back to 1865, that is, when no administrative law court had been set up on the basis of the legislative framework in force then.

Third, a direct remedy is available in our legal system, whereby an administrative court may be seized to claim annulment of an illegal regulation; accordingly, the incidental review remedy is to be regarded as a residual one, to which minor importance is attached. Its specific features are related to non-applicability, and this remedy is mostly actionable, if it is necessary to protect the legal situation of the individual entities concerned. Fourth, the finding by a court, on an incidental basis, that a regulation is illegitimate is ancillary to the operative part of the judicial decision, since it is only contained in the reasons for the decision and it is not even adequately publicized - since no specific legislative provision is applicable in this regard. Fifth, the relative nature of such a finding can also be accounted for by the risk that the administrative body's defenses might be undermined in the course of a proceeding before non-administrative courts.

An incidental finding of illegality does not involve, per se, any publicity requirements. The decisions rendered in this regard by ordinary and/or administrative courts do not share any of the features that apply to the decisions taken by the Constitutional Court in terms either of their formal structure or of their effects. This considerably affects the rule of law principle and the

[59] As regards, for instance, administrative law proceedings, since justiciability is meant to protect interests vested in individual entities, such interests represent both a fundamental precondition for seizing the court and a constraint placed on the scope of justiciability. That is to say, if an administrative court may only intervene insofar as the interests have been violated, it should also intervene only as long as this is necessary in order to protect the interests vested in specific entities, after establishing the violation of such interests.

assurance of legally treating identical cases by legally identical standards. No specific arrangement is envisaged in respect of incidental findings (e.g. publication in newspapers or on online media) to ensure that their effects are generally binding.

7. *Mandatory or Optional Nature of Review and Sanctions.*

The requirement that a regulation should be found in judicial conformity with a higher level rule is related, in general, to the *public order* concept; however, the requirement has no specific implication. There is no specific legislation whereby *public order* is linked to incidental findings of illegality; yet, it is unquestionable that "setting aside an illegitimate statutory provision is a requirement that goes beyond individual interests, since it concerns society as a whole for the sake of the rule of law"[60].

Albeit resulting from the challenge made by an individual entity, which claims the violation of individual interests, the review of regulations mainly focuses on establishing and overcoming conflicts between sources of law differently ranked. This is the reason why we believe that the findings made in the judicial decision are general in scope and lend themselves to being regarded as binding in nature.

Thus, any court, whatever its competences, is empowered to claim non-conformity of a regulation with a higher-level legislative instrument of its own motion (*ex officio*) – namely because the review of legality is closely related to the need for protecting the rule of law. Since the incidental review of legality is only allowed with regard to regulations, which are always administrative instruments in terms of their formal features, no court might be empowered to challenge legislative instruments for their "legality" – or, rather, for their being conform to constitutional principles.

[60] See R. Meregazzi, *L'annullamento giurisdizionale dei regolamenti*, in *Scritti in memoria di Antonino Giuffrè*, III, (1968), 610, who also adds that only with regard to the annulment of regulations could one support the view that the jurisdictional powers allocated to the Council of State are mainly intended to ensure the legitimacy of public administrative activities.

8. *Peculiarities of Domestic Law in Case of Breaches of European Law.*

If European law is breached, the legal approach to regulations is rather different. First, if the regulatory instrument is in conflict with European law, the lower courts may refrain from applying it by their own motion and at any time – just as it happens to any item of domestic primary legislation[61]. This is a direct consequence of the primacy of European law.

Moreover, administrative bodies are also empowered to refrain from applying regulations that are in breach of European law, inasmuch as they are branches of a Member State that has undertaken to fully implement European law. Indeed, public administrative bodies and judicial authorities are bound to act in respect of EU law and, therefore, refrain from applying any item of legislation that is not compliant with it – and one can hardly imagine that things should be in any way different with regulations – as long as they come into play in the administrative case to be decided upon; in order to do so, they do not have to await the repeal of Parliament or the preliminary ruling issued by the Constitutional Court[62].

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[61] As clarified by Council of State, Division VI, 23 May 2006, decision no. 3072, domestic courts are in any case required to refrain from applying a domestic instrument, including a regulation, that is in conflict with EU law. This stance is supported by Council of State, Division VI, 25 September 2009, decision no. 5765; Council of State, Division VI, 23 July 2008, decision no. 3642. The importance of legal rules in the European legal system is discussed by G. della Cananea, C. Franchini, *I principi dell'amministrazione europea*, Second edition, (2013), 86.

[62] European Court of Justice, Case C-103/88, *Fratelli Costanzo* – judgment of 22 June 1988, as commented by R. Caranta, *Sull'obbligo dell'amministrazione di disapplicare gli atti di diritto interno in contrasto con disposizioni comunitarie*, in Foro amm., 1990, 1372. That administrative bodies must also refrain from applying domestic instruments that are in conflict with EU law is uncontested: see Council of State, Division VI , 23 May 2006, decision no. 3072, whereby the primacy of EU law requires not only judicial authorities, but also Member States as a whole, that is, the whole administrative framework of such Member States, to fully implement European laws and refrain from applying domestic laws in case of conflicts. This stance is supported in Council of State, Division IV, 20 November 2008, decision no. 5742; Id., Division V, 8 September 2008, decision no. 4242; Id., Division V, 14 April 2008, decision no. 1600.
The impossibility to rely on analogy in order to extend this power also to administrative measures that are in breach of EU law is expounded in Council

From this perspective, an administrative body is not required to follow the review procedure as set forth in the Act on administrative proceedings in order to refrain from applying a regulation that is incompatible with EU law; in this case, the emphasis is put on the primacy and effectiveness, principles that underlie the protection of rights grounded in European law. However, if one considers the legal relationship between a private entity/individual and the administrative body, the fact that the latter refrains from applying the regulation – without removing the rules contained from the realm of law[63] – would not seem to afford a sound alternative remedy such as to replace the setting aside of the regulation in question. Furthermore, the public body will have to check in any case that the intervening time span is not excessively long, something which can ultimately justify the addressee's reliance on the legitimate nature of the measure in question[64].

9. *Concluding Remarks.*

The regulation is an "in betweener": halfway between a source of law and an implement of the executive power. This fact creates obstacles to a logical, consistent analysis. If one considers the legal status of secondary sources of legislation, apart from their respective contents, the administrative components would

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of State, Division VI, 17 October 2005, decision no. 5826; Id., Division IV, 22 September 2005, decision no. 5005.

Lower courts have been considered to be empowered to refrain from applying domestic provisions that are incompatible with EU law, so as to bring EU law into full effect, since the decision rendered by the Constitutional Court on 8 June 1984 (decision no. 170) – whereby the European and domestic legal systems are autonomous and separate systems; however they are mutually co-ordinated in accordance with the allocation of competences set out in the Treaty. Thus, incompatible domestic provisions are neither repealed nor derogated from nor null and void: their application is refrained from because such provisions belong to a different, autonomous legal system.

[63] E. Cannada Bartoli, *L'inapplicabilità degli atti amministrativi*, cit. at 12, 35; F. Cintioli, *Giurisdizione amministrativa e disapplicazione dell'atto amministrativo*, cit. at 12, 95.

[64] E. Broussy, E. Donnat, C. Lambert, *Stabilité des situations juridiques et droit communautaire*, in Act. Jur. Dr. admin., 2006, 2275; H. Wenander, *Withdrawal of national administrative decisions under european administrative law*, in Eur. Law Rep., 2007, 54.

appear to prevail over the legislative ones. Moreover, secondary rules are not capable of repealing laws, unless ad-hoc laws confer this power to them; they may be withdrawn by administrative bodies; they may not be challenged before the Constitutional Court[65]. Hence, the predominance of administrative law components accounts for the choice made to reserve the challenging of regulations for administrative courts.

However, this paper shows that the general framework of judicial review does not fail to take into account the subject to be reviewed, since administrative judicial proceedings are multifaceted. They are meant to decide both on the challenge made and – sometimes – on the right to tangible consideration. Because of this flexibility, administrative judicial proceedings are suitable for challenging regulations on account of the hybrid nature of regulations, which are halfway between legislative instruments and tools inherent in the exercise of public authority. Indeed, administrative law courts seized with the review of regulations can adjust themselves to and admit of innovative approaches – such as refraining from applying regulations of their own motion (*ex officio*), which "does away with the obsolete equivalence between administrative measures and administrative regulations"[66]. By relying on a standard that applies typically to sources of law – i.e., the *iura novit curia* principle – administrative judicial proceedings lend themselves to becoming tools in order to settle conflicts between regulatory provisions.

[65] These differences are highlighted by F. Benvenuti, *Disegno dell'amministrazione italiana*, (1996), 246, where it is specified that a regulation is factually legislative in nature, although it is an administrative instrument, both substantively and formally.

[66] G. Pitruzzella, *Atti normativi del Governo e tutela dei diritti*, in *Tecniche di normazione e tutela giurisdizionale dei diritti fondamentali*, edited by A. Ruggieri, L. D'Andrea, A. Saitta, G. Sorrenti, (2007), 161 and ff.