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EDITORIAL

RE-THEORIZING PUBLIC LAW

Giacinto della Cananea*

One of the consequences of the economic and financial crisis is to give new impetus to the debate about the distinctiveness of public law, especially within some Member States of the European Union. In Italy, in contrast with the dominant tradition, some strains of public law thought either deny or tend to minimize the special character of the institutions and actions of the State. They exclude, for instance, that grants and subsidies are to be regarded as authoritative measures of public authorities. They contest the system of administrative justice for the increasing weight given to the administrative judge (in terms of competence and powers), if not for its existence, on the assumption that only a monistic system of judicial review is really coherent with the Rule of Law.

Such questions have been the subject of debate, both in continental Europe and in the UK. There are certainly grounds to argue that the traditional divide between public law and private law is eroded by a variety of factors. However, the recent crisis does not seem to support the idea of a demise of public law. Quite the contrary, in several countries there has been a return of the State as investor and owner of important economic activities.

Consider, for example, banking: for several years most commentators held that it could be discharged only by the private sector, but in many countries it has received strong financial support from the State.

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This is an important debate on which the *IJPL* will focus in the New Year, in particular by organizing a symposium on the question whether Italian public law is fit for the twenty-first century. The key question is whether our public law meets certain basic standards of public life (not only legality, fairness, and rationality on the part of decision-makers, but also quality of public utilities) which are met by other countries with which Italy has achieved a closer integration in Europe.

However, this debate should not be regarded only from the point of view of the divide between private law and public law, but also from another, concerning the relationship between law and other social sciences. For this reason, this issue of the *IJPL* includes both broad analyses of administrative law and more specific studies concerning the gradual adjustment of public rules, procedures, and checks in order to ensure the respect, first, if not of the ideal of legal certainty, at least of public trust in market operators and, second, that public accounts are adequately construed and presented to political institutions and to the electorate. One of such studies is written by two economists and others may follow in the next issues, coherently with the ambition of *IJPL* to discuss critically about public law.

ESSAYS

CONSTITUTIONAL LAWFULNESS IN THE HISTORY OF MODERN LAW

Paolo Grossi*

Abstract

In a moment of transition and crisis when the socio-economic, political, legal foundations built by our founding fathers are undermined by growing instability a crisis hit the legal scholarship too. It is a crisis of sources of law, the starring source of modernity, which is undergoing a progressive decline in the post-modern era. Constitutional lawfulness appears instead to run uninterrupted between modern and post-modern.

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1. The current crisis in juristic modernity as a crisis in law sources

It is easy and elementary to bear witness to the fact that we are undergoing a moment of transition – actually, extremely rapid transition. And we may verify this each time – and this occurs often – that we find ourselves drowned in a maddening fluidity, while heavy uncertainty dominates our daily lives. There is widespread talk of crisis, not incorrectly if through this abused term we refer to the serious cracks opening in the foundations – be they socio-economic, political, juristic – built in solid rock by our forefathers, now undermined by growing instability.

This is a crisis that hits head-on the jurist in particular, because it was the juristic construction fine-tuned in modern times[1] that was discussed in its deepest recesses during the last years of the 20th century. It is not a crisis of law – as is sometimes hastily and misleadingly stated – but one of that shape in which modern civilisation forced law to take form and manifest itself, those forms that in everyday juristic jargon are usually called *sources*. It is at any rate certain that the juristic fabric has been torn, and these tears led to a widespread sense of dismay, so much so that a number of young jurists – careful observers of changes in the environment – openly spoke of identity crisis[2].

The law historian, in the habit of not isolating individual points that form the timeline, in the habit of grasping the timeline in its long and eventful unrolling, is – possibly – among jurists the only one not feeling the discomfort. On the contrary, he is aware that we are on a path towards new uncharted territories, that we are leaving the still, solid and certain grounds of modernity to venture into the unstable, fluid and uncertain territory we conventionally label as post-modern (a historic indication that is quite approximate, and which we may only accept if through it we

[1] Modern civilisation is lucidly aware of the precious function of law – all law – as unifying cement for a state's compactness, it aims at controlling and manipulating it. The outcome is that very accurate juristic construction mentioned in the text.

[2] Reference is made to: G. Gitti (ed.), *L'Autonomia Privata e le Autorità Indipendenti* (2006), at 7. I noticed this attitude in a very recent paper: P. Grossi, *Il diritto civile tra le rigidità di ieri e le mobilità di oggi*, in M. Lobuono (ed.), *Scienza giuridica privatistica e fonti del diritto* (2009), at 43.

intend a temporal slot typified solely by a current movement, and therefore still undefined).

Undoubtedly, we are increasingly moving away from a specific shore, a well-known one that is stable in its certainties but is inadequate in terms of new historical requirements, and we find ourselves once again in the middle of a ford without having reached a gratifying landing place. It is understandable that the lover of positive law may suffer from such uncertainty, and it is equally understandable that the historian – who rests his knowledge on the dialectical vision of past, present and future – perceives the fertility of the moment, discovering it as an exploration towards *new*, the building site for *new*.

The 20th century, a century which – formally – appears to have just been closed behind us, provided fertile soil on which a law historian believes that the passage beyond modernity took place and matured, penetrating more and more in that undefined areas we have accepted to qualify as post-modern. This was a long century in the eyes of the historian/jurist, as it started in the turbulent last decades of the previous century[3], and now it is still moving towards an unreached landing place; a century during which that crisis in the sources of law, mentioned at the beginning, manifested itself in all its crudeness. A century in which law, the starring source of modernity, underwent a progressive decline.

Constitutional lawfulness appears instead to run uninterrupted between modern and post-modern, which as a matter of fact is the topic of our conversation; we are talking however of continuity within discontinuity, since it will be exactly constitutional lawfulness, in its birth in the arms of modernity, to provoke the first crack in the modern approach to law and in the modern solution to the problem of sources of law; and in its transformation during the course of the 20th century, it shall cause its final cancellation.

Up to now we have spoken with vitanda vagueness of the sources of law, legality, constitutional lawfulness, without offering to an audience formed mainly by non-jurists any instrument of

[3] Turbulent because marked by the suffering of the fourth "state", resulting in open and violent social conflict, even if minimised or even ignored by the strictly single-class pseudo-democracy.

comprehension. I shall therefore haste to provide contents to statements that are familiar to the juristic ideology and vocabulary, but are irksome and difficult to grasp for those not familiar in that field[4]. I would like, as a matter of fact, to respond to the great honour bestowed on me by the *Consiglio di Presidenza* with the assignment of the solemn speech at the closing of the academic year, in the presence of the Head of State and before the classes of the Academy, with an earnest attempt to escape the bounds of esotericism that – unfortunately – usually mark the speeches of jurists.

2. Modern lawfulness as an expression of juristic absolutism

As soon as we look backwards, to that juristic modernity that started to form from the 14th century onwards in continental Europe[5], and which found full consolidation in the 18th and 19th century, the juristic environment appears to us fully defined and having net and certain boundaries.

The protagonist in the history of law that was developing during that historical timeframe was the state; or rather, the several states into which the political and juristic unity of Europe was fragmenting itself. I shall clarify as of now that by *state* I do not mean all political powers equipped with effectiveness in a set territory, but a totalising, all-encompassing power aimed at controlling and dominating any social manifestation, a sort of huge puppet-master holding all the strings and refusing to let

[4] For a professionally juristic reader, several notes acompanying the text of the *lectio* shall appear unnecessary. They were added having in mind a highly cultivated reader lacking in juristic experience, in the attempt to enable an easier comprehension.

[5] It is worth advising that the European juristic history features, at least during modern times and until yesterday, two stories that ran independently and in parallel: the one of continental Europe and the one of the English kingdom. This is a situation, a juristic and not solely geographically insular one, where life continued for the whole modern age in accordance with a vision of law that was medieval, where the assignment of the development of the law fell on a class of experts – in the English case, to a complex and closed lawmaking class – rather than on political power. On the other side of the Channel therefore, the very close connection, almost a tie, between political power and the production of law, is missing, while it is more and more thriving on the continent.

them go. The state was thus more a psychology of power than a more or less significant quantity thereof; as such, it was the novelty that marked with incommensurable discontinuity the grounds of modernity, intensifying the boundary-setting between *modern* and *medieval*[6].

The Middle Ages encountered political subjects equipped with the utmost potestative scope, and the tyrannical exercise of power was not infrequent. In this civilisation however, the collective conscience held on to the notion – which was widespread and never denied – of the *incompleteness* of political power, meaning with this noun that its holder was not supported by a totalising psychology. On the contrary, he only took care of whatever was directly pertaining to the maintenance of public order, enabling plural and diverse forces to manifest themselves and take form in civil society.

The example offered by law is very enlightening: the medieval Prince – whether lay or from the church, or a free city – did not identify the involvement in law, its production, as the essence of his/its supreme function. His/its will, expressed in a law or in a city statute, only concerned limited objects, and always in close connection with the public order of the *civitas* or of the principality. The medieval Prince was only occasionally a lawmaker, while the ongoing production of law was reserved to the community[7]. The main source, as a matter of fact, was and remained for the entire Middle Ages custom, that is, habits germinating from the ground up, observed within the community and interpreted knowingly by theoretical and practical jurists.

It shall be the modern Prince, by force of the totalising psychology mentioned before, to focus more and more significantly on law, in a growing spiral from the 14th century to the 18th century. This Prince sought to produce law; he/it started identifying the sign of his/its sovereignty in this very peculiar activity. The Prince was and remained Prince especially because

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[6] This is the strong idea supporting my reconstruction of medieval law. See P. Grossi, *L'Ordine Giuridico Medievale* (2009).

[7] I clarified the attitude briefly described herein in a paper that duly integrates the extract of note 6: P. Grossi, *Un diritto senza Stato. La nozione di autonomia come fondamento della costituzione giuridica medievale* (1996), now in *Assolutismo Giuridico e Diritto Privato* (1998) (in German it is found in: *Staat, Politik, Verwaltung in Europa.Gedächtnisschrift für Roman Schnur* (1997).

he/it was a lawmaker. The age of political absolutism became for the law historian the age of *juristic absolutism*[8].

This did not occur immediately, also due to the fact that the long unwinding of the medieval millennium entrenched its values onto the very roots of western civilisation. The tendency was however marked, and consisted in the very close binding of political power and law, a tie that at the end of the consolidation process of modern law – that is, with the French Revolution and Napoleon – appeared as necessary and unavoidable. This was the moment of great codification, when the State seized back private law, which had until then been left in the maternal embrace of custom and had been reduced to object of the first Code demanded by the Revolution and implemented by Napoleon, the Civil Code.

The creator of modern law was therefore the political subject equipped with a wholly new psychology, that led him to seek full control of a glue that was precious in terms of the compactness of the political body. Consequently, the main source of lawmaking was that same authoritarian and authoritative voice of the Prince, the law, in a pregredient historical process that in the end made it exclusive.

Take due note: law is a word and notion flawed by polysemicity. Evan Thomas Aquinas spoke of *lex* in the midst of the medieval ages, reducing it to an *actus rationis ordinantis*, that is, to the reading of an objective order of social issues that the Prince was required to publicly manifest but also to comply with[9]. However, the law, in the hands of the uninhibited subject the modern Prince had become, was transformed into something very different.

Jean Bodin, a Parisian lawyer and careful watcher of the evolution of French statehood who (at the end of the 16th century) depicted its essential political/juristic features for us (that same

[8] This syntagm – *juristic absolutism* – I chose to mint a few years ago, and it obtained general acceptance in light of its effective clarification, but also some criticism. Looking at it with the benefit of hindsight, I continue to consider it as successfully expressing a significant turning point in the history of law. For further reference, you may read the essays collected in: *Assolutismo Giuridico e Diritto Privato*, cited above, and especially the introductory essay: *Ancora sull'assolutismo giuridico (ossia: della ricchezza e della libertà dello storico del diritto)*.

[9] Tommaso D'Aquino, *Summa Theologica, Prima Secundae*, q. 90, articles 3 and 4.

Bodin on whom our illustrious member Cesare Vasoli wrote very insightful pages recently[10]), Bodin took care of setting its contents: the law for the new ages belonged to the will and not to the research activities of the Prince, it was therefore something self-referential, that justified itself within the psychology of the requesting subject, identifying itself purely and simply with what the subject liked[11].

Again at the end of the 16th century and again in that kingdom of France, which represents for us an extraordinary forerunner and laboratory of juristic modernity, another personality, also equipped with significant juristic education and sharp watcher of his times, Michel de Montaigne, made sure he advised, in his abundant chest of *Essais*, that whoever intended conditioning their obedience to the law of the Sovereign for its justice contents would be acting distortedly, since a law demands obedience by being a law, in its representation of the will (whatever it may be, good or bad) expressed by whoever is entitled to sovereignty[12].

3. Constitutionalism as a reaction to juristic absolutism: early constitutionalism and the 'rights charters"

"*Quiconque leur obeyt par ce qu'elles sont justes, ne leur obeyt justement par où comme il doibt*". Montaigne's statement is merciless in its harshness and registers the change undergone by law in approaching the territory of modernity. It is a reality devoid of content, or – even better – one that the Sovereign may fill as far as he pleases; and it is a law to be obeyed even if it repulses common conscience because it is riddled with arbitrary or unfair orders.

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[10] Reference is primarily to the subsequent, recent and very fruitful volume : C. Vasoli, *Armonia e giustizia. Studi sulle idee filosofiche di Jean Bodin* (2008).

[11] "*Commandement du souverain usant de sa puissance*" is his definition of *loy* (Bodin, *Les six livres de la Republique*, liv. I, c. VIII *De la souveraineté*). Bodin does not fail to note the style clause, with which – for the duration of the old regime – royal *ordonnances* were closed: "*car tel est nostre plaisir*", eloquently meaning that, in the absolutistic psychology of the modern political power, will and desire tend to be identified (*ibidem*,). The king of France however had a limitation for the whole old regime, that is, in the customary structure constructed by immemorable habits that almost formed the material constitution, unwritten, but providing the foundations of the Kingdom.

[12] Montaigne, *Essais*, liv. III, c. XIII.

The new statualistic vision demands as much, and degenerates into absolutism not only on a political level but on a juristic one as well.

It is in this historical environment and in reaction to the same that a widespread and rich current of thought and action took form, which we usually call *constitutionalism*[13]: as a first trademark, it strove to oppose itself to a lawfulness that could take form in substantial violence against the common citizen. That is because the Law – a vast and plural phenomenom mirroring a vast and plural society – was being reduced to a set of laws, since the Sovereign, in the new and rigidly statualistic vision, was the only one who could transform through his will a social and economic fact into Law. We may now, from the end of the ancient regime onwards, especially thanks to the revolutionary Jacobite clinch, speak of juristic monism, as opposed to the significant medieval pluralism, with a single producer of Law, a single source, laws, the new Law embodying absolute command. The dominating principle could only but be the one of lawfulness, that is, complete compliance with the laws of the Prince, removed from their contents.

Diffidence towards a positive state lawfulness – that is, one implemented by this or that Sovereign and that could turn loath in front of cases of abuse – was the first seedling of constitutionalism. To which an operational proposal immediately followed: the division of lawfulness. There wasn't as a matter of fact only the law produced by the *pro-tempore* holder of supreme power, beyond that and on top of that, there was a law of a different quality, since it was Divinity itself to demand it as a safe control of the original man[14]. Constitutionalism, a political/juristic

[13] I specifically chose to use constitutionalism and not modern constitutionalism in order to convey my non-participation in the unreasoned anticipationisms of those wishing to identify an ancient constitutionalism and a medieval one, with the negative result of putting two very different situations in the same basket, turning constitutionalism into a vague and undefined common ground, and most of all, removing the uniqueness of the movement developing in the 17th and 18th centuries.

[14] It may be advisable to warn that when we speak of Divinity, we do not refer to a purely metaphysical entity, as in the Jewish/Christian tradition, but to a pantheistical vision that tends towards the sacralisation of immanent nature itself.

phenomenon, entrenched itself in the great legal/naturalistic reflection, representing one of its consequential developments.

Here is the elementary plot: juristic absolutism is the fruit of human history, it represents one of the many betrayals human history has accumulated in its development. The rescue consists in looking beyond history, into that state of nature where primitive man retrieved the ideal environment for his development and where he found himself equipped by a benevolent Divinity with all the suitable rights, abilities and powers for his own protection.

It is on that model of an early man that we must focus, before contamination by social and political history. Constitutionalism took from the doctrine of natural law the effort to base the new civilisation on pre-historic grounds, assigning this ruse with a purely *civil rights* attribute. It was the natural law fable of the state of nature, of a golden age that never actually existed; this took on the aspect of an extremely able strategy to reinforce a range of subjective situations borne in an original time of which no human could deprive the subject.

It is clear that all of this led to a sublime artifice, since the evoked and invoked environment never existed and may only be considered virtual; but it is also equally clear there was a need for meta-historical grounds able to remove the individual and his liberties from the suffocating embrace of the State: before history there was a world populated by single individuals who were all the same, each of whom equipped with a precious set of rights. Before history, which inevitably appears to be dotted with communities and various forms of power, there was a time in which the subject could freely exercise his rights consistently with his nature.

Basically, before the State there was the law, or better, a higher-placed, intangible, unconquerable law.

Even if the stated subjects were not historically living creatures and this was a mere case of museum models, the result was significant for western juristic society: the subject was being truly liberated from all of the timescale deposits layered onto him by historical events, and thus an individual was produced armed with favourable subjective situations, autonomous in his individuality, unwilling to get caught up in the network of social classes, communities, corporations that had conditioned him in

medieval times and had continued harassing him until the end of the old regime.

The so-called 'Rights Charters', faithful expressions of the first 17th-18th century constitutionalism, specifically indicated with their rights-catalogue format, the *civil rights* nature of the purposely-sought after natural law foundations. The aim was a result: to overlay onto the layer of positive Sovereign laws a superior layer immediately based on the nature of things, and therefore an intangible one; to break down lawfulness imposing a superior lawfulness interwoven not with commands, but with un-forfeitable and irrepressible rights.

Constitutionalism was already in action, and a profile of constitutional lawfulness was coming through, albeit floating on the concreteness of real-life law – more like a grouping of philosophical/political principles than of regulations ordering an economic/social experience. It shall be necessary to look into and specify these undoubted limitations in a moment.

4. 'Rights charters': an expression of modern juristic individualism

I spoke earlier of strategy, of precious strategy: an initial step to strengthen the citizen in front of the abuse of political power. I feel like I need to add something: a double strategy.

As a matter of fact, the supposed state of nature was a relevant contribution towards the provision of undisputable foundations for an individualistic-type civilisation. Only a foolish apologetic attitude could prevent us from grasping the sense of a penetrating politics-of-law operation: once the much-coveted political power was conquered at the end of the 18th century, a rigidly single-class State was designed with an attempt however to equip it with winning features, able to cover the fact that the unfair dominance by privileged classes of the old regime had been simply replaced by dominance by that intelligent and entrepreneurial bourgeoisie who had encouraged and made the Revolution.

The suitable juristic make-up was, as a matter of fact, provided by the natural law foundations of the earlier constitutionalism. Everything was measured – I have already said it – not on flesh and blood people, but on disembodied models, on

virtual subjects that were more like museum statues than living creatures. The flaw rested mainly in the abstractedness of the designed environment, a flaw that was the basic mainstay of a watchful strategy, which became a precious quality in order to painlessly achieve a specific aim. Working on abstract models enabled, as a matter of fact, providing each person with the scent of hope, without affecting the economic and social inequalities of the present world.

The examples on equality and private property are of effective eloquence.

In the state of nature men are all individuals and all equal, and *égalité* was written on the flyers of the Revolution, in all programmes and in all 'charters' dotting the revolutionary six years. But we are speaking of formal, purely juristic equality, with a more negative than positive function leading to an absence of juristic bonds to the reaching of de facto equality. For the gutter-dwelling Parisian who owned nothing, it was no more than a flashy but useless decoration[15].

Worse even concerning private property: in the state of nature Divinity desires each man to be the owner of himself, to be equipped with a proprietorial charge projecting itself into the exterior world. Here too this function should be evaluated in a negative sense: class bonds that prevented access to property were removed, each man was a potential owner. With this aggravating circumstance: in the absence of social/legal preventive bonds, the missed securing of factual ownership could only be ascribed to the laziness and ineptitude of the subject[16].

There was a cost to this, and a heavy one: the unfulfilled distance between the very convincing political/juristic rhetoric of the 'rights charters', in the form of those manuals and catalogues that set them out, and civil society in its unrefined and shapeless historical authenticity. The 'charters' appeared to be floating on top of society without any possibility of making an etching, and a sort of Chinese wall separated the miseries of social/economic

[15] And *fraternité*, which could add substance to equality, always turned out – sadly! – as an ineffective and mocking rhetorical expression.

[16] And as a matter of fact the poor, who though provided unfairly as poor, had had *privilegia* in ancient regime societies (the *privilegia pauperum*), were now condemned to open scorn as they were identified (as mentioned in the text) as one with the lazy and the inept.

facts from the natural law designs that took form in mockery for the large majority of citizens (most of whom not even equipped with the instrument of political vote).

If the diligent regime propaganda successfully concealed the real conditions of the country, continually extolling the supposed, final and insuperable conquests[17] of the Revolution and of 19th century pseudo-democracies, there was no lack, in the second half of the 19th century and within that same dominating class, of those who though not cultivating revolutionary overthrows, and backed by a strong ethical conscience and a sharp and merciless diagnosis, highlighted the classist nature of the State and the ensuing fracture between declarations of intent and daily reality.

I shall note here, among the various examples that could be made, only the energetic commitment of two Tuscan intellectuals, Leopoldo Franchetti and Sidney Sonnino, who were to become protagonists in the Italian political life and who chose to corroborate their individual voices and give them increased scope through the creation of a Magazine having a manifestly programmatic nature, the "*Rassegna Settimanale*"[18] ("Weekly Review"); these were significant voices as they originated from politically conservative individuals, and they were very eloquent because – without beating around the bush and with the nailing authority of veritable field investigations – did not hesitate to twist the knife in the wound insisting in the provocative yet exemplary truth that freedom and equality as theorised for all, and formally ascribed to all, remained theoretical statements, while formal civil rights institutions in fact protected the interests of an oligarchy. Sonnino spoke of "liberal formalism"[19], identifying the convincing

[17] These latter conquests, insuperable and therefore unfailing, were the object of an undisputed belief and necessarily corroborated by a very knowledgeable and nailing mythology. I offered a few clarifications on these modern *mythologies* in a number of essays collected in the following volume: P. Grossi, *Mitologie giuridiche della modernità* (2007).

[18] It was the "Weekly political, science, literature and arts review" that started appearing in 1878 at the Florentine publisher Barbera, and which "Remains the best magazine of post-unity Italy" (in Eugenio Ripepe's words, who dedicated intelligent attention to Franchetti and Sonnino in his forerunning book (E. Ripepe, *Le origini della teoria della classe politica* (1971), at 177).

[19] S. Sonnino, *I contadini in Sicilia* (Vallecchi 1925, at 339) (1877).

announcements of the 'right charters' as the "phantasmagoria of juristic (*doctrine*) freedom".

5. The juristic 20th century and the multi-class state: towards a new constitutionalism

Modern political/juristic reductionism, which bore in its very bones the elitist vocation entrenched in natural law and in juristic enlightenment, necessarily felt a deep diffidence towards social magma, and had thus wised up to control it. The social mass now appeared, after the revolutionary squeeze, as a compact and inert platform that should remain inert, since the reins of the government of the *polis* were delivered in the hands of what Franchetti and Sonnino had courageously – for some, shockingly – qualified as 'oligarchy'.

When – during the decades that chronologically closed the 19th century but, according to law historians, opened the long century we still find ourselves in – social magma seeped out of the dungeons where it had for long been locked up, it did not limit itself as in the years of the Revolution to crowds spilling in the streets, destined to end up soon to be swallowed once again in the gutters. One hundred years – and what years! – did not pass in vain, and this is proven by the events that followed each other, interwove, but most of all moved over several levels and with different strategies: unrest turned to social conflict, social conflict took the shape of strikes, less crowd-gathering yet extremely corrosive for the stability of the economic environment. Associative forms became more and more wide and widespread.

If Franchetti's and Sonnino's observation is true that, "Lower classes, which are the majority of the nation […] do not participate in the game of political forces […] these classes and their interests do not take part at all in the country's life, they are excluded from it"[20], the new and decisive feature of the social/juristic environment in Italy and Europe at the end of the century was that the mass of have-nots was no longer the occasional gathering of individual physical forces without any link except for widespread desperation; the two dimensions that

[20] See the quote in E. Ripepe, *Le origini della teoria della classe politica* (1971), at 186.

the bourgeois civilisation had drastically tried to remove, the social and – worst yet – the collective one, were now growing in presence.

The novelty of the last decades of the 19th century was a social/juristic environment that was now articulated and enriched by various and growing social gatherings, the foremost being the unions. The novelty, in the eyes of the law historian, lays in an environment that had lost its forced and artificial *simplicity* and had become more *complex*. Now, the time had come to face up to that mass psychology, which had become more aware and mature, and which had recognised in collective identification the sole strength of the socially and economically weak subject. An attitude accompanied by the actual and effective presence of that strength, with consolidation of precious social forms, among which – as we said – the unions.

The forced and artificial stage of yesteryear had been *reduced* to a rarefied game of individuality, the macro-individual State and the micro-individual physical subject, and was the fruit of a very crafty strategy that had thus – substantially but disguisedly – enhanced the purely census-related foundation of society. The stage, which was more and more coming to the forefront between the 19th and 20th centuries, was way more complex, exactly because the bourgeois regime was slowly losing grasp of watchful social control. And the State laboriously shifted from single-class to multi-class.

The deforming vision we continually receive of jurists as servile subjects who acquiesced to power, and who were therefore deaf to changes, may lead us to envisage their total astonished silence, but it was in fact one of them who blew the whistle most loudly on the transformations that were under way. Our man was a connoisseur of public law, I would not hesitate in placing him among the top voices on 20th century juristic science, Santi Romano.

Romano, who on the one hand, from a strictly juristic point of view, had not failed to severely criticise the latest and definitive conquests of modern civilisation, denouncing the abstractedness of those sorts of 'catechisms' represented by 'rights charters'[21], on

[21] 'Catechisms', like 'panegyric' and 'political romanticism', are harsh and figurative expressions used by Romano himself, almost to highlight a group of

the other hand was a careful observer of social changes, and without ripping his clothes off and without conservative inhibitions, he noted the features of the new environment and the ensuing crisis of the state structure built to perpetuate – maybe indefinitely – the social/juristic order minted by the Revolution, which at the beginning of the 20th century appeared in its true light: a forcing, a compression of the plural forces in society.

My reference, as any legal jurist may well expect, is to the inauguration speech at the beginning of the academic year, which Romano was asked to make in 1909 at the University of Pisa, titled – with a very brave face-on approach – "The modern State and its crisis" [22]. The crisis was identified by the great Palermo-born jurist/publicist specifically as the rise and growth of social formations that, by indenting the compactness of the State (that compactness demanded by the Jacobite project, albeit very congenial for the liberal *stato di diritto* [limited government]), were eroding it deeply.

Just a few years later, in 1913, Italy was to achieve universal voting for men, which had been obstructed for a long time and fiercely, and this was to resolutely transform the old single-class structure. Again a few years later, the storm of the World War, from many points of view unnecessary and an enormous tragedy, was to represent the furthest boundary stone of a society that was controlled and directed from the top down[23].

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statements not subject to verification in day-to-day reality, in a strict reproach held in his inauguration speech at the University of Modena in 1907: Santi Romano, *Le prime carte costituzionali*, now in *Lo Stato moderno e la sua crisi - Saggi di diritto costituzionale* (1969), especially pages 165 and 168. Please refer also to the very significant essays, always by Romano: *Saggio di una teoria delle leggi di approvazione* (1897), now in *Scritti minori* (1950) (reprinted in 1990); *L'interpretazione delle leggi di diritto pubblico* (1899), now in *Scritti minori*, vol. I, cit.; *Osservazioni preliminari per una teoria sui limiti della funzione legislativa nel diritto italiano* (1902), now in *Lo Stato moderno e la sua crisi*, cit.

[22] Now in *Lo Stato moderno e la sua crisi*, cit.

[23] It is not a mere coincidence that exactly in the final year of the great War, in 1918, Santi Romano published a small book "*L'Ordinamento giuridico*" that was the first theoretical construction aimed at removing the law from the overbearing shadow of the State, replacing it in the wide and complex embrace of society. Those wishing to know more may refer to my post-grad lesson in Bologna dedicated to the design of the scientific message of Santi Romano (see P. Grossi, *Santi Romano: un messaggio da ripensare nella odierna crisi delle fonti*

6. Features of the new constitutionalism

It was in this intensely renovated climate that constitutionalism took a decisive turn, and experienced a second and intense moment with the entrenchment of a constitutional lawfulness that was intrinsically new.

The first relevant step taken by 17th-18th century constitutionalism with the 'rights charters' was no longer sufficient. There was now a need for much more than 'catechisms' (as poignantly qualified by Romano). If the 'charters' – aimed at a desired meta-historical state of nature, shaped on a purely abstract subject leading a meta-history that was in fact never actually experienced by humankind – could not fail to be seriously flawed by abstractedness, the new and successful attempts occurring all along the 20th century came through as an interpretation of society in its historical concreteness, and therefore, in its actual complexity, without design strategies forcing or artificially changing the true social/juristic environment.

Values, interests, needs that were actually circulating in that historically concrete reality represented by a population living at a certain time and space, took form in a text, which was no longer a static catalogue of abstract subjective situations, but a supreme juristic rule regulating human cohabitation.

We must repeat – and therefore stress – that this was an attempt to design a juristic framework of a historical fabric, of living history, without submitting it to artificial contractions, to simplifications that would mortify its concreteness. The complexity of society, now fully recovered in the multi-classism of the social structure of the 20th century, was loyally reflected in the 20th century Constitutions, where the term 'Constitution' marked a substantial difference from the old 'Charters'[24].

The first accomplished example occurred right after the conflict, in 1919, in a Germany that was seeking to venture down new roads after the breakdown of the Wilhelm Empire, with the Federal Republic of Weimar: the Weimar Constitution as a matter of fact strove to interpret the juristic attitude of German society, transforming it into an organic grouping of principles and rules.

(2005), now in *Società, diritto, Stato. Un recupero per il diritto* (2006), and in *Nobiltà del diritto. Profili di giuristi* (2008).

[24] With the due specification that the term 'constitution' was formally used also to denote some 18th century French and American charters.

Among the many that were to be realised in Europe during the course of the 20th century, the Italian Constitution of 1948 was also a conspicuous example: it marked the birth of a new life – after the ruins of the war, the oppression of the Fascist dictatorship, the betrayals of the Savoy dynasty – and was a faithful reflection of the juristic attitude of the Italian population, as grasped over two years of intense work by an extraordinary 'constituent assembly'.

7. New constitutional lawfulness

I insisted on historicity as a new attitude with respect to the previous abstractedness, and proof of it comes from the special focus shown by constitutionalism on the conception and construction of the *subject*. The subject appears as protagonist both at the beginning and subsequently, but from an irreparably different viewpoint.

First it was the unitary subject of natural law, an a-historical and therefore merely virtual subject, a model of man and no more; abstract subject, devised and resolved as an insular entity protected by several rights and burdened only by the duty of self-preservation. Here on the other hand, we speak of an intrinsically *relational* entity, well-entrenched in a cultural, social and economical context, found alongside another, all others, and having a very close and necessary relationship with them.

First an *individual*, now a *person*, undoubtedly equipped with numerous subjective situations that the Constitution is asked to protect, and which develop in concrete environments of freedom, but also committed to an equally wide range of duties. This is highly relevant, because it is duty that socialises the subject, weaving him into a relational fabric; in other words, it historicises him.

Let me add a further specification: it is a subject who often operates within one of the many social formations produced by civil society. The new pluralistic vision rejects the Jacobite compactness of the State, that compactness that had found during the 19th century its crowning achievement in the State/person, a juristic invention that also reached the aim of separating State and society, of avoiding contaminating the State with the disorderly social magma. The crisis denounced by Romano in 1909 approached a lucid awakening: the State was starting to be a

community. In fact, a community of communities, setting off a process whose development was witnessed in Italy in the last years, especially in terms of relevant constitutional amendments[25].

It is clear that the newly-minted Constitution could not resolve itself in a catalogue of rights; or better yet, it could not exhaust itself in this, but it desired and was required to speak of religion, culture, education, economy, work, environment, health, as well as of the "organisation of the Republic", as stated in the second part of the Italian Constitution of 1948. It is clear that it should be so, since it is consequential for the purpose that 20th century constituents set themselves: to express the juristic attitude of a population in its historical concreteness, translating it into principles and rules.

The citizen was not faced here with philosophical/political sermons on a 'happiness' that was too often unattainable (as in American and French 'charters'), or of an equality that was as abstract as it was unfulfilling; he received, on the other hand, his fundamental juristic compendium as life compendium.

It is obvious that constituents tended to look beyond the State, taking as reference the entire civil society in all its complexity. The 20th century Constitution appears to us therefore more as a great act of knowledge than of potestative will. Last summer, when I was asked to celebrate – at a Convention – the sixtieth anniversary of our fundamental rule at its vigorous sixtieth birthday, I did not hesitate to qualify it as an act of reason. I did not wish in 2008 to rekindle the far-away Thomist definition of law, nor did I wish to entertain a vacuous rhetorical expedient; I wanted, on the contrary, to highlight a significant and typifying feature of these experiments of mature constitutionalism, bearing witness to their effort to make an unbiased, objective interpretation of the fabric of a society, extracting those principles and rules that – on their own – were to realise a non-fictitious but most of all lasting unity; they were to design precisely in terms of scope and contents, the fundamental law of a population, offering it not philosophical/political propositions but a concrete and supreme juristic law, intrinsically juristic and concretely applicable.

[25] Reference is to the notorious – and questionable – reform (implemented recently) of title V of the second part of the Constitution.

8. The Constituent Assembly of 1946-48 and the construction of new constitutional lawfulness in Italy

A probatory example of what we were saying just now may be eminently pointed out by the toil of our constituent fathers in the 1946-1948 period; it also appears clearly to us in the very fruitful preparatory works, which I have always read with intellectual edification and which I have always recommended reading to my students for as long as I was asked to hold university 'courses'.

I deliberately used the term 'edification', which belongs to the usual vocabulary of moralists, and I did so to kindle attention. The Italian Constituent Assembly was not a chorus of angels. It was formed by party men who were often divided by strong ideological fractures; there was no lack of clashes and even hot disputes. There was, however, a basic attitude that deserves, from the mouth of the historian and constitutionalist, use of the adjective edifying: because there was an attempt to construct a solid political unity, in full awareness that it may be reached by getting rid of contingencies that brought separation and distance, and focusing strictly on common values. There was an endeavour, in other words, to construct not transiently but for the long run, for that *longue durée* that, well beyond the transient, is the real time of history.

The recent celebrations of the sixtieth anniversary proved that the target was hit, at least concerning 'fundamental principles' and the 'first part'. Our 'Charter' perfectly corresponded with the feature of being not only a fundamental rule for the Italian population, but also being solidly cemented, and therefore lasting in time; belonging to those Constitutions that a proactive constituent, Piero Calamandrei, chose to call *long-sighted*[26] with a clarification that hit the mark. This evaluation,

[26] "The Constitution should be long-sighted, it must see far away, it cannot be short-sighted," (as stated in the very well-known speech at the Constituent Assembly, in the session of the 4th of March 1947, during the general discussion on the project designed by the Commission of Seventy-five; the text – *Chiarezza nella Costituzione* – may now be easily consulted in P. Calamandrei, *Opere giuridiche* (M. Cappelletti ed., vol. X, Morano 1985, at 496). The Calamandrei intervention was however still veined with criticism and reservations, a legacy he still had in connection with the illuministic dogma that nailed his earlier self. We should duly note that 1947 was a year of gret re-thinking for the great Tuscan proceduralist, and his messages – during the course of that year – show

after due consideration, looking back on the sixty long years that have elapsed, was duly picked up by Giorgio Napolitano in a conference held in Turin a few weeks ago[27].

This responsible working method was fully implemented, within the Commission of Seventy-five, by the First Sub-Commission, which had been assigned with the undoubtedly higher yet very delicate issue of the 'Rights and duties of the citizen'. This comprised individuals of the highest stature, among which I like to recall jurists Dossetti and La Pira, Christian Democrats, Socialist Lelio Basso, Communists Concetto Marchesi and Palmiro Togliatti. Aware of the delicacy of the problems they were asked to solve, they were all of the advice that the best road to take was that of being led by reasons that would not be detached from the fields of rational and reasonable.

There was a *synergy* (a beloved term of Dossetti), but this could only happen because the dimension chosen in which to move was the most objective, the least polluted by veins of low-key politics.

Here is the high voice of Dossetti, "Above these fundamental principles, which should offer in brief the features of the new State and of relations between citizen and State, it is necessary to get consensus"[28]. Which was given, by grace of the rationality of the approach. The issue was red-hot: the person, society, the State, in their complex relational intertwining. Dossetti's proposal was to make their moves based on a shared principle: "precedence of the person with respect to the State"[29], a

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some contradictions, marking the start of a new path. In October of 1947 we may find a speech, proving the actual detachment and marking a boundary in the constant – yet no longer continuous – thought by Calamandrei on the great issues/problems of the sources of law, on constitutional lawfulness, ordinary lawfulness, interpretation of the law, on the role of the jurist and specifically that of the judge. I recently focused on this significant turning point in the cultural life of Calamandrei during a Florentine commemoration organised by the *Consiglio Nazionale Forense* in order to duly remember those unforgettable events of 1947 (see P. Grossi, *Lungo l'itinerario di Piero Calamandrei* (in print in the 'Rivista trimestrale di diritto e procedura civile' and on the 'Rassegna forense').

[27] G. Napolitano, *Costituzione e democrazia* – Speech held at the 'Biennale Democrazia', Turin, 22nd of April 2009, Rome, Press Office of the President of the Republic, 2009, at 10.

[28] G. Dossetti, *La ricerca costituente 1945.1952* (A. Melloni ed., 1994), at. 103.

[29] See id., at 102.

suggestion fully aimed at valuing the person, protecting it. Dossetti convincingly added, "This fundamental concept of precedence of the person, of its full vision and of the interpretation it receives from social pluralism, may be asserted with everyone's consent"[30]. And there was open dialogue between Dossetti, a believer, and Togliatti, an agnostic. Consensus was achieved.

All of the discussion on 'fundamental principles' and on the 'first part' was based on this calm observation. Giorgio La Pira, one of the Speakers, him too enveloped in fecund synergy, stated, "This first part […] with its progressive determination of the essential rights of the person and of the community, would represent a true reflection of the structure of society"[31]. The link was with the 'real' – they were convinced they should and could do it. A '*real*' to be read in its objectivity, to be *recognised* (another beloved term of our constituents) beyond the State, on a more decanted field than the one of daily politics; certainly not in a rejectable, purely virtual state of nature, but in the concreteness of society, in its history, its tradition, its customs.

The 20th century Constitution – this renewed and more aware constitutional lawfulness, our current complex lawfulness that across the 20th century, the century of post-modernity, led us stoutly toward the uncharted territories of the future – has the gift of not expressing museum-like geometries, nor unsatisfactory mythologies, but rather a full historicity of law, finally enabling the harmonisation between society and the juristic order, that harmonisation that modernity was not successful in achieving, and which it probably did not seek.

Allow me, in conclusion, to add that a precious glue of the growing (yet not easy) coherence between constitutional values and legal commands was offered, is offered and shall be offered by an institution that is central to the heart of the State and of the Constitution of 1948, and to which I am proud to belong, the Constitutional Court, a veritable breathing organ of the Italian juristic body, a body devoted to civil rights on account of the citizen who finds therein protection of his fundamental freedom.

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[30] *Id.*

[31] G. La Pira, *La casa comune - Una costituzione per l'uomo* (U. De Siervo ed., Cultura 1979), at 152.

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

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1. Administrative power and interests protection

1.1. Necessity and function of power

Administrative law regards:

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

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

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

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

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

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

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

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

there are powers and organizations able to satisfy them.

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

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

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

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

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

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

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

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

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

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

1.1.1. The necessity of power and necessary memberships

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.1.2. The gradation of memberships

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.3 Needs, interests, subjective legal situations[39]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.3.1. Necessary satisfied interests

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The *juridicalization* of power

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

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

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

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

2.1. The characters of *juridicalizated* power

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The thesis contains some correct features and some misunderstandings.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.4. Relevance of the emergence of administrative law in China

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The evolution of administrative law

3.1. The three phases of evolution and scientific elaboration

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

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

a) The initial *juridicalization*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b) Expansion and consolidation of rights and protections

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In these cases three alternatives can be determined:

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

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

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

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

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

4. New perspectives and problems of method

4.1. Beginning of new assets

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

The main ones are:

a) From citizenship to human rights

A shift from the rights of citizenship, connected to

membership in a state, to human rights is occurring.

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

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

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

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

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

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

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

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

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

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

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

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

c) The environmental value

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

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

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

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

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

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

d) The potentials of information technology

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.2.2. Applicative examples of the essential and gradualist method

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

a) The concept of a public body

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

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

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

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

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

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

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

b) The protected subjective legal situations

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

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

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

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

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

c) Administrative act and contract. The gradation of cases

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SEEKING "CERTAINTY" BETWEEN PUBLIC POWERS AND PRIVATE SYSTEMS

Auretta Benedetti*

Abstract

The decline of the "positivist" concept of certainty in civil law countries and the diffusion in supranational legal systems of new models of trust's guarantee assigned to private certifiers, that are not expression of public powers, triggers the need to carry out a thorough "re-interpretation" of the issue of certainty, particularly in civil law systems. This paper deals particularly with "certainty" created by public subjects or "private experts" in order to guarantee the orderly development of relations amongst private persons, particularly within the scope of economic relations. The need for certainty appears to be darkened by the more pervading "need for trust," which more effectively expresses the condition of parties that need to make choices in conditions of uncertainty. The traditional binary scheme opposing "public" and "private" spheres is no longer sufficient to investigate the issue of certainty. Only the analysis of interrelation between systems of political legitimation and social/market systems can offer the perspective that makes it possible to appreciate the specific nature of the instruments of certainty.

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I. Introduction.

This article aims at giving a reflection concerning the certainty's function, in particular due to the decline of the "positivist" concept of certainty, in the civil law countries, and the diffusion, in supranational legal systems, of new models of trust's guarantee assigned to private certifiers, that are not expression of public powers.

In legal scholarship, the term "certainty" immediately evokes the primary mission of a legal system that stabilises social expectations and creates security in the relations amongst members. In this respect, Maurice Hauriou used to define "certainty" as the *ideé directrice* of each legal system and, in particular, of the sovereign legal system[1].

The fact that the term "certainty" has almost disappeared from the vocabulary of contemporary scientific debate – which has entirely shifted towards the opposite concepts of uncertainty,

[1] M. Houriou, *La Théorie de l'institution et de la fondation (Essai de vitalisme social)* (1925), in M. Hauriou (ed.), *Aux sources du droit. Le pouvoir, l'ordre et la liberté* (1933), at 91 *et seq*. Significatively, L. Duguit used to hold that there is no feasible distinction between *souveraineté* and *puissance publique* or *autorité politique* (L. Duguit, *Souveraneté et liberté* (1921, last ed. 2002), at 68). For a complete picture of the political doctrines reconstructing the State's authority in terms of the guarantee of order, see the still relevant text of A. Passerin d'Entrèves, *La dottrina dello Stato* (2009), at 231 *et seq*. References to more recent studies in the different civil law systems on the subject matter are included in P. Costa, D. Zolo, E. Santoro, *Lo Stato di diritto: storia, teoria, critica* (2003).

insecurity, and risk – is the clearest indication of the crisis of the concept of a self-sufficient legal system that is capable of controlling social and economic phenomena. On the other hand, there is increased awareness of the key importance of the interdependence between sovereign and supranational legal systems, as well as between political and institutional systems and private legal systems, whose boundaries often exceed the territories delimiting the respective sovereign areas[2].

The most radical transformations – in terms of models generating certainty – involved civil law countries, which are more exposed than other systems to the erosion of the role of the law as a regulator of social and economic relations and of the consequent "formal" and "positivist" concept of certainty related thereto[3].

As stated by J. Locke[4], Anglo-Saxon culture is typically based on the individual assumption of responsibilities and risks, which requires the legal system to assume a different approach with respect to certainty. It is sufficient to think of the way in which law is created: the doctrine of precedent, typical of common law systems, in addition to anchoring rules to facts to a greater extent, does not consider the lack of a framework of pre-

[2] For a view, even if only partial, of the much-discussed terms at issue, it would be necessary to quote the highly extensive international literature on the effects of globalisation on legal systems. Please allow us to limit the relevant indications to some relevant literature, which J.K. Galbraith has defined in *The Age of Uncertainty* (1977); Z. Bauman, *Globalization. The human consequences* (1998); U. Beck, *Politik der Globalisierung* (1998); M.R. Ferrarese, *Le istituzioni della globalizzazione* (2000); R.O. Keohane - J.S. Nye, Jr., *Power and Intendependence: World Politics in Transition* (2001); A. Baldassarre, *Globalizzazione contro democrazia* (2002); G. Teubner, *La cultura del diritto nell'epoca della globalizzazione. L'emergere delle costituzioni civili* (2005); S. Cassese, *Oltre lo Stato* (2006); G. della Cananea, *Al di là dei confini dello Stato* (2009); G. Rossi, *Potere amministrativo e interessi a soddisfazione necessaria. Crisi e nuove prospettive del diritto amministrativo* (2011).

[3] To the extent that "certainty" has been defined as the "predictability of the legal consequences of actions," the concept has in fact been linked (for a long time) with the codification supremacy: see the much-discussed volume of F. López de Oñate, *La certezza del diritto* (1942).

[4] Reference is made to the work of J. Locke, *Two Treatises of Government* (1689), which outlines the basic philosophical ideas of the Anglo-Saxon liberal system.

established rules with universal vocation to be a factor of insecurity, thus entailing a different perception of certainty[5].

Furthermore, with regard to the theme of certainty, both the continental and the Anglo-Saxon approach find common ground in the EU legal system, which, despite its significant continuity to civil law systems, is also characterized by prominent and significant discontinuities.

It is sufficient to think of the procedural nature of the European principle of legal certainty, which is essentially derived from the restrictions placed on the legislator and on the courts rather than their respective powers[6], or even the limitation of the "giudicato" effects (a fundamental instrument of certainty in civil law systems) where the need to ensure the supremacy of the EU legal system is at stake[7].

Given the background of the aforesaid significant changes, this paper will not focus on the certainty that may derive from the law or from the decisions of judges. Instead, it deals with the "certainty" created by public subjects or "private experts" in order to guarantee the orderly development of relations amongst private persons, particularly within the scope of economic relations.

In this area, the differences between civil law and common law legal systems are fundamental: in the former, the creation of

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[5] A. Giunchard, *Securité juridique en Common Law*, in L. Boy, J.B. Racine, F. Siirianen (eds.), *Sécurité juridique et droit économique* (2008), at 101 *et seq.* As already stated, there is a different perception of certainty, not an "absence" of certainty, as already pointed out by Italian scholar T. Ascarelli, *Certezza del diritto e autonomia delle parti*, in *Problemi giuridici* (1956), at 117.

[6] In fact, pursuant to the said principle, the necessary publicity and clarity of the laws and of court decisions are laid down: the binding nature of judge-made decisions, the limited retroactive nature of the laws, and above all, the necessary protection of the lawful expectations arising therefrom. Insofar as the principle of legal certainty in the EU legal system is concerned, see T. Tridimas, *The General Principles of EU Law* (2007), at 242 *et seq.*; G. della Cananea & C. Franchini (eds.), *I principi dell'amministrazione europea* (2010), at 94 *et seq.* The European Union's explicit acknowledgment of the need for a principle of legal certainty clearly indicates how the latter is not guaranteed by the legal system itself: "*il faut des normes <<thérapetiques>> pour soigner le système de ses maux*" (J. Baptise Racine & F. Siiriainen (eds.), *Propos introductifs*, in L. Boy, J.B. Racine, F. Siirianen (eds.), *Sécurité juridique et droit économique*, cited above, at 7).

[7] With regard to this point, see R. Caponi, *Giudicati civili nazionali e sentenze delle corti europee tra esigenza di certezza del diritto e gerarchia delle fonti*, 2010, *paper* published on *http://unifi.accademia.edu*.

certainty has traditionally been traced back to public powers and organised as a public role (or public service). Private persons producing certainties have been defined as assistants to public powers (if one considers, e.g., the role of the civil law notary).

In common law countries, such a structured and developed scope of public activities generating certainty is lacking. Nonetheless, Anglo-Saxon systems have developed different forms of production of reliance in the markets, which are centred on private autonomy rather than on public power. Consider the various models of private certifications (from quality certifications to the auditing of financial statements), which aim to increase the trust of consumers or of investors through the certificates issued by licensed private persons operating in the market.

Whilst the EU legal system resulted in a radical reassessment of the public law model of production of certainties in civil law systems, the globalisation of markets has caused an extraordinary spread of market certifications.

Both phenomena, despite their differences, result in the need for a thorough "re-interpretation" of the issue of certainty, particularly in civil law systems[8], which are undergoing a crisis in the legal system model inherited from the French Revolution and are increasingly willing to converge with Anglo-Saxon legal systems.

II. The public law model for the creation of certainties in civil law legal systems.

a. Public certainty and sovereignty.

In civil law systems, public certainty affects a wide area of the activities of public institutions or of the private persons entrusted by the legal system for the said purpose.

In particular, these activities may be ascribed to a public certainty role in order to circulate "not doubtful", thus reliable,

[8] The priority (but non-exclusive) references of this article have been drawn from the Italian legal system, ranked among the emblematic models, insofar as the subject matters dealt with are concerned, within the scope of civil law countries.

declarations[9] on the legal state, qualities, items related to facts, persons, or things[10].

The activities that aim to create public certainties therefore, given their nature, target a general group of recipients (*erga omnes*) but are not necessarily binding. In fact, pursuant to the traditional theory, only the so-called "legal certainties" require receivers to consider the contents of whatever has been declared as "true" (such as the establishment of burdens and measures or notarial public deeds) or, otherwise, to issue specific legal proceedings (such as the forgery lawsuit) in order to "demolish" the produced certainty. In these cases, the binding force derives from the law[11].

Beyond the aforesaid cases, public certainties aim to offer "useful" information, namely, reliable data that can facilitate the development of legal or exchange transactions without being binding (for instance, official weather forecasts)[12].

Many declaration and certification activities of public authorities have developed in civil law countries; these aim to prevent conflicts from arising by declaring, for the purposes of certainty, the existence of facts as well as the presence of personal qualities and status. These activities thus guarantee the spreading of qualified information that does not need to be specifically verified by third party users.

With specific reference to the legal nature of similar activities, legal scholarship has, since its beginnings, stressed the relation of close derivation of public certainties with respect to sovereign power.

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[9] In fact, the etymology of the word "certainty" derives from *certus*, past participle of *cernere*; therefore, the word means "separate" from false and "not doubtful."

[10] Despite there not being a unitary concept of "public certainty," pursuant to the most authoritative Italian law scholars having dealt with the said subject matter, the same defines the set of activities composed of a verification phase (of data, legal states, qualities) and of a declaration phase thereof having *erga omnes* effectiveness. In this respect, see M.S. Giannini, *Certezza pubblica*, in *Enc. dir.* (1960), 769 *et seq.*

[11] M.S. Giannini, *Certezza pubblica*, cit., 772.

[12] It is a case of what Giannini calls *certezze notiziali* (the so-called "information certainties"), understood as the "clarification of facts made available to the public so that whomever may be interested may benefit therefrom" (*Certezza pubblica*, cit., 773).

German law scholars used to define the establishment of burdens and measures as the exercise of an "absolute sovereign right," equal to the monetary function[13]; French legal scholars used to count the "authentication power" (of public officers or Latin notaries) amongst *police administrative* activities, reserved to the public authorities and aimed at the preventative guarantee of public order[14].

More generally, the capacity to "declare" legal qualities or clarified facts in the fundamentally "binary model" that is typical of legal systems inherited from the French Revolution (defined on the basis of the polarity of public power – contractual autonomy) – in a binding way for a majority of subjects (who have not taken part in the deed) – was typically considered a public privilege[15].

In fact, private autonomy relations express the power of the parties to dispose of the "subjective situations falling within their respective competence"; this is sufficient to exclude that the latter may express a function of declaration or judgment, or aim to pursue "truths" to be expressed to third parties. The best civil law scholars have even reconstructed "assessment transactions" as the "removal of uncertainty on the pre-existing situation, implemented through the establishment of the content of the situation itself"[16]. The purpose therefore involves putting the relation "out of discussion" (*Ausserstreitsetzung*)[17], removing the

[13] P. Laband, *Das Staatrecht des deutschen Reiches* (1878).

[14] Therefore, it is a case of activities that are distinguished by the corresponding role allocated to the judiciary (*police judiciaire*) instead. In this respect, see the reconstruction of E. Picard, *La notion de police administrative* (1984), at 503 *et seq*.

[15] "In no way can private persons create legal qualifications to be complied by the majority and, therefore, in no way can the latter create certainties effective *vis-à-vis* third parties: therefore, there are no legal certainties of private origin." In this respect, see M.S. Giannini, *Certezza pubblica*, cited above, at 775.

[16] In this respect, see M. Giorgianni, *Accertamento (negozio di)*, in *Enc. dir.* (1958), at 233, who denies that, in the private legal system, "the expressions of the parties on the facts and legal situations which affect them amount to <<judgments>> or mere declarations of <<science>> or <<truth>>," since these are activities are typical of the "third party" (judge if called to apply the rules of law).

[17] For the original joint reconstruction of assessment transactions, see M.F.G. von Rümelin, *Zur Lehere von den Schuldversprechen und Schuldanerkenntnissen des B.G.B.*, in *Archiv. Civ. Praxis* (1905).

uncertainty with preclusive effects limited to the parts of the legal transaction[18].

Initial Italian law scholarship was thus aware of the fact that the mere declarations aimed at a majority of receivers had to be public, even if the same could be ascribed to the so-called "non-transaction based deeds"[19] of public powers. The fact that the activities producing public certainties were not the expression of an administrative "will" but were instead expressions of the "discretionary power of knowledge" was thus highlighted[20].

The aforesaid concept corresponded to the penal law notion of "public faith," understood as the expression of the "legal certainty" ratified by the State. In this respect, public faith "clashes with private faith since it is subjectively public" – amounting to a joint belief amongst all citizens – "and objectively public, since it is issued by a public Authority"[21].

b. Private activities generating public certainties: the civil law notary.

Therefore, if the power to produce certainties is "exorbitant" with respect to private autonomy, in accordance with traditional administrative theory, the possibility to produce certainties by subjects (who do not belong to the public institutions) derives from the allocation of public power to private persons by the law.

In the aforesaid case, we are before *personnes dépositaires de l'autorité publique* or, otherwise, in charge of a *munus publicum*: this

[18] The definition of the effects of the assessment as preclusive effects is provided by A. Falzea, *Accertamento*, in *Enc. dir.* (1958), 205 *et seq.*

[19] In fact, the first Italian legal scholarship reconstructed administrative activities on the basis of the relevant civil categories and distinguished between "*attività negoziali*" and "*attività non negoziali*," depending on whether or not the same expressed acts of will. Insofar as the aforesaid categorisation is concerned, see, in particular, U. Fragola, *Gli atti amministrativi non negoziali (*1942).

[20] The reference is to the distinction made by U. Borsi (*Le funzioni del comune italiano*, in V.E. Orlando (ed.), *Trattato di diritto amministrativo italiano* (1915), at. 225) and taken up again by G. Sala (*Certificati e attestati*, in *Dig. disc. pubbl.*, (1987), at 538), whereby the certifying public power is the expression of a "discretionary power of knowledge and not of will."

[21] F. Carrara, *Programma del corso di diritto criminale*, vol. VII, § 3356 (1871).

image fully reflects the concept of a private person who acquires exorbitant powers to protect a general interest[22].

In particular, Italian administrative law specialists have developed a role relative to the "private exercising of public functions" in order to specifically embrace the multiple cases in point in which a private person may be called to carry out activities of public interest[23].

The concept does not coincide with the more recent concept of "outsourcing" of roles or services. In fact, the latter not only includes cases in which the public institutions avail themselves of the competence and professionalism of private operators in order to fulfil public duties in a more effective way[24] by delegating public functions or services. The concept is much wider and also includes cases for which there is no "delegation" of powers but an original legal allocation of public duties, such as public certainty functions, to private persons.

The most significant example involves intellectual professions and, in particular, the civil law notary[25].

Since Napoleon's Civil Code of 1804, civil law notaries have been vested with an exclusive right related to family, real property, and corporate services, and with the "authentication function," namely, the power to render the contents of notarial deeds non-challengeable (except by means of specific legal proceedings) for third parties.

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[22] In particular, the theory of *munus*, developed by M.S. Giannini (*Diritto amministrativo* (1993), I, 129 *et seq.*), expresses the typical structure whereby the law entrusts a private person with the protection of an "alien" interest, which may be private or public.

[23] The theory of the private exercise of public functions in Italy is based on the work of G. Zanobini (*L'esercizio privato delle funzioni e dei servizi pubblici*, in by V.E. Orlando (ed.), *Trattato di diritto amministrativo italiano* II (1915), at 235 *et seq.*). Different figures, such as concessionaires or receivers, have been ascribed to the "private exercise of public functions."

[24] S. Cassese, *Istituzioni di diritto amministrativo* (2009), at 116.

[25] Historical studies have shown that the trust relationship between the community and professionals (such as lawyers, pharmacists, or doctors) has very old historical roots and is based on the public reliance generated by these parties, which are holders of "specialised knowledge." In civil law countries, control over these parties has been entrusted to self-regulation forms of interests through the relevant professional societies, which, throughout time, have been granted a public law authority by the State.

Therefore, notarial deeds entail true public certainty since they are as reliable and secure as the law.

Unlike the Anglo-Saxon notary, the civil law notary retains a role of "adaptation" in the legal system (assisting private persons towards the search for the most adequate legal solution for their needs) and produces public deeds fit to bind the judge's rulings[26].

From this standpoint, the civil law notary has been defined as *magistrat de la jurisdiction consensuelle*[27] and the notarial function as "anti-procedural", thus fit to prevent disputes, in a sort of preventative justice[28].

The role of the civil law notary is therefore emblematic since it refers to a specific interpretation of the relation between private (autonomous) interests and the legal system's general interest. The civil law notary has a public role, which is not delegated but which is originally "recognised" by the law; he acts on the basis of private autonomy relations, producing qualified certainties that are binding for third parties.

III. Creation of certainties in open markets through "Reputational Intermediaries."

a. Expert powers and market-wide certainties.

In the open markets, throughout the twentieth century, a new governance "model" (of Anglo-Saxon setting) became consolidated; it was not centred on the exercise of the sovereign power, and it solved "certainty issues" through the intermediation, first of all, of experts working in the market. The most significant examples are those developed in the financial

[26] From this standpoint, the role of the Anglo-Saxon notary is very different; the notary carries out limited certification activities (verification of the validity of signatures and of agreements), does not advise the parties, and does not have the same level of independence. Notarial deeds are not enforceable. See G. Shaw, *Notaries. A profession between State and Market*, Bristol, 2007 (a French version is published in *Le Droit et l'économie*, 2007, 158 *et seq.*).

[27] Likewise, civil law notaries have been defined as "*capable de conférer aux actes qu'il reçoit le caractère authentique, en vertu de la parcelle d'autorité publique don't il est investi*." E. Deckers, *Le ressort de la confiance. Notariat, justice préventive* (1997). According to the author, "*le lien avec l'État est ombelical: sans lui le notariat disparaîtrait*" (37).

[28] F. Carnelutti, *La figura giuridica del notaio*, Riv. notariato 8 (1951).

markets, with audit and rating companies, but the model is repeated with entirely similar features even in other markets, such as quality markets, where forms of certification and declaration that are suitable for overcoming information asymmetries in the markets and creating "reliability signals" for consumers or users are multiplied[29].

Anglo-Saxon literature has focused on the features of the aforesaid model, which can be traced back to the Reputational Intermediaries or the so-called Gatekeepers[30].

Confidence in the markets is produced, in these cases, through the intermediation of a third party with respect to the parties of the single contractual relations (which, in the case of the consumer contracts, are often serial). It is not by chance that similar parties are defined by corporate economics as "third party certifications" in order to indicate the role of the third party, who "facilitates" the exchange, making available information that would otherwise be unknowable, or expressing "reliability judgments" fit to guide the choices of consumers and ensure that the certified subject remains in the market ("gatekeeper" role). The certifiers' judgments are based on the reference to consensual technical rules in the market itself.

The group of parties meeting such features (even if heterogeneous) may be represented by the term "market certifications," which appropriately specifies the origin of parties structured by the interrelation of parties in the market in a "horizontal" way and not through a political willingness to pursue a public interest.

In fact, as indicated by the term "Reputational Intermediaries" itself, the selection of the "third party expert" (certifier) does not occur on the basis of the link of the said party with a public power but on the basis of "reputational"

[29] M. Power, *The Audit Society. Rituals of Verification* (1997). With regard to this issue, see G. Dimitropoulos, *Zertifizierung und Akkreditierung im Internationalen Verwaltungsverbund* (2012), expecially 13 *et seq.* and 38 *et seq.*; and, also, please allow us to make reference to A. Benedetti, *Certezza pubblica e "certezze" private. Poteri pubblici e certificazioni di mercato* (2010).

[30] Studies were specifically developed in relation to financial markets. With regard to the literature on the topic, see V.P. Goldberg, *Accountable accountants: is third-party liability necessary?*, in 17 J. Legal Study 295 (1988); J.C. Coffee, *The Acquiescent Gatekeeper: Reputational Intermediaries, Auditor Independence and the Governance of Accounting*, in Columbia L. & Econ. (2001).

mechanisms. This implies, in theoretical terms, that the functionality of market competition mechanisms in which the said parties operate would allow for the selection of those capable of producing more reliable judgments; the said certifiers would then be interested in maintaining high qualitative standards in their respective activities, specifically for the purpose of not wasting their "reputational capital" acquired in the market. The penalty for "bad certifiers" would be the "expulsion" from the market in which they operate.

By using the same competition mechanisms, it was considered feasible to also solve the problems linked with the independence of certifiers and their third party position with respect to the contractual parties (specifically with respect to the certified subjects), but the resounding scandals that overwhelmed the financial markets, particularly since the 1990s, have proved the entire fragility[31].

The problem is that the certifier is contractually linked to the party that requested the certification and carries out the respective activity to the benefit of third parties, which are not parties to the certification contracts. This results in a very high risk of obliging certifications, which is not effectively neutralised by the reputational mechanisms in the market that are characterised by very strong information asymmetries: in fact, consumers are not able to ordinarily distinguish between "good" and "bad" certifications and, therefore, are not able to ensure that the reputational mechanisms work correctly in the absence of other corrective remedies.

b. Private regulatory, certification, and accreditation systems.

The production of credit in the markets through the Reputational Intermediaries model is not fully understandable if we disregard the "systemic" aspect of these mechanisms.

In fact, the development of these forms of certifications arises in the open markets due to the need to control and disclose

[31] See the remarks of J.C. Coffee, *Understanding Enron: It's about Gatekeepers, Stupid*, July 2002, *Columbia L. & Econ.*, working paper No. 207, on *http://ssrn.com/abstract=325240.*

the adjustment of market players to technical standards or regulatory principles (accounting or otherwise), which arose in order to guarantee the development of the markets and the reliability of the parties operating in the latter.

The extraordinary proliferation of international regulation bodies, such as the ISO, is instrumental to the spreading of techniques "for general and repeated use"; the related certifications aim to communicate the adjustment to similar rules through qualified private persons[32].

In this respect, reference is made to market governance mechanisms, which make up for the lack of a joint regulator in addition to representing the interests involved and developing control and certification instruments that are fit to develop the relationship between firms as well as between companies and consumers or investors.

In this contest, the issue of the distinction between public and private is no longer significant, as illustrated by the rating systems, which make reference to private players or political entities without distinction when the latter enter the bond market and request to be judged as regards their reliability as creditors.

Both technical regulation and certification functions, as well as control over certifiers through various forms of accreditation, are organised through these market systems. Even in this case, there are auditing activities used to assess the presence of technical prerequisites and control over the operations of certifiers on the part of entities that are themselves private and subject to competition with entities implementing the same functions.

The distinguishing feature of these systems is their legitimation, which does not derive from public powers (besides,

[32] In Italy, the law scholar debate has stressed the process of erosion of technical regulatory power and, as a result, of state sovereignty in favour of "aggregated groups which produce technical rules," according to the reconstruction made by A. Predieri, *Le norme tecniche nello Stato pluralista e prefederativo*, in Dir. Economia 279 (1996). Insofar as the debate on the subject matter is concerned, see the studies collected in the volume by P. Andreini, G. Caia, G. Elias, F.A. Roversi Monaco (eds.), *La normativa tecnica industriale. Amministrazione e privati nella normativa tecnica e nella certificazione industriale* (1995); F. Salmoni, *Le norme tecniche* (2001); G. Smorto, *Certificazione di qualità e normazione tecnica*, in *Dig. disc. priv. – sez. civ.*, *Agg.*, II, (2003), at 205; M. Gigante, *Norma tecnica*, in S. Cassese (ed.), *Dizionario di diritto pubblico*, IV (2006), at 3806; A. Zei, *Tecnica e diritto tra pubblico e privato* (2008).

it is a case of systems that exceed the dimensions of the specific legal systems) but from the interrelations and the repeated relations amongst market players[33]. In this sense, it is possible to speak about a legitimation of "reputational" nature, specifically in order to specify the mechanism for the acquisition of consent and power through the repeated relations spread throughout the market. The limits of these systems may be found in the same mechanisms of the market, which are not perfect and, above all, fail under the strong information asymmetries amongst operators and consumers. The need for public law regulation (with regard to the entire problems connected with the different dimensions between the regulator and the regulated party) is placed in this dimension.

IV. Metamorphosis of models in the EU legal system.

In the main European civil law countries, the revision of the public law model of production of certainties is not only the effect of an opening of the markets and, therefore, of the pervasiveness of further and different models, such as those of Reputational Intermediaries. A fundamental role is held by the EU legal system, which requires member states to redefine the same instruments of implementation of the legal system, and for the creation of certainties on the basis of a new model, which allocates a primary role to economic freedom. As a result, public power becomes, on the one hand, inadequate in guaranteeing credit that is anchored to market mechanisms; on the other hand, it is forced on reconsidering the activities generating certainties due to a new

[33] The "systemic" approach is drawn from sociological studies of special interest, such those of N. Luhmann and, in particular, G. Teubner (*Diritti ibridi: costituzionalizzare le reti di* governance *private*, in *La cultura del diritto nell'epoca della globalizzazione. L'emergere delle costituzioni civili*, cited above, 89 *et seq.*; from the same author, see *Diritto policontesturale: prospettive giuridiche della pluralizzazione dei mondi sociali* (1999). With regard to the law studies in this field see G. Rossi, *Introduzione al diritto amministrativo* (1999), at 60; G.F. Schuppert, *Governance. A Legal Perspective*, in D. Jansen (ed.), *New Forms of Governance in Research Organisation* (2007), at 50 *et seq.*. With regard to the neo-istitutionalism theory see A. Benz, S. Lutz, U. Schimank, G. Simonis (eds.), *Handbuch Governance. Theoretisce Grundlagen und empirische Anwendungsfeleder* (2007), at 161 *et seq.*

market pervasiveness as a scheme of relations amongst members[34].

a. Competition regulations and erosion of the public law model.

The integration between the EU legal system and member states sets the decline of the self-referential sovereign power, which has the exclusive duty of qualifying and declaring on the basis of certainty, as well as establishing the forms of implementation of the legal system itself through private persons in charge of public certainty roles.

The problem is not only about facilitating and simplifying certainty-specific public control activities, through mechanisms such as the *autocertificazioni* ("self-certifications")[35], nor simply about structuring public law activities of technical control, on the basis of certainty, according to market relations (a case in point that is significantly represented in Italy by the "SOA" – public works certification companies[36]).

The EU legal system forces a reconsideration of the structure of the same private activities that are designed to produce certainties, on the assumption that the consideration of

[34] The phenomenon is connected to the "institutional complementarity between public and private law-making at EU". With regard to this issue see F. Cafaggi, *Private Law-making and European Integration: Where Do They Meet, When Do They Conflict?*, in D. Oliver, T. Prosser and R. Rawlings (eds.), *The Regulatory State. Constitutional Implications* (2010), at 223. With regard to the practical and theoretical issues concerning regulation in European Union see R. Baldwin, M. Cave, M. Lodge, *Understanding Regulation. Theory, Strategy and Practice* (2012), at 388 *et seq*.

[35] In this case, the declaration of status, personal qualities, or significant legal facts is entrusted to the declarations of interested persons and is subject to subsequent control by the public authority. Reforms of said nature bring into play the individual liability of those who make the declaration but do not remove the public control, which is simply moved from before to after the declaration (pursuant to the procedures established by the public authorities).

[36] The objective is the qualification of firms aiming to take part in public works contracts: whilst, in the past, a centralised system based on the recording into a roll held at the Ministry of Public Works was in force, the amendment law has marked the passage to a certification system based on companies (the so-called SOA) working on the market and supervised by the Authority for public contracts.

the public law aims also needs to follow the adequate assessment of the activity's competition structure.

The most evident transformations specifically concern the work of intellectual professions, whose public law framework has been significantly undermined by the extension of the competition regulations. The EU legal system, in particular, has questioned the systems of exclusive rights and those aspects of public law regulations of professions that create artificial barriers to access and competition amongst professionals and are not effective in providing public protection for the professions themselves[37].

It is very significant, from this standpoint, to consider the work of the Court of Justice, which aimed at systematically demolishing the public law interpretation of a series of private activities of general interest in order to affirm the prevailing nature of competition regulations.

The Court has denied that the auxiliary nature of a private activity with respect to public powers is sufficient to shield the activity itself from competition regulations[38]. It has stated the prevailing nature of competitive reasons with respect to public law qualifications made by member states in many cases: when the activity carried out by the private professional is solely of collaborative nature with respect to the exercise of a public role by each state body (unfit to change the effective exercise)[39]; when the private person's duty is performed in an assessment of technical nature for public decision-making purposes (with the relevant undertaking of public law liability)[40]; and, more generally, in all

[37] On the subject matter, see G. della Cananea, *Libera concorrenza nelle professioni liberali (dell'Europa unita)*, in *Scritti in onore di Alberto Romano* (2011), and, from the same author, *Professioni e concorrenza* (2003).

[38] G. Corso, *Amministrazione transnazionale. Normativa comunitaria sul mercato e le sue conseguenze sul diritto interno*, in *Tempo, spazio e certezza dell'azione amministrativa, Atti del XLVIII Convegno di studi di scienza dell'amministrazione di Varenna* (2003), at 335 *et seq.*

[39] With regard to this issue, for instance, refer to EC Court of Justice, 21 June 1974, case C-2/74, *Reyners*, in *Racc.*, 631, the first case law on the subject matter, whereby the Court denied the possibility to include the lawyerly profession within the concept of "public power."

[40] See EC Court of Justice, 30 March 2006, case C-451/03, *Servizi ausiliari dottori commercialisti*, in *Racc.*, I-2941. Furthermore, see the twin judgments of the Court concerning private certifiers of organic products: EC Court of Justice, 29 November 2007, case C-393/05, *Commission/Republic of Austria*, in *Giorn. dir.*

those cases in which the private activity of general interest is based on contractual relations of private autonomy (therefore excluding their being traced back to a "direct and specific expression of public power")[41].

In the special (and emblematic) case of the civil law notary, the Court has furthermore specified that in no way can the "authentication function" be deemed the expression of public powers: it is an activity of general interest that justifies a specific public law regulation but not total exclusion from competition regulations[42]. The binding effects vis-à-vis third parties of the certainties produced by notarial deeds would exclusively be ascribable to the law governing the notarial activity, which, on the other hand, is organised in accordance with a competition structure and is therefore suitable for justifying the extension of the regulations.

Therefore, the EU legal system aims to "separate," with respect to the activities producing certainty, the expression of private autonomy – and therefore what needs to be defined pursuant to a competition structure (even if regulated) – from those effects that only legal norms can impose for certainty purposes but that cannot lead to qualifying the activity of private persons from a public law standpoint. More specifically, in accordance with this reconstruction, civil law notaries would not carry out a public activity but a service activity towards private persons that aims at increasing the security of exchanges: the fact that notarial deeds create certainty for third parties solely concerns the law, which is intended to reinforce the effect of public safety by limiting individual free valuation as to the authenticity of the deed's content.

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amm., 2008, p. 732; and EC Court of Justice 29 November 2007, case C-404/05, *Commission/German Federal Republic*, in *Racc.*, I-10195.

[41] EC Court of Justice, 31 May 2011, case C-283/99, *Commission/Republic of Italy*, in *Racc.*, I-4364.

[42] In this regard, see EC Court of Justice, General Court, 24 May 2011, cases C-47/08 (*Commission/ Kingdom of Belgium*); C-50/08 (*Commission/French Republic*); C-51/08 (*Commission/Grand Duchy of Luxembourg*); C-53/08 (*Commission/Republic of Austria*); C-54/08 (*Commission/German Federal Republic*); C-61/08 (*Commission/Hellenic Republic*); C-52/08 (*Commission/Portuguese Republic*), with a note by A. Benedetti, *Libertà di stabilimento e professione notarile*, in *Giur. it.*, 2012, 703 ss.

b. Incentives for market certifications and public law regulations.

The EU legal system encourages the spreading of market certifications and, at the same time, proposes models for the regulation of market instruments.

Insofar as the first aspect is concerned, the EU's environmental policy is significant as it bases one of its pillars precisely on the spreading of voluntary instruments of adjustment to high standards of environment protection, such as environmental certifications. Instruments such as ISO 14001 environmental certifications (together with eco-management certifications such as EMAS) are favoured in European legislation; this is also reflected in member states' legislation, contributing to the spread of instruments of production of private credit that are not to be ascribed to national public powers[43].

At the same time, European legislation defined a public regulatory model for certifications that aims to correct the failures of the certification market while establishing a series of public law guarantees.

Therefore, Regulation No. 765/2008 of Parliament and of the Council, dated 9 July 2008, within the framework of a redefinition of the supervision of the quality certification market, has stated that the accreditation bodies "should operate on a non-profit basis," "ensuring the necessary level of confidence in conformity certificates" (recital 12). In fact, it has set forth that the aforesaid activity is reserved to a national accreditation body that is appointed in order to provide non-profit-making "authoritative statements" (articles 4-6). In some passages, the rule appears to make cross-reference to the granting of public powers (as in the definition of the "national accreditation body," which "performs accreditation with authority derived from the State" - Art. 2, 11).

[43] Italian legislation is particularly significant from this standpoint since it spurs the spreading of similar certifications even by ascribing specific public advantages to the respective holdings: in this respect, quality and environmental certifications are preferential requirements for firms taking part in public tenders, pursuant to the public contracts code; for firms holding environmental certifications (such as ISO 14001 and EMAS), the law also sets forth specific privileged paths for the simplification of procedures aimed at the issue or renewal of public law authorisation titles.

Likewise, the European Union has removed the market certification mechanisms by providing for "official controls" for a series of food certifications, which are suitable for shifting the liability for whatever has been declared to consumers on the salubrity of food and on the health of animals to the central public power[44].

In other cases, EU legislation establishes certification systems, through market systems supervised by public power (CE mark, organic or environmental certifications), in order to guarantee maximum reliability on the side of consumers[45].

A mixed model of production of certainties in the markets emerges from such a structured framework, whereby competition mechanisms are combined with more or less penetrating forms of public supervision and control.

V. Hybridisation between models or convergence of legal systems?

a. Decline of the "positivist" concept of certainty.

The review of the public certainties issue, from the standpoint of the civil law systems, is rooted in the transformation of needs, which has an impact on the profile of the legal instruments fit to meet the same.

The need for certainty appears to be darkened by the more pervading "need for trust," which more effectively expresses the condition of parties that need to make choices in conditions of uncertainty.

At present, the greater attention given to the "substantial qualities" of goods and subjects, and to those instruments (public or private) that are more capable of recording similar qualities is in conflict with the prevailing nature of the "formal" concept of

[44] The model of official controls within the food sector is defined in the EC Regulation No. 882/2004 of Parliament and of the Council, dated 29 April 2004, to which the subsequent EU regulations on food certifications also make reference.

[45] For an analysis of the different cases in point from the standpoint put forward, see A. Benedetti, *Certezza pubblica e "certezze private"*, cited above, at 122 *et seq*.

public certainty, which generates reliance in connection with its subjective origin [46].

The instruments aimed at producing reliance in the markets are extraordinarily developed due to market globalisation and mark the limits of the public role of certainty in each single legal system.

In this sense, the "credibility" problem also affects political systems and governmental processes since it is based on factual assumptions and, before that, on obsolete theoretical divisions between "public" and "private."

The formal concept of certainty, as an expression of a sovereign regulating power and of a joint "willingness" aimed at performing general interests, reveals the same limits of the sovereign concept connected therewith. The image of a social order that may be organised in abstract terms through the capacity of the public to distinguish between what is "certain," not doubtful, and what is not almost assumes a utopian meaning within the context of the entire interrelations of which the same legal system is a party.

Certainly, the link between sovereign power and the production of certainties remains untouched with respect to the series of legal qualifications that find their respective exclusive origin in the legal system. The possibility to declare, without doubt, the existence of a status or qualities of exclusively legal nature where, failing the relevant legal rule, the said qualities would not exist remains an exclusive prerogative of public powers and of what has been granted thereby. These are the cases in which certainty is not set up against what is "uncertain" but against what would simply be "inexistent"[47].

However, this qualifying capacity of public powers finds intrinsic limits in the open and dynamic nature of current legal systems. It is by now totally unquestionable that, in the current

[46] A. Romano Tassone, *Amministrazione pubblica e produzione di "certezza": problemi attuali e spunti ricostruttivi*, in F. Fracchia & M. Occhiena (eds.), *I sistemi di certificazione tra qualità e certezza* (2006).

[47] In this respect, the insight of M.S. Giannini is still relevant, whereby, with specific respect to those whom he defines as the *certazioni*, he highlights how, when a legal quality is created by the legal system (for instance, the "healthy and strong physical constitution"), the alternative to the quality's public declaration is not the uncertainty but the inexistence of the same.

scenario, "the certainty of legal relations no longer appears to be achievable through complete and exhaustive regulatory provisions, which finally establish all subjective legal positions"[48].

The foregoing entails that the "certainty" relative to the quality of a good may be ascribable to a set of sources, amongst which private technical rules may have greater legitimation with respect to public law rules, along with forms of private verification of compliance to similar technical rules, even if under public supervision.

The phenomenon is of such extent that Italian courts have questioned, in different circumstances, whether there is a true obligation for the legislator to adapt to the development of technical regulations that are recognised to a greater extent in the markets, with the consequence of assuming the unlawfulness of a law that does not include an explicit reference provision or that, by imposing a uniform and abstract regulation, amounts to a breach of fundamental equality and equity needs[49].

Therefore, the "stable" definition of the legal entity by the legal system gives way to other forms of qualification that are less stable but more in keeping with characterizing the features that are not subject to the qualifying capacity of the legislator and of public powers.

b. Certainties "for" the market and certainties "through" the market

Market regulations account for the other fundamental limit that public power finds in its original self-sufficiency in creating and verifying legal qualities.

In a closed and self-sufficient legal system, public power generates certainties, binds members to comply with the same, and delegates or acknowledges similar powers to qualified parties within it (a prerequisite of the theory of the private exercise of public duties).

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[48] S. Fortunato, *La certificazione di bilancio* (1985), at 557.

[49] The limit is the same as that outlined by legal philosophers with respect to legal certainties: "Legal certainty demands positivity, yet positive law claims to be valid without regard to its justice or expediency," G. Radbruch, *Legal Philosophy*, in K. Wilk (ed.), *The Legal Philosophies of Lask, Radbruch and Dabin* (1950), at 47 *et seq.*

The pervasiveness of competition regulations forces public powers to redefine the area of the activities generating certainty, taking into consideration the structure of financial private activities pursuant to the competition and market principle.

The market organisation modality is nonetheless not predicable with respect to any type of certainty. Since private autonomy truly expresses itself in the market dimension, the latter solely suits those activities that generate reliance and include free choice. For instance, this is the case in the audit of financial statements or of quality certifications that do not create real "certainties" and do not bind their own receivers but entrust their respective credibility to the choices repeated throughout time.

The aforesaid approach offers interpretation perspectives that are useful for grasping the multiple aspects of phenomena and allows one to understand the impossibility in reducing "certainty issues" to the "vertical" dimension of certainty as a substitute for the reality defined by the political party: in fact, in the said cases, the "horizontal" dimension of trust – as a result of the interrelation of the subjects existing within the market – is exhibited in all its complexity, in reciprocal interdependence, and in accordance with a plurality of relations that may acquire their own legal significance or be subject to public regulation (without altering the substantial structure).

The regulation of market certification systems also highlights a special structure of the relation between public powers and certainties.

In fact, regulatory powers are set in a context in which there are no public "prerogatives" and the activity (either of certification or of accreditation) is a service activity carried out in competition by private parties when performing their respective autonomy.

The regulation, as a "public law guarantee of development of market relations pursuant to the competition organisational principle"[50], aims to correct the failures of the certification market by imposing certain obligations and restrictions on private subjects or by subjecting their respective activity to public control.

In this respect, the production of certainties that may be traced back to the certifications only finds – in public powers – an indirect guarantee of correct operation of the certification system

[50] A. Zito, *Mercati (regolazione dei)*, in III *Enc. dir.* (2010), at 815 *et seq.*

in accordance with a market structure. There is no substitution of public power with respect to private players, only intervention aimed at correcting the market mechanisms.

Therefore, the focal axis of the public certainty theory is jeopardised since it used to derive not only the legitimation of binding certainties from sovereign power but also the reliability of non-binding certainties.

c. Certainties and relations between public powers and private systems.

The outlined scenario is therefore significantly more complex than what could be understood by interpreting the analysed phenomena as simply a progressive convergence of civil law and common law systems[51].

In fact, the different analysed models, namely, the continental "public certainty" model and the Anglo-Saxon model of "certifications through Reputational Intermediaries," can only overlap to a minimum extent.

The comparison is nonetheless stimulating since it highlights the limits of a model centred on public powers (the former) and the expansive capacity of a model centred on private autonomy (the latter), which nevertheless has also resulted in failures and critical problems.

On the other hand, it is clear that the certainty issue, understood as the pursuit of security in the relation amongst members, has not simply faded as a certain way of understanding the regulating roles of public powers and of the law.

In civil law systems, the fact of pursuing the highest level of security in the relations amongst members is still a fundamental aim of the legal system, amounting to its distinctive feature (as also proved by recent market crises): what may instead be questioned is the capacity to produce security due to the integration with other legal systems (it is sufficient to think of the impact of the EU legal system) and the existence of phenomena exceeding state boundaries (precisely, as in the case of global

[51] J.R. Maxeiner, *Legal Certainty and Legal Methods: A European Alternative to American Legal Indeterminacy?*, in 15 *Tulane J. Intern. & Comparative L.* 541 (2007), which may also be found on http://papers.ssrn.com.

markets, in which the new forms of governance are recorded with respect to which single state is not a *dominus* but a "party").

This is the interpretation that explains the expansion trend of public regulations of market certification systems that aim to correct market failures and ensure correct operation. Precisely, however, the reference to the market systems regulated by the public makes it clear that the developments in place may not simply be interpreted from the standpoint of a "removal" of public power with a corresponding expansion of the area entrusted to private autonomy[52].

The traditional binary scheme opposing "public" and "private" spheres (inherited from the French Revolution) is no longer sufficient to investigate the issue of certainties, which, on the other hand, needs be formulated on the basis of the interrelation between systems of political legitimation and social/market systems that are based on their own and autonomous legitimations. Only from this perspective will it be possible to appreciate the specific nature of the instruments of certainty, with their different interpretations and their mutual interrelationships.

[52] With regard to the conflict to the conflict between the bureaucratic paradigm and the regulation, new model of administration, see M. Eifert, *Regulierungsstategien*, in W. Hoffmann-Riem, E. Schmidt-Aβmann, A. Voβkuhle (eds.), *Grundlagen des Verwaltungsrechts* (2006), at 1237 *et seq.*; M. Ruffert (ed.), *The Transformation of Administrative Law in Europe* (2007), at 311 ss.

GOVERNMENT ETHICS: THE STRANGE ITALIAN "CONFLICT OF INTERESTS"

Bernardo Giorgio Mattarella*

Abstract

This paper is divided into three parts. Each part is devoted to four issues, which are always the same: the definition of conflict of interests; the scope of its regulation; the remedies for such situations; and the control and punishment mechanisms.

In the first part of the paper, these issues are addressed in general terms. In the second part, they are considered in a comparative perspective. The third part focuses on the Italian legislation and particularly on the cabinet members. The relative statute contains a very unusual definition of conflict of interests. It uses only one of the possible remedies, the disqualification, but under its provisions establishing the grounds for disqualification and proving a violation is practically impossible. The main provision of the statute, in fact, is a fake one.

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1. The issues.

This short paper is divided into three parts. Each part is devoted to the same four issues: the definition of conflict of interests; the scope of the relative regulation; the remedies for such situations; and the control and punishment mechanisms.

In the first part of the paper, these issues are addressed in general terms. In the second part, they are considered in a comparative perspective: few remarks are proposed on the basis of the analysis of some countries' laws. The third part focuses on the Italian legislation and particularly on the national regulation of cabinet members' conflict of interests.

1.1. The definition of conflict of interests.

The first issue concerns the very notion of conflict of interests, as it is defined by the laws concerning government ethics. In order to discuss this issue, it is necessary to provide at least one clarification for each of the terms that the expression consists of: "conflict" and "interests".

1.1.1. "Interests".

As for interests, it should be pointed out that not every contrast or tension between different interests is a legally relevant conflict of interest. Political activity necessarily requires comparing and balancing different interests. In fact, comparing and balancing are required by every public function – including those of administrative agencies – and also by every private function, such as those of the contract representatives and of the company

managers. For instance, when the government has to make choices concerning industrial development and to strike a balance between fostering the economy and protecting the environment, this is not sufficient to speak about conflict of interest. In these cases, politicians have only to take care of different, and possibly conflicting, public interests.

There is a conflict of interests only when one of the involved interests belongs to the office and the other belongs to the individual who is in charge of the office or works in it. Conflicts of interests imply conflicting loyalties on the part of an officer when his personal interest might get him to postpone or disregard the interest of the institution that he works for. Such a situation is typical of the "agent" whose interest is opposed to that of the "principal".

Conflicts between different public interests may of course arise, but, as stated before, they are not conflicts of interest in the common and in the legal sense. However, in a particular sense, one can say that administrative agencies themselves can sometimes face a real conflict of interests. A good example is provided by the states in which the police departments have an interest in seizing private properties, because they can keep the outcome of the seized goods' auctions, in order to fund their functioning, as in happens sometimes in the United States. In the Italian experience, there are few similar examples, such as the fines inflicted by the municipal police for breaking the speed limits, limits which often are kept low by the municipal administrations themselves, which can keep the money of the fines or a part of it; or the fines issued by certain independent regulatory authorities, which can do the same. In these hypotheses, in fact, there is a conflict between the real (or "final") public interest, relating to the proper performance of administrative duties (involving people's safety and supervision over private businesses) and the "instrumental" (or "private") interest of agencies, pertaining to their funding.

In this paper, however, I do not consider these hypotheses, as I focus on personal conflict of interests (mainly of politicians), which is the conflict between a public interest and a private one.

1.1.2. "Conflict".

As for the conflict, the main issue concerns the "static" or "dynamic" nature of the conflict of interests. Using a criminal law distinction, one could say that the conflict of interests can be perceived either as a crime of *danger* or as a criminal *damage*. Conceived in the first sense, the conflict takes place when an interest collides with another. Conceived in the second sense, it takes place only when the private interest actually prevails over the public one, which is adversely affected by the agent's decision.

As far as I know, in all the languages in which the term is used, "conflict of interests" is intended in the first sense, the "static" one; it is a situation in which two interests are opposing or diverging from each other, cannot be both satisfied, and one of them *might* (although not necessarily it actually *will*) illegally damage the other. A very good definition is proposed in an Oecd document: «a conflict between the public duty and private interests of public officials, in which public officials have private-capacity interests which *could* improperly influence the performance of their official duties and responsibilities»[1].

Acting in conflict of interests, therefore, means acting *in spite of* the conflict between the different interests which, in different ways, pertain to the agent. It does not necessarily mean acting *by reason of* the conflict of interests or wickedly, nor does it mean favouring the private interest and neglecting the public or collective one, that the agent is in charge of. This undue preference is the likely detrimental effect of the conflict of interests, but it is not the conflict of interests.

Noticeably, however, things change when the undue preference takes place – that is, if the conflict of interests results in an unjust harm to one of the two interests, namely the public one. In this hypothesis, there is no more potency, but act; no more danger, but damage. It is, of course, a nastier situation and this is why, at times, the law prohibits this situation and not the mere existence of a conflict of interests, or treats differently the two.

[1] Oecd, *Managing Conflict of Interest in the Public Service. Oecd Guidelines and Country experiences*, Paris, Oecd Publishing, 2004, p. 15.

1.1.3. "Distingue frequenter".

Although the notion of conflict of interests is quite clear, in the Italian political and legal debate, and even in the Italian law, this issue is often confused and justaxposed with different issues, such as the qualifications required in order to get a political or administrative post (for example, not being convicted for crimes against public administration), the funding of political parties, the regulation of political campaigns, and even the property of newspapers and television channels.

These other problems are certainly very important in every democratic system – even more important than that of conflicts of interests – and are certainly relevant in terms of governmen ethics. Some of them may even be solved by some of the remedies which are also suitable for conflicts of interest, such as incompatibility or disqualifications. However, they are distinct problems, which – owing to the peculiar political scenario of the last twenty years – Italian politicians and scholars tend to confuse and to group together under the label "conflict of interest".

The relations between these problems should be taken into account, but the different issues should not be mixed up. In the following pages, the ancient teaching "distingue frequenter" will be followed and the issue of conflict of interests will be considered separately by those other issues.

1.2. The scope of regulations.

As for the scope of regulation of conflicts of interests, I will mention the relevant categories of public agents.

I will exclude the private sector and focus on public agents. Among them, the law regulating the conflict of interests may include only politicians or also professional officers, i.e. civil servants. Secondly, the law may treat differently the members of the national government and of the regional and local ones. In federal or regional systems, like the Italian one, the diversity is implied – at least for regional government – by the apportioning of legislative power between the National and the regional Parliaments.

Finally, the law may decide to establish different regulations for members of Parliament (and of regional and local

assemblies) and for cabinet ministers (and members of regional and local boards).

The choices made in regulating the conflict of interests of the various categories of personnel are obviously connected with those inherent to the sources of legal regulation. If, for instance, the rules are set out by regulations or codes of conduct, issued by certain boards or assemblies (such as the American Congress or the British Cabinet), their scope will inevitably be restricted to the members of those boards or assemblies.

1.3. The remedies.

1.3.1. Conflicting goals.

In a conflict of interests, an agent, who should take care of a principal's interest, has an interest of his own which collides with the former. The law does not like such situations, as they expose an inevitably weak interest (that of the principal, who is unable to take care of it by himself and has to delegate the agent) to the threats brought about by a strong one (that of the agent, who acts on behalf of the principal).

How to prevent these threats? One should consider that two different needs, two conflicting goals, are at stake. The first concerns the protection of the weak interest and offers good reasons to hinder or limit the officer's ability to make decisions. The second concerns the regular performance of his administrative duties and offers good reasons to let him decide and even to accept the risk that his decisions may be influenced by the strong personal interest. In other words, the law needs to prevent a dishonest decision, but it also needs to ensure a decision (and to avoid that brilliant candidates are kept away from public jobs, as they might be afraid of being obliged to waive their private interests). The first goal would push for extreme solutions, such as the dismissal of the officer in conflict of interests; the second goal would favour less strict solutions, or simply the acceptance of the conflict of interests, as a lesser evil than the dismissal of some public officers.

1.3.2. The three remedies.

The main possible techniques to manage conflicts of interests are three: the removal, which implies the choice between the two interests; the neutralization, which implies a duty to disqualify; and the exhibition, which implies a certain transparency.

The first approach requires the agent to choose between the public position and the private interest. It is obviously the most effective remedy. Of course, in order to remove the conflict of interests, the officer, not willing to give up the public position, has to get rid of the private interest, not simply of the private position: for instance, he has to sell his shares in the company, not just to resign as a manager. This technique gives rise to devices such as the incompatibility and the duty to sell.

This approach is a radical one. Remedies such as the incompatibility and the duty to sell one's shares in a company are very burdensome for the interested person. Good candidates, such as managers and practitioners, may be kept away from public posts if they have to give up their private interests or posts. This problem is even greater when the public posts are political offices, because strict rules on conflicts of interest can virtually exclude many people from electoral competitions. Therefore, this approach should be used cautiously.

The second approach consists of duties to disqualify for the officer who, having to make a single decision, finds himself in a conflict of interests. It is obviously a less effective remedy, as it involves the acceptance of the conflict of interests, but it can prevent its degeneration. It is often used by the law, especially for corporations: here, a conflict of interests situation does not usually force the manager to choose between the company job and the personal interest (or between the jobs in two different companies); the conflict of interests does not imply his dismissal and his decisions are not void, if the company interest is not adversely affected.

This approach, however, has its flaws. First and obvious, the duty to disqualify may be violated. Second, this system may work for occasional conflict of interests situations, but not when conflicts of interests are likely to arise frequently. Moreover, the higher the concerned public post, the greater the problems brought about by the duty to disqualify: a minister's or regional councilor's

disqualification distresses the political representation mechanism; if it is the Prime Minister or the Regional President to be forced to disqualify himself, the stress on the mechanism is even harder; and if this happens frequently, the functioning of the national or regional government can be troubled. Consequently, when serious and recurring conflicts of interests take place at the highest political level, there may simply be not a good solution at hand.

The third approach, the transparency one, entails the duty to display the conflict of interests. The law accepts that the agent finds himself in a conflict of interests and it also accepts that he makes his decisions in spite of it. But it requires that the principal be informed of it. It is obviously the softest remedy, but it is always useful, irrespective of the use of the other two. Corporation law adopts sometimes this remedy, imposing a duty of disclosure to the companies' managers in conflict of interests.

There is, in fact, also a fourth approach, which can complete the previous three: training and consulting. It is often quite difficult to realize conflicts of interests, and personal assessment are easily biased by the conception of one's own ethical behavior and by the social and professional context. Therefore, although this is not an issue of legal regulation of conflicts of interests, it is important for public officers to be informed about the relevant law and its implementation and to be able to receive advice about the correct behavior.

1.3.3. The possible combinations of remedies.

One should notice that the said remedies are not alternative to each other: they can coexist in the same regulations, as each of them is fit for different hypotheses. The first is useful when dangerous conflicts of interests can arise frequently. The second is more suitable in serious but occasional conflicts of interests. The third is always helpful. The good regulations of conflicts of interests are the ones combining the three approaches.

But how should they be combined? How to decide when the private good, from which the conflict of interests arises, should be sold, when the officer should disqualify himself and when it is enough to display the conflict? There are two possible approaches: a scrupulous list of the various hypotheses; and a general clause, conferring to a reliable authority the duty to select the right

remedy for every concrete case. A continental European lawyer would probably opt for the first approach, an anglo-saxon lawyer for the second one.

1.4. Checks and penalties.

To be effective, any remedy requires penalties for the wrongdoers and independent enforcement authorities.

Penalties can hit the agent (as it happens with dismissal or suspension from the public post, or with fines, criminal penalties and civil liability), the issued act (which can be deemed void or annulled) or both. They can work not only on the public side, but also on the private one: for instance, fines may be inflicted to the business, in which the public officer has a personal interest, or which have been favoured by his illegal decision.

Remedies and penalties need to be implemented by public authorities, which can be either courts or administrative agencies. Some remedies, such as those affecting a contract and the criminal sanctions, are normally administered by courts. Other remedies, such as fines, can be an administrative agency's business, although such an agency needs obviously to be indepentent from the concerned person.

2. Comparative remarks.

2.1. The definition of conflict of interests.

It should be noticed, at the outset, that not all legal systems have a well-defined regulation of politicians' conflicts of interests: important and respectable countries, such as France and Germany, seem to be satisfied with some provisions which establish cases of incompatibility, some of which are intended to prevent conflicts of interests.

This remark corroborates the notion of conflict of interests that I have proposed. Incompatibility, in fact, is a device designed to avoid situations of conflict of interests. Therefore, in these countries – as well as in those which do have a regulation of governmental conflicts of interests – the current notion of conflict of interests is plainly the "static" one, expressed in the mentioned Oecd definition. A conflict of interests is a situation, not a behaviour.

2.2. The scope of regulations.

As for the scope of regulation of conflicts of interests, in many legal systems there are different provisions for members of Parliament and for cabinet members, although in other systems there are common rules for both. For example, in the United States, at the federal level, there are: some general provisions, relevant for all public officers; special provisions for the members of each Congress House; other special provisions for administrative agencies' personnel; and further provisions for single agencies. In the United Kingdom, each House of Parliament has its own code of conduct, while ministers' rules are included in the *Ministerial Code*, which is updated by every new Cabinet.

Moreover, regulations may obviously be different for the various levels of government. In the United States, every state has its own rules, different from those of the federal Government. In the United Kingdom, local bodies, such as the *Greater London Authority*, have their own.

2.3. The remedies.

As for the remedies, as I mentioned before, the good regulations are those which combine the three approaches. The law should use very carefully the first (removal), more often the second (neutralization), and extensively the third (exhibition). North American countries provide good examples. In the United States and in Canada extreme solutions, such as the duty to sell company shares and the blind trust, are used exceptionally and are mostly voluntarily chosen by the concerned agents. Nevertheless, at times they are the only possible way, for a candidate, to be eligible for a certain post, without facing an even more draconian set of rules and criminal penalties. These regulations use massively the *financial disclosure*. Following the officer's statement, the competent authority makes an assessment of his conflicts of interests: this can start a procedure, in which the agent can dispute the authority's findings. The necessary measures to manage the conflict of interests are determined in the final decision.

Is should be stressed that the strictest remedies, proceeding from the first approach, have to be used cautiously. As these remedies force the candidate to choose between the public post and his private interest, they end up in strong limitations of the

right to take up political and administrative jobs. As far as political elections are involved, they produce limitations not only to the right to be elected (for possible candidates), but also to the right to elect (for the voters, who are prevented from choosing certain candidates).

On the other hand, this approach is the only appropriate one in special cases which do occur in many countries, such as Italy in recent years, when one of the richest men of the country becomes president or prime minister. In these cases, the other remedies are not suitable: the second approach, because the concerned person could be forced to disqualify for most of (or for the most important) governmental decisions; the third, because it is very difficult to be aware of all the interests of a very wealthy man and even more difficult to trace the effects of governmental decisions on his personal interests. In such cases, there is a hard choice between the electoral principle and government ethics and the law is probably not the best instrument to solve the problems, which can be more effectively solved by the voters.

2.4. Checks and penalties.

All the mentioned regulations provide for severe penalties for wrongdoers, which are at times subject to criminal law rules. These penalties are administered by independent authorities, free from political influence, sometimes by courts.

This happens also in those legal systems in which a well-defined regulation of politicians' conflicts of interests is lacking and there are only some provisions establishing cases of incompatibility. The disputes concerning the enforcement of these provisions are usually settled by courts (sometimes by the constitutional or supreme ones).

Types of remedies and competent authorities are obviously connected issues. Criminal punishments are inflicted by criminal courts. Civil courts are competent for civil remedies, such as civil liability and the voidness of contracts. Administrative fines can be imposed by administrative authorities, usually independent from political control. Even when the remedy is administered within the constitutional or administrative body (like the parliament), there is often an independent office competent for the procedure, such as the Office for Congressional Ethics in the United States Congress.

3. The Italian law.

3.1. The definition of conflict of interests.

While describing the Italian law, I will primarily refer to the bill n. 215 of 2004, which regulates the cabinet members' conflicts of interests.

This statute contains a definition of conflict of interests which diverges from the way in which this notion is usually intended, as it entails an event of damage and not a situation of danger. Doing violence to the Italian language, it states that «there is a situation of conflict of interests […] when the holder of a cabinet post takes part to the performance of an act, even with a proposal, or does not issue a mandatory act, being in a disqualifying situation [or gaining an advantage], causing a harm to the public interest». A conflict of interests (in the sense of the law), therefore, takes place not when there is a conflict of interests (in the common sense), but when someone, being in a conflict of interests, gains an undue advantage from it or breaks a disqualification rule. The law does not regulate the conflict of interests, but some possible behaviours of the minister who finds himself in a conflict of interests.

It should also be remarked that, if the minister is in conflict of interests and acts consequently, gaining an undue advantage, this is still not sufficient to have a conflict of interests (in the sense of the law): a harm to the public interest is necessary as well. To have an "Italian conflict of interests", thus, three elements are necessary: a conflict of interests in the common sense; an advantage for the cabinet member; and a harm to the public interest.

What is a public interest, however? Everybody knows that public interests are many, do not exist in isolation, frequently collide with each other and often are not material in nature. Any decision, favouring a private interest, can be easily justified by reference to a convergent public interest. The minister of health, for instance, might decide the purchase of a large amount of medicines from the company of which he owns a share: he will certainly get richer, but he will be able to deny the harm to the public interest: he will claim having taken care of the people's health. Any private interest may become public by political decision. To make choices involving interests is the politicians' job, to decide objectively if the balance is positive or negative is

impossible. Requiring the evidence of a harm to the public interest, then, means demanding a Devil's proof, a *probatio diabolica*.

The main provision of this statute, therefore, is a fake or useless one, as its factual grounds cannot possibly occur.

In the Italian legal system, however, there are also different legal regulations, which use a more acceptable notion of conflict of interests. A very good provision, for example, is the one relating to the local government: it simply prevents local politicians to make decisions when they have a conflict of interests, regardless of the advantage that they may gain. If they do, their decision is illegal and can be annulled by a court. This provision is almost one century old and has always worked very well, allowing every interested party to challenge before a court the suspect decisions.

3.2. The scope of regulations

As for the scope of regulation, the mentioned Italian statute regulates only cabinet members' conflicts of interests. As I have already reported, however, there is a good provision concerning local politicians. There is also a sound provision in the national frame statute concerning regional politicians, which entitles regional statutes to provide for incompatibility as a remedy to conflicts of interests.

On the opposite, there are no provisions concerning members of Parliament, which are among the few Italian public officers lacking any regulation of conflicts of interests.

As for administrative agencies, there are general provisions and special ones. The latter can be found in law concerning single agencies, such as certain indepentent regulatory authorities. The former are contained in the Code of behaviour for the civil servants, issued by the Government, which combines quite well the different approaches which I have described. In very rare cases, it requires the public employee to get rid of his private interest. More often, it imposes a duty to disqualify. In still broader terms, it establishes duties of disclosure.

3.3. The Remedies

As for the remedies, the recurrent confusion between the conflict of interests and other important issues, which I have

noticed, produces some confusion. For example, the ineligibility is often put forward as a suitable remedy for conflicts of interests, although it has little to do with it: ineligibility, i.e. the exclusion from an electoral competition, is an istrument to regulate electoral campaigns and to make them fair. The conflict of interest is a problem which can arise after the election, not before. Another example is the statute regulating cabinet members' conflicts of interest, which I have already mentioned: it regulates matters which have nothing to do with it, such as competition and the media.

Among the three approaches which I have described, this statute rejects obviously the first one, which is based on a "static" definition of the conflict of interests. As I have already noticed, the statute is based on the denial that a situation of conflict of interests is a problem in itself. The Italian law admits the possibility that cabinet members are in conflict of interests. It only pays attention – with a useless provision, as I have noticed – to the hypothesis in which a cabinet member, being in a conflict of interests, takes advantage of it and lets the private interest prevail over the public one.

The statute also disregards the third approach, as it does not provide for any transparency. The statements that cabinet members must submit to the antitrust Authority within thirty days from inauguration, are clearly not a transparency device: it is not required that they be made public and they actually are not (although the antitrust Authority could publish them). The report that the same Authority has to transmit to the Presidents of the Parliament Houses, in the very unlikely hypothesis in which it ascertains a violation and inflicts a penalty to a business, is not public either: such report does not even have to be forwarded to the members of Parliament.

The statute, thus, uses only the second approach, based on disqualification. But, as I have already noticed, establishing the grounds for disqualification and proving a violation is practically impossible.

3.4. Checks and penalties.

The enforcement body is the antitrust Authority. It may inflict fines both to the cabinet member performing a "conflict of

interests" (in the sense of the law), and to the business favoured by his decision.

As for the business, the law states that the antitrust Authority inhibits the business from putting in place any conduct intended to take advantage of the decision or orders it to put in place adequate actions in order to stop the violation or, if possible, remedial measures. If the business does not comply with the inhibition or order within the fixed delay, the Authority inflicts it a fine. The amount of the fine depends on the culpability of the business's conduct, but cannot exceed the financial advantage gained by the business. It is, of course, a minor penalty, unable to discourage infringements: for the business, the balance can be positive or nought, but it can never be negative.

As for the cabinet member, the penalty is even more modest: the only punishment is the mentioned report of the antitrust Authority to the Presidents of the Parliament Houses, who are normally elected by the same parliamentary majority which supports the cabinet. The statute does not provide for any transparency of this report, nor has the Authority autonomously established any.

Finally, the statute does not even impose financial liability neither on the cabinet member nor on the business, although – as I have mentioned – the damage to the public interest is one of the grounds for the antitrust Authority's action and one of the elements of the statutory definition of conflict of interests. In the "Italian conflict of interests", there is tort but there is no compensation.

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THE HARMONIZATION OF ACCOUNTING IN THE ITALIAN PUBLIC SECTOR: A NEW ACCRUAL BASIS STANDARD VERSUS IPSAS'[1]

Fabio Giulio Grandis[*] and Giorgia Mattei [**]

Abstract

This paper aims to analyse the principle of accrual accounting when applied to non-business-oriented companies, including most general government bodies. The analysis is carried out by referring to concepts that are well-established and firmly anchored to the 'history' of accounting and which, today, allow us to define the principle of accrual accounting for 'non-business' activities differently to that applicable to profit-oriented companies. This also gives rise to a different interpretation of the economic result. This work subsequently provides a 'fieldwork' analysis of how accrual accounting has been introduced in the Italian public sector through an on-going accounting harmonization project. Finally, this paper offers a critical examination of the current accrual basis recognised by the International Public Sector Accounting Standards (IPSAS), as compared to its theoretical definition. The conclusions of this paper support the theory that the IPSAS can contribute to the current harmonization of Italian government accounting, but also reverse.

[1] In this joint research, paragraphs 1, 2 and 3 are written by F.G. Grandis, the others by G. Mattei. This paper is the result of development and re-arrangement of a paper presented at the international conference EGPA - European Group for Public Administration, held in Athens, Greece, April 26- 27, 2012.

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1. The accounting harmonization in the Italian Constitution

In Italy, the public sector accounting harmonization project should have begun in 2001, as a result of the amendment of Article 117 of the Italian Constitution. However, only at the end of 2009 did the Italian Parliament adopt the law that marked the launching of such a project, which is currently on-going.

The true incentive for such accounting innovation is the fact that the Italian Government must provide EUROSTAT with the data necessary for the latter to verify Italy's compliance with the stability parameters set by the Council of the European Union.

EUROSTAT, and ISTAT in Italy, draw up the data in compliance with Regulation (EC) 2223/1996, more commonly known as "ESA 95", which is a collection of statistical - not accounting - rules. The accounting data under ESA 95 pertains to cash flow and not the principle of accrual basis.

As a result, the macroeconomic tendency at European level is to give increasing primacy to cash flow. Accrual accounting will gain relevance only if it can bring 'added value' in terms of informational content to those who govern single public administrations, i.e. at microeconomic and managerial levels.

In order to put this into effect, the principle of accrual basis ratified by IPSASB (International Public Sector Accounting Standards Board) should not be implemented without question by IAS (International Accounting Standard), but should reflect all the particularities and specificities of public administrations.

In all likelihood a new definition of the accrual basis principle, applicable to the public sector, would be appropriate, not only to modernise public accounting systems but also to avoid

regretting having replaced the current public accounting system with the accrual basis accounting system.

The work carried out by the International Public Sector Accounting Standards Board (IPSASB, formerly PSC, Public Sector Committee) was that of adapting the accounting principles of the IAS to the public sector.

After 2002, IPSASB began to develop a number of specific accounting principles for cases in which the IAS principles could not apply - hence the peculiarity of the public sector. For example, the IPSAS 23 principle on "Revenue from Non-Exchange Transactions" was published in December 2006. During this period, IPSASB's strong attachment to the IAS framework conditioned its choice to extend the so-called "accrual basis" principle of accounting, applicable to private companies, to the public sector (Newberry 2002, Ellwood e Newbury 2006)[2].

This paper's first objective is to analyse whether the accrual basis principle set out in the IAS framework can be implemented in non business organization without any modifications, or whether it will have to undergo the typical adaptations or tailoring required for the public sector.

This paper's second objective is to examine how the accrual system has been introduced in the Italian public administration over the last 20 years and, in particular, to study the recent process of accounting harmonization of public financial statements, which is provided for in the Italian Constitution.

The turbulent context in which European public administrations operate would prompt a traditional accounting system being implemented alongside one that can maintain economic stability over time. However, it is also true that economic stability for a profit-oriented company is very different to that of a non-business-oriented entity, such as general government bodies - at least the Italian ones.

If we consider other international scenarios, the assumption that all of the most economically advanced countries have adopted, or are about to adopt, the 'full accrual' accounting system, is clearly put into question.

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[2] S. Newberry, *The conceptual framework sham and its support for an even greater sham*, 12 Aus. Acc. Rev. 186 (2002); S. Ellwood & S. Newbury, *A bridge too far: a common conceptual framework for commercial and public benefit entities*, 36 Acc. & B. Res. 243 (2006).

A new interpretation of the accrual accounting system aimed at the public sector is likely not only to revive the modernisation of public accounting systems, but also to avoid any regrets in switching from the current public accounting system to one with a focus on accrual basis accounting. (Perrin 1998, Lapsley et al. 2009)[3].

2. Accrual basis standard: "profit" versus "non profit" organizations

Nowadays, public administrations are mainly made up of non-business-oriented bodies which carry out a number of activities that are similar to those of 'business-oriented' companies.

In fact, it has been observed (Cassandro 1970)[4] that public administrations also carry out business-like processes, have their own asset management activities and carry out profitable corporate transactions. These activities, however, play an instrumental role with respect to all the other activities which such public bodies carry out in order to reach their institutional, political and social goals.

In Italian general government bodies, economic relevance of accounting gained notoriety only in the 1990s, notwithstanding the fact that a distinguished scholar had anticipated its importance by more than a century (Cerboni 1877 and 1886) [5].

In the past, management analysis was limited to financial and monetary aspects, following a "cameral" accounting system (Schrott 1856)[6]. This approach, adopted by traditional public administrations, revealed its shortcomings when the public sector began to adopt increasingly complex production processes as a

[3] J. Perrin, *From cash to accruals in 25 years*, 18 Pub. M. & M. 321 (1998); I. Lapsley, R. Mussari & G. Paulsson, *On the adoption of accrual accounting in the Public Sector: a self-evident and problematic reform*, 18 Eur. Acc. Rev 18 (2009).

[4] P. E. Cassandro, *Le gestioni erogatrici pubbliche* (1970).

[5] In the 19th century, the most prevalent scholar of Italian public accounting was definitely Giuseppe Cerboni. It is worth noting that he was the second Accountant General after the unification of Italy. Some of his most relevant works include G. Cerboni, *Quadro di contabilità per le scritture in partita doppia della ragioneria generale dello Stato* (1877); G. Cerboni, *La ragioneria scientifica e la sue relazioni con le discipline amministrative e sociali* (1886).

[6] J. Schrott, *Lehrbuch der allgemeinen Verrechnungswissenschaft* (1856).

result of public economic intervention and the direct fulfilment of the collective administration needs.

Such an approach has given rise to a number of technical and administrative difficulties, many of which are still relevant today (Grandis 1995; Pezzani 2005)[7], and the most important of which relates to corporate asset fluctuation.

Net asset maintenance has therefore become the minimum requirement for a company's 'survival' and sustainability; without this condition, the public sector would suffer 'a continuing pathology' (Amaduzzi 1935)[8] resulting from management trapped in an 'irreversible coma'.

Net asset conservation is to be interpreted dynamically, perhaps as a 're-conversion' of assets according to public needs, which change through time and in accordance with the main political class in power.

A management analysis based solely on financial aspects is now considered to be deficient.

In Italy, the reform of the public accounting systems introduced the requirement – for the public Administration - to also carry out an economic and asset management analysis but different accounting models[9] prevailed. Such models reflect two distinct approaches, which are also found in international doctrine:

1. the first approach completely abandons "traditional" public accounting in favour of the same economic survey models used by companies[10] ;

[7] On this topic, see also: F. G. Grandis, *Il conto economico nei documenti contabili degli enti pubblici* (1995).; F. Pezzani, *L'evoluzione dei sistemi di contabilità pubblica* (2005).

[8] A. Amaduzzi, *Aziende di erogazione. Primi problemi di organizzazione, gestione e rilevazione* (1935). It is assumed that the term "long-lasting company" used by the author refers to public sector companies that, as such, cannot go bankrupt. Nevertheless, in today's reality, such public sector companies can have their goods confiscated and auctioned, can be placed under temporary receivership or, potentially, be absorbed by a higher-level administrative body.

[9] F. G. Grandis, *Le ambiguità nelle riforme dei sistemi contabili pubblici*, 47 Quaderni Monografici RIREA 10 (2006).

[10] B. W. McCulloc. & I. Ball, *Accounting in the context of financial management reform*, 8 Fin. Acc. & Man. 214 (1992); M. Evans, *Corporate governance*, in P. Jackson & M. Levender (eds.), *The public service* (1996); D. Heald & G. Georgiou, *Resource accounting: valuation, consolidation and accounting regulation*, 73 Pub. Admin. 283 (1995); T. Mellor, *Why local governments are producing balance sheets*,

2. the second approach is based on different integration models for both financial and economic surveys[11].

The choice of one approach over the other fuels scholarly debates and clarifies the rationale behind several accounting provisions applicable to the various areas of the public sector.

In any case, an economic analysis of management has become both necessary and inevitable. Nonetheless, in order to understand the actual relevance of such information, it is important to examine how the accrual basis system applies to non-business-oriented companies, as opposed to the typical profit-oriented companies that are active on today's markets.

The production cycle of public sector entities only justifies costs and charges. Only rarely are adequate earnings made on a service, since the entire business process is not aimed at sales but, rather, at meeting the needs of a community.

Furthermore, most of the revenue which funds the factors of production is, contrary to costs and charges, entirely independent from the volume of the activity carried out. For example, a state or government grant or a mandatory contribution towards a public sector entity is often awarded notwithstanding the quantity and quality of the services provided. In these cases, the revenue perceived is not consideration for a specific service provided, but it generally falls within a general institutional objective.

Thus, in order to fully understand the differences between the economic management of a business-oriented company and that of a non-profit-oriented one, it is necessary to distinguish management details taken from the economic results and based on the following points:

- earnings and costs, implying an underlying exchange of goods and services;

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55 Aus. J. of Public Admin. 78 (1996); A. Gillibrand & B. Hilton, *Resource accounting and budgeting: principles, concepts and practice: the MoD case*, 18 Pub. M. & M. 2 (1998); J. Guthrie, *Application of accrual accounting in the Australian public sector. Rhetoric or reality?*, 14 Fin. Acc. & M. 24 (1998).

[11] M. Aiken.& C. Capitanio, *Accrual accounting valuations and accountability in government: a potentially pernicious union"*, 4 Aus. J. of Public Admin. 54 (1995); N. Coon, *Reservation about governments producing balance sheets*, 55 Aus. J. of Public Admin. 426 (1996).

- revenue and charges, that do not imply an exchange transaction, but relate to other unilateral acts – be they casual, voluntary or compulsory; these would include, for example, obtaining a contribution in cash or in kind; an extraordinary variation in the value of assets; endowments and donations; taxes and levies, etc.

All administrative facts tied to the economic management of a company can be sub-divided according to their effects on one financial year instead of another. The costs and earnings, and the charges and revenue, are recorded every calendar year on the basis of assumptions on the 'causal link' between positive and negative economic elements. It is thanks to this causal link, called 'accrual basis', that we can measure asset variations and their respective economic results for the year.

However, the 'causal link' is not only extremely different, but literally inverted (Onida 1971)[12] when comparing the dynamics of non-business-oriented companies and profit-oriented ones.

Indeed:

- in profit-oriented companies, costs are borne in order to make earnings; the company's main goal is to increase the margin between costs and earnings.
- in non-business-oriented companies, the opposite occurs: revenue is obtained, often in a compulsory manner, to bear costs and charges needed to reach social, political and institutional goals; the volume of revenue and earnings should represent the maximum limit of costs and charges; in the medium- to long- term, there should be no significant or stable margin between positive and negative economic elements.

[12] The different notions of accrual basis can be noted by the following comments by P. Onida, *Economia d'azienda* (1971): "*But the revenue and expenses of a commercial business cannot be assimilated, respectively, to earnings and costs of a production company for the market exchange. In this company the costs – or better still, complex data of costs - are usually borne on the assumption that they will bring about earnings* [...]. *However, in a service company, the provision of services and the incurring of expenses, i.e. the outgoings, are not stimulated by potential earnings relating to such outgoings, but rather to satisfy the needs of the entity to which the company belongs. It is also true that the volume of revenue influences expenses and that the means at a company's disposal affects the propensity to consume, and its increase seems to cause and stimulate needs, especially those that are more superficial*".

The notion of 'accrual basis' therefore takes on a particular meaning when it is applied to non-profit-oriented companies and, in particular, to public administrations.

When the accrual basis concept is applied at non-business organizations, it has a special connotation, particularly as applied by public administrations.

Asset management and business activities find their *raison d'etre* in non-profit-oriented companies only inasmuch as they generate positive net equity, which, seen as a 'means', is subsequently 'used' to reach an institutional goal.

It is absolutely clear, in fact, that a business activity carried out by a company in loss would have a negative effect on its delivery process. This is due to the fact that a public body, given its unitary character, should cover the losses even where this is to the detriment of the very social needs for which it was created.

It follows from the above that the economic analysis of the management of a public sector entity requires that, as a preliminary step, a distinction be made between events that are directly linked to a market exchange transaction and those that are not, by virtue of their social objectives[13].

In the former, the accrual basis for income and expenses can be traced back to the notion used for companies, i.e.:

- income is distributed to a financial period on an accrual basis when an exchange has taken place, in other words where a transaction such as a succession, an asset or a service has been completed in all its production cycle;
- expenses are linked to the income for which they were incurred. The correlation can therefore be deducted analytically and directly as a result of a cause and effect. When there is no such causal link, the correlation can be

[13] The difference between services on "individual request" and on "collective request" is well-known. The former are particular and divisible services, i.e. services that satisfy specific needs and for which it is possible to quantify the service rendered to the individual beneficiary. The latter are general and indivisible services, i.e. services of collective interest and for which it is not possible to quantify the benefit provided to the user. Clearly, only the services on individual request can be managed in accordance with a business regime, i.e. by requesting specific consideration for the service, regardless of whether the amount of such consideration is regulated by market prices or reflects a political price.

made by reference to the functionality or usefulness from a rational and systemic point of view (for example a time basis) or when utility and functionality of costs is lacking.

In any case, were it is feasible to gain earnings, on a synallagmatic basis, notwithstanding its political price, the aforementioned principle becomes entirely applicable and must be referred to when defining the economic components of a financial period.

In the latter case, and thus for most public sector entities, it is necessary to consider the accrual basis directly in relation to the provision of social benefits and services rendered 'outside' market rules i.e. where there is no sales transaction.

Revenue for a public sector entity is not usually related to the volume of institutional activities carried out (take, for example, all taxes and all financial contributions from higher administrations, etc.). Rarely do these constitute consideration for the granting of goods or services. In other words, the synallagmatic connection between income and expenses in this context wanes, whilst revenues and charges follow asynchronously. This therefore implies that, while income derives from costs – as a result of the production and sales process - revenue may have nothing to do with charges: the body that provides the revenue need not be that which benefits from the provision of goods or services.

Furthermore, this highlights the public sector's duty to redistribute national wealth.

The amount of costs and charges is closely related to the amount of institutional activities carried out, since one generates the other. Following such logic, revenue is obtained by virtue of a 'formal commitment', or by a 'solemn promise' to use it to cover the costs and charges necessary to carry out the required social functions.

Such 'formal commitment' and 'solemn promise' are contained in the annual budgets which thus become not only the legal bond which regulates the relationship between individual public administrations and their government entities, but also - on a business level - represent the main element when identifying the correlation between cause and effect of revenue and management costs and charges.

The legally binding requirement for public administrations to budget and to engage in management forecasting can now be seen in light of its unavoidable managerial aspect, since the significance of economic analysis would be compromised without them.

In fact, in business, management forecasting is necessary and appropriate, but not essential; in this context, 'corporate governance' works 'rationally' (Simon 1958)[14] expecting earnings as soon as costs are incurred; the economic result for the year is relevant regardless of whether any management planning has taken place.

In public administrations, on the other hand, the expected profits must be identified and agreed upon before any costs are incurred and, more importantly, before revenue has been collected. A causal link must therefore be established in the planning phase so as to allow the economic result to be of greater informational value in indicating management progress. In this case, a net deficit could also be the result of a conscious and express decision (Paoloni e Grandis 2007)[15].

Furthermore, costs and charges must be considered, as a rule, on an accrual basis – not when the corresponding earnings are made, as is expected for profit-oriented companies - but when the following two conditions are met:

- the production cycle of goods and services is over;
- the service has been allocated.
- There is a transfer of property rights as a result of an individual request, in the case of goods or services, or the goods or services become a public benefit in the case of social and service activities provided on the basis of a collective request.
- The participation of the costs and charges in the production and distribution cycles takes place when:
- the costs incurred in a financial year by a company relate to items which are not longer relevant by the end of that financial year, or their future relevance cannot be assessed or calculated;

[14] H. A. Simon, *Il comportamento amministrativo* (1958).

[15] See M. Paoloni & F. G. Grandis, *La dimensione aziendale delle Amministrazioni pubbliche* (2007).

- the accrual basis of costs can also be determined on the basis of cost flow forecasts or, failing a more direct link, of the distribution of the long-term utility or functionality on a systematic and rational basis (for ex. amortisation);
- the potential social utility of the factor of production which incurred costs in the previous financial years is lower or can no longer be assessed;
- the relationship with the production process or the utility allocation on a rational and systematic basis is irrelevant.

There are specific rules concerning the survey of costs concerning long-term activities, namely the production of goods and the provision of services whose productive process goes beyond a financial year.

Revenue, as well as all the positive economic components provided by non-exchange transactions, must be linked to the costs and charges of that financial year. That link, which is opposite to that concerning income and expenses, represents a fundamental corollary to the principle of accrual accounting for facts of management which characterise the activities of non-profit-oriented companies. It is therefore essential that expenses in a financial period, whether definite or presumed, be set against the respective income. Such a link can be achieved:

- by a causal link between income, costs and charges. The link can be made analytically or directly (for example: fund-specific taxes, tied loans, entailments, etc.);
- by the direct allocation of income to the financial statement of a financial period. This can be time-related (for example, year-based taxes) or disjointed in the cost/taxes correlation (for example, income from gains);
- by transferring, from the balance sheet to the income statement, income that was previously obtained but which is linked to one or more activities carried out in that financial period.

In the last example cited above, there is a need to define a specific set of rules in order to properly account for revenue provided to carry out long-term activities. These are, typically, grants given by the State and other government entities.

It becomes apparent that a proper accounting arrangement within a financial statement should reflect the real *animus* with which such grants are given[16] and, therefore, should take into account the accrual basis used when making the effective *animus* assessments.

The *animus*, intention, purpose and reasons for the grant, as well as the possible recipients thereof must, in this context, be differentiated on the basis of the role they play in the management of a single public administration.

We can therefore differentiate between grants intended to restore or increase net assets and those intended for 'consumption' or, more precisely, for management.

The *animus*, intention or purpose of the grant is often retraceable to the laws of the individual county or to the motivations of the governing entities that have given the funding. Thus, once the reasons for a grant have been identified:

- grants that represent a transfer of funds designed to pursue institutional goals in a lasting and sustainable manner are to be considered to be an increase in net assets;
- grants 'for management', designed 'for consumption' or covering costs and charges of the year's management will converge into the income statement, among the positive items of that financial period;
- grants that are to cover specific institutional services over a number of years (carrying out public works, long-term research projects, purchasing fixed assets, etc.) compensate the 'social' value generated by the public administration by carrying out its activities; in this case, the grants could be treated like deferred income i.e. 'deferrals', or accounted for as a specific

[16] On this point, refer to da F. G. Grandis, *Lo schema di bilancio delle aziende sanitarie pubbliche* (1996). Similarly, in the case of businesses, it has been said: "*… Riteniamo che il metodo più corretto per la contabilizzazione dei contributi in conto capitale debba essere scelto facendo riferimento alle finalità e alle peculiarità di ogni iniziativa agevolata, considerando anche le modalità in base alle quali tale iniziativa si inserisce nell'ambito dell'economia dell'impresa che ha fruito del contributo; solo in questo modo può essere valutata la validità di un determinato approccio e l'efficacia informativa del conseguente criterio contabili …*". G. Paolucci, *I contributi in conto capitale nell'economia dell'impresa. Peculiarità contabili, prassi internazionale ed indagini empiriche* (2001).

liability to be linked to the cost incurred to carry out the activities for which the grant was given, by using the accounting procedure of 'sterilization'.

In the latter case, the grant could represent, on an abstract level, a "commitment debt"[17] taken against the community for future services to be rendered or, more precisely[18], in the form of 'future accrual basis revenue'. In this manner, the balance sheet counterbalances a specific funding source with a specific on-going investment, thus highlighting the binding objective of the grant.

In conclusion, a principle of accrual accounting tailored to public administrations does indeed exist. Such a principle, in some respects, is the opposite to that which applies to profit-oriented companies.

Only in this manner can the economic result for the period of a non-business-oriented company be of relevance.

3. The economic result: private versus public sector

The different notion of the accrual basis for public administrations finds a logical, strategic and managerial meeting point with 'profit-oriented' businesses.

The economic result of a profit-oriented business indicates, when positive, that the year has closed profitably, yielding a net earning; conversely, a loss is recorded when a year is unprofitable.

In public administrations, like in all 'non-business' companies, the economic result of a financial period is not viewed in the same manner[19]. In fact, when a particular public administration constantly generates a net surplus, it is considered

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[17] F. Besta, *La Ragioneria* (1909). In fact, the author utilizes this edition to indicate the pledge that insurance companies make. These companies, after receiving payment, 'commit' to carrying out future services relevant to compensation, like life annuities and return on capital.

[18] P. Onida, *La logica ed il sistema delle rilevazioni quantitative d'azienda* (1970).

[19] J. L. Chan, *International public sector accounting standards: conceptual and institutional issues*, in M. D'Amore (ed.), *The harmonization of government accounting and the Role of IPSAS* (2008). "*… The accounting equation (assets-liabilities=residual equity) benefits the nature of business firms.* […] *The residual equity or net assets of a government cannot be easily explained or interpreted. In addition, some government assets are difficult to measure with accounting technique developed for a market economy. Some potential government liabilities are difficult to define because of political and legal considerations …*"

not to have allocated all of its resources to reaching its institutional goals. Rather, it is considered to be making an undue profit and to be asking citizens to make an excessive sacrifice in light of real needs and the actual services provided.

In fact, such a scenario effectively indicates that resources can be assigned to services through an increase of charges and of costs which relates to:

- an increase in the number of users and beneficiaries;
- an increase in the type of services offered;
- an increase in the quality of services offered.

As an alternative, the net surplus could be placed in a reserve fund in order to address potential situations of short-term deficit[20]. In fact, in public administrations, there is no payment of dividends to individual citizens.

In any event, should one not want to take any of the steps described above, one could still:

- lower the prospective political price of the provision of the services in question;
- request less funding from the State, which can thus allocate such resources to the pursuit of other public policies;
- return the surplus to the government entities.

A positive economic result of the year is not considered to be a 'profit' as it is understood in 'business-oriented' companies – it rather acquires the meaning of a "saving"[21]. Such "saving" is

[20] A. Amaduzzi, *Aziende di erogazione. Primi problemi di organizzazione, gestione e rilevazione*, cit. at 6, 123 "*... Attraverso la politica del risparmio il criterio informatore del pareggio economico dei risultati di esercizio viene a tramutarsi in una politica di normalizzazione dei risultati di esercizio, che intende, mediante un accantonamento di ricavi di contributi, per fare fronte a maggiori costi di futuri esercizi, a fare sì che nei vari esercizi l'amministrazione non conduca al disavanzo economico, ma a quel pareggio o a quell'avanzo economico che esprima un normale soddisfacimento di bisogni. La politica della normalizzazione dei risultati economici dei vari esercizi dovrebbe perciò possibilmente consentire il soddisfacimento di ogni nuovo ed eccezionale ordine di bisogni che l'amministrazione aziendale dovesse affrontare: prevedere quelle temporanee impellenti circostanze non economiche che condurrebbero a squilibri se non fossero fronteggiabili, e dovrebbe anche provvedere a quella mutevolezza di forze economiche dell'azienda e dell'ambiente che potrebbe condurre a risultati troppo vari nel tempo …*"

[21] P. E. Cassandro, *Le gestioni erogatrici pubbliche*, cit. at 4, 39. "*… L'avanzo economico è in sostanza un risparmio, che varrà a incrementare il patrimonio dell'azienda, e a migliorare la sua condizione economica futura. Va, tuttavia, ricordato*

justifiable only in the short-term, provided it does not affect the quantity or quality of the services[22], or if it is used to cover short-term deficits or fund future services. Instead, it will be seen as a 'harmful' saving if it detracts funds from the social objectives sought by the government entity, or if it requires citizens or local councils to provide an excessive contribution for services rendered to the community.

On the other hand, the prolonging of a deficit situation would indicate a serious imbalance in the allocation of resources and, *rebus sic stantibus*, the wish to pursue institutional goals (Airoldi, Brunetti e Coda 1994)[23] - in other words, the ability to satisfy the future needs of the community, which the local administration was set up to address. (Cassandro 1970)[24].

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che l'avanzo economico non deve considerarsi una méta della gestione erogativa, che è in equilibrio, se i componenti negativi sono pari ai componenti positivi, se cioè si manifesta una situazione di pareggio economico …".

[22] R. Mussari, *Economia delle aziende pubbliche* (2006), when dealing with the financial surplus of public companies, states that: "… *la sommatoria dei proventi/ricavi, considerato il peso rilevante che i tributi hanno fra quei componenti economici positivi, non è assimilabile al totale dei ricavi conseguiti con la vendita dei fabbricati o dei servizi prodotti esposti nel conto economico di una azienda che scambia, sul mercato, contro moneta il suo output produttivo. I proventi derivanti dall'imposizione fiscale non sono conseguiti per mezzo di operazioni di scambio propriamente dette, onde non si tratta di "ricchezza prodotta dall'azienda" nel senso di "valore che ai consumi, assemblati in modo da ottenere il prodotto od apprezzare il servizio, viene attribuito da mercato", ma, in misura consistente, di ricchezza prelevata e trasferita. Inoltre manca, in questo caso, una chiara ed evidente relazione causale fra costi e proventi onde il risultato che scaturisce dalla contrapposizione di quei valori deve essere letto in modo opportuno. Da quanto scritto deriva che, se dal confronto fra i proventi/ricavi e i costi di competenza economica previsti scaturisce un risultato di segno positivo, non si può affatto concludere che la condizione di economicità aziendale complessiva sia stata soddisfatta in quanto essa può dirsi conseguita solo nell'ipotesi in cui la gestione risulti essere, al contempo, efficace ed efficiente …*"

[23] It has furthermore been noted that: "… *L'azienda composta pubblica si svolge secondo economicità quando:* […] *si realizza un risultato sintetico di risparmio o un disavanzo contenuto in misura tale che non sia compromessa, nel lungo periodo, la stabilità del sistema economico nazionale o dello stesso sistema politico e sociale …*". G. Airoldi, G. Brunetti & V. Coda, *Economia aziendale* (1994).

[24] P. E. Cassandro, *Le gestioni erogatrici pubbliche*, cit. at 4, 26. "… *Lo squilibrio del processo erogativo è da intendersi, pertanto, come insufficienza dei proventi ordinari competenti a un anno amministrativo, a coprire le spese richieste dal soddisfacimento del programma annuale dei bisogni. Lo squilibrio annuale è naturalmente destinato a ripetersi, data la ricorrenza ciclica annuale dei proventi ordinari e delle spese ordinarie, sempre che non si riesca a modificare il programma dei bisogni o il gettito dei redditi,*

In this case, the management variables with which to operate should be, in particular, 'internal' ones, namely those that can be amended by means of decisions or actions that are not dependent on any external influence. These relate in particular to:

- carrying out a radical analysis of efficiency, return and costs;
- determining the specific needs to be satisfied, some of which may no longer warrant 'public' assistance and can, therefore, be managed by the business sector;
- examining the effectiveness of the services provided. In some cases the fulfilment of needs could even fall below the minimum social needs necessary;
- thoroughly analysing earnings and revenue by means of, for instance, an increase in the political price of some services;
- increasing the output amount - only the minimum amount of such output is usually binding - by imposing a 'price' that is at least greater than the unitary variable cost, without increasing fixed costs.

A situation could also arise where the resources available are insufficient to achieve institutional goals. The public sector entity is then compelled to obtain more funding from the State or from general government entities, or if it has fiscal autonomy, to increase the tax levy on citizens, thus increasing the tax burden on the community.

However, obtaining greater revenue of this kind should be conditional on the State or government entity bearing this burden expressing a social, political and macro-economic opinion on this.

In brief, the scalar income statement must be read 'the other way round': once the balance statement balances out, the intermediate results, for example EBITD (Earnings before Interest Tax and Depreciation), must be as low as possible and not, as for companies, as high as possible.

The lower the EBITD, the more income has been allocated to covering institutional costs and charges rather than facing extraordinary and unforeseen operations.

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come abbiamo accennato. Ecco perché lo squilibrio annuo può assumersi come indice di disfunzione permanente del processo erogativo …".

Once again the economic logic behind public administrations, as for all non-business organisations, is 'inverted' compared to profit-oriented businesses[25].

4. Accrual accounting in the Italian public sector

As a result of accounting reforms implemented between 1992 and 2003, accounting in Italy has been characterised by its ambiguous rules (Grandis 2006)[26] and its heterogeneous application, even among public administrations of the same kind.

The accounting system of every public administration is characterised by the legislation applicable in its particular field and the authoritative legal bond sanctioned by the budget forecast. This also weighs heavily on the general principles and the framework that is set for financial reporting.

Although the analysis below relates only to obligatory financial reports, accounting principles in Italy can be summarized as follows:

a) the state accounting system provides for the drawing up of a 'balance sheet'; in 1997 a cost accounting system was introduced, but which does not, however, provide general results or an economic appraisal[27]; the general principles of this system were extended to regional level in 2000[28];
b) provisions applicable to local authorities (provinces and councils) since 1995 enforce the mandatory 'balance sheet' and 'income statement' schemes, but leave to their discretion the way in which to introduce accrual

[25] G. Marcon, *L'evoluzione delle teorie sui processi decisionali delle amministrazioni pubbliche, premessa per l'interpretazione della riforma della contabilità*, 3 Azienda Pubblica 317 (2011). "*… È il caso degli enti locali e delle aziende sanitarie pubbliche, dove la maggior parte dei componenti positive di conto economico proviene da trasferimenti attivi (e dunque è rappresentata da proventi e non da ricavi). In questo contesto, il valore aggiunto potrebbe avere un significato segnaletico fuorviante. Invero, un valore aggiunto elevato potrebbe significare non già capacità di produrre ed erogare servizi con efficacia ed efficienza, ma semplicemente – e, a ben vedere, all'opposto – capacità di negoziare finanziamenti esterni a titolo gratuito …*"..

[26] F. G. Grandis, *Le ambiguità nelle riforme dei sistemi contabili pubblici*, cit. at 9

[27] L. 94/1997 e D. lgs. 279/1997, Article 10.

[28] L. 208/1999 and the subsequent D. lgs. 76/2000.

accounting[29]; on analysis, there are remarkable differences among the accounting systems of over 8000 local authorities, despite the fact that a specific body was set up to draft uniform accounting principles[30];

c) since 1992, the accounting method to be used by bodies linked to the National Health Authority (*Aziende del Servizio Sanitario Nazionale*) is that set out in the provisions of the Italian civil code applicable to limited liability companies, although regional authorities have the power to establish more detailed rules[31]; consequently, this has resulted in 21 different legal regimes (19 regions and 2 autonomous provinces) being applicable to 250 public health companies scattered throughout the country;
d) since 2003, the rules applicable to national institutional entities (welfare entities, research entities, Government entities, national parks, etc.) are essentially analogous to those of local authorities; the rules in fact specify the general accounting principles, including the accrual basis principle[32]

Based on the analyses carried out, public administrations falling under points (b) and (d) use the "theoretical" accrual basis principle defined in chapter 2 of this paper. This is substantiated by :

- the latest version of the accounting principles published by the National monitoring centre for the finance and accounting of local authorities (*Osservatorio per la*

[29] D. lgs. 77/1995 transposed by D. lgs. 267/2000. Concerning accrual basis accounting, see Article 232 of the D. lgs.267/2000.
[30] This organization, called "Osservatorio sulla finanza e la contabilità degli enti locali", is provided for by Article 154 of the D. lgs. 267/2000.
[31] D. lgs. 502/1992, Art. 5. Regional bodies have aligned themselves to these standard with considerable delay and, even now, there are entities pertaining to the National Health Authority that have only formally introduced accrual basis accounting.
[32] See addendum n.1 of the President of the Italian Republic Decree (D.P.R.) 97/2003

Finanza e la Contabilità degli enti locali), for administrations falling within point (b)[33];

- both in the text of the law itself and the technical documentation relating to its publication[34].

Furthermore, when analysing the liabilities in the balance sheet[35] of institutional bodies, local authorities[36] and companies forming part of the Italian National Health Authority[37], one can see how multiannual contributions provided by government entities are recorded under a specific liability entry. Consequently, in order for such data to be used, an accounting "sterilisation" procedure is necessary, implying the 'correlation between revenue and cost' and not the 'correlation between cost and earnings'.

Recently, within the context of the government accounting harmonization process provided for in the Italian Constitution[38] after a 2001 amendment, public administrations have had to adopt accrual accounting[39], in addition to - and not in replacement of - traditional public accounting. Accrual accounting will only be of informational value, providing support to managerial processes, but will be devoid of any legal or authoritative value.

As a result of the aforementioned prescriptive provisions, some common principles of general accounting were set out[40]. Amongst these is the 'accrual basis principle', compatible with the results of the theoretical analysis discussed in chapters 2 and 3.

It is in this very context that IPSAS could be particularly useful if they were not the result of a mere unquestioning transposition of IAS but were able to take account of the particular characteristics of public administrations in general and, in

[33] Ministero dell'Interno - Osservatorio per la Finanza e la contabilità degli enti locali, *Principio contabile n.3. Il rendiconto degli Enti locali*, text approved on the 18th November, 2008, par. 111 and 134.

[34] Cfr. Ministero dell'Economia e delle Finanze – Dipartimento della Ragioneria Generale dello Stato, *Principi contabili per il bilancio di previsione e per il rendiconto generale degli Enti pubblici istituzionali* (2001).

[35] See addendum 13 of the D.P.R. 97/2003.

[36] See model 20 of the D.P.R. 194/1996.

[37] See D.M. 13/11/2007.

[38] Art. 117, item n. 3of the Constitution of the Italian Republic.

[39] Art. 2,item n. 2, point d) of L. 196/2009.

[40] See addendum 1 of the D. lgs. 91/2011. Similar regulations are contained in addendum 1 of the D. lgs. 118/2011.

particular, those in which the budget still plays a strong 'authorising' role.

5. Conclusions: a criticism of accrual basis principle in IPSAS

Taking into account IPSAB's strong attachment to the IAS framework, it seems clear how the accrual basis principle[41] has also become the standard for public administrations that opt for IPSAS.

Paragraph 22 of the IAS framework, entitled 'accrual basis', indicates that this basis is useful for the preparation of financial reports. However, it specifies that under this basis, the effects of transactions are recognised when they occur, and not when cash or its equivalent is received or paid. Consequently, these transactions are noted and merged into their corresponding time frame in annual reports.

When comparing this definition with the one provided for in the Italian civil provisions[42], which provide for an inclusion in the budget of '[…] period revenues and charges, irrespective of the collection or payment date', no fundamental differences seem to exist between the two. Here we can also see that the basic idea is to establish a link between costs and earnings, therefore establishing that the economic effect of all the period events must be attributed to the relevant financial period and not to that where the corresponding payments are made or received.

In the light of the above, as well as the concept which was developed at length in chapter 2 relating to the impossibility of applying the accrual basis principle *tout court* to the public sector, it becomes apparent that it is necessary to adapt such *a* standard to the particular characteristics of public administrations.

The cash basis has always been taken into account by IPSAS, even though it was intended to be a transitional system though which to reach the '*full accrual*' system[43]. Only as from 2006

[41] Paragraph 22 of the IAS framework entitled : '*Accrual basis*'.

[42] See Article 2423 bis, Italian Civil Code, point 3.

[43] S. Pozzoli, *The international public sector accounting standards between "convergence" and conceptual framework*, in M. D'Amore (ed.), *The harmonization of government accounting and the Role of IPSAS* (2008)..

onwards (Bergmann 2009)[44] did the IPSASB – aware of the difficulty of extending all the 'private' standards to the public sector – undertake the planning of a specific IPSAS framework in which it would have even been possible to redefine the standard of accrual basis[45]. The last of the four documents issued by IPSASB dates back to January 2012, when the IFAC website published an Exposure Draft[46] and a consultation paper entitled *"Conceptual framework for general purpose financial reporting by public sector entities: presentation in general purpose financial reports"*.

An analysis of the draft documents pertaining to the IPSAS framework illustrates the well-rooted position that the accrual basis should be used in drawing up public accounts. In fact, one can easily appreciate the main advantages[47] of using accrual basis for management-related issues. It therefore seems that the findings based on the cash basis provide considerably less information than that obtainable from documents drafted on the accrual basis[48].

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[44] A. Bergmann, *Public sector financial management* (2009).

[45] The expectations of the transactors find their *raison d'etre* in the frequent misapplication of certain IPSAS principles – especially the one connected to accrual basis accounting – where these may not be applicable to public Administrations. The elaboration of the IPSAS framework has been divided into four stages. An exposure draft has been published for each stage: 1. *Users, objectives, scope, qualitative characteristics, reporting entity*; 2. *Elements and recognition in financial statements*; 3. *Measurement of assets and liabilities in financial statements*; 4. *Presentation and disclosure*.

[46] Exposure Draft is a document draft that can be modified and commented on on behalf of all potential interested parties. As for the *Conceptual framework for general purpose financial reporting by public sector entities* (GPFRs), the document published in January 2012 concernes stage 4, i.e. budget publication and information prioritizing.

[47] This statement can be found on the 31st January 2012 IFAC website entry, which says: "*… Financial statements prepared under the accrual basis of accounting inform users of those statements of past transactions involving the payment and receipt of cash during the reporting period, obligations to pay cash or sacrifice other resources of the entity in the future and the resources of the entity at the reporting date. Therefore, they provide information about past transactions and other events that are more useful to users for accountability purposes and as input for decision making than is information provided by the cash basis or other bases of accounting and financial reporting …*".

[48] The necessity of implementing an accrual bass system is highlighted. In fact, on page 3 of the document we find: "*… Under the accrual basis of accounting, transactions and other events are recognized in financial statements when they occur (and not only when cash or its equivalent is received or paid). Therefore, the*

Furthermore, there is no evidence in the IPSAS standards of the need to combine a cash system with accrual basis accounting. However, in Italy many authors[49] advocate for an integrated approach to accounting. The coupling of traditional accounting which, by its very nature, is suitable for the financial aspects of management, with full accrual basis, which can cover also other financial aspects, could provide more information to stakeholders, in particular national governments that have signed international agreements on financial stability.

As set out above, accrual basis accounting establishes a correlation between costs and the income resulting from bearing such costs. Such income is recorded under the period in which the transaction takes place. However, this begs the question whether one can apply the accrual principle to entities whose revenue derives primarily from non-exchange transactions. Can this accrual principle apply to entities where most of their costs are unrelated to their income? [50]

Until 2006, none of the IPSAS standards had considered the possibility that income could derive from non-exchange transactions[51]. A non-exchange transaction implies that the income is not linked to an exchange, but to a levy, to a tax or a transfer. In Italy, the financing of the management of the public sector comes mainly from taxes, transfers from other entities or from the payment of services or products rendered. The latter items fall within IPSAS 9, while the others are subject to IPSAS 23.

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transactions and events are recorded in the accounting records and recognized in the financial statements of the periods to which they relate …".

[49] G. Zappa & A. Marcantonio, *Ragioneria applicata alle aziende pubbliche. Principi contabili* (1954); A. Amaduzzi, *Aziende di erogazione. Primi problemi di organizzazione, gestione e rilevazione,* in VV. AA., *Studi di economia aziendale* (1995); P. Capaldo, *Il bilancio dello Stato nel sistema di programmazione economica* (1973); E. Borgonovi, *Principi e sistemi aziendali per le amministrazioni pubbliche* (2002).; G. Farneti & S. Pozzoli (eds.), *Principi e sistemi contabili negli enti locali. Il panorama internazionale, le prospettive in Italia* (2005).

[50] J. L. Chan, *International public sector accounting standards: conceptual and institutional issues*, cit. at 19

[51] The absence of a IPSAS that could acknowledge non-exchange transactions is to be attributed to the derivation of international public sector accounting principles from the private. Due to the difficulty of companies in obtaining this type of revenue, no specific IAS exists.

Taxes are linked to the institutional activities of the entity and to the carrying out of functions that satisfy general societal needs. Taxes, from a legal point of view, can be seen as a forced levy on wealth, while, from an economic point of view, they constitute indirect compensation for providing services to society[52]. Generally speaking, taxes can be collected directly by the individual public entity or can be acquired indirectly by means of transfers from other entities. Based on how they are collected, they can be divided into levies and taxes. Levies are linked to income and assets - and not to the activities of the public body. Taxes, on the other hand, are linked to certain financial operations carried out by the public sector for the benefit of citizens - despite the fact that the beneficiary need not be the person having paid the tax.

Transfers are a source of indirect funding because they come from a system of public relations that is established between different government levels and which varies according to the public governance model adopted. Furthermore, no specific correlation exists inasmuch as their entity depends on the organization and provisions which vary from country to country.

The major criticism voiced in relation to IPSAS 23 is the use of the accrual basis - in its traditional sense - when having to attribute to one period rather than another income obtained from non-exchange transactions.

Based on an analysis of cases in some European countries where IPSAS have been implemented, the principle of accrual accounting is subject to a specific derogation for non-exchange transactions. Such derogation has resulted in the cash accounting principle being applicable in order to allocate all income deriving from non-exchange transactions.

Conversely, under the accrual basis principle, tailored to the public sector, as described in chapter 2 and as applicable to the accounting of the Italian public sector (chapter 4), income deriving from non-exchange transactions could have been attributed not to a cash accounting system, but to the economic relevance of charges for which they were mandatorily taxed.

[52] E. Borgonovi, *Principi e sistemi aziendali per le amministrazioni pubbliche*, cit. at 49.

STATE AND REGIONAL LEGISLATION IN ITALY IN THE DECADE AFTER THE CONSTITUTIONAL REFORM

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Translated from Italian by Viviana Gaballo**

Abstract

This paper describes the evolution of the legislative powers in Italy after the constitutional reform of Title V and, in particular, in the decade that followed. Constitutional Law no. 3 of 2001 sought to amend the Constitution so as to provide greater legislative autonomy to the Italian regions; for this reason, it reversed the criteria for the distribution of legislative powers, and provided a residual clause whereby all matters not expressly provided for in Art. 117, par. 2 and 3, should be considered to belong to the full legislative competence of the Regions. In the next ten years the Constitutional Court was called to offer a reading of the new reach of legislative powers. The result is a structure of powers which is quite different from that envisaged by Art. 117 of the Constitution. The study outlines the characteristic features emerging from an analysis of the decisions of the Constitutional Court as to each type of legislative powers (exclusive, concurrent and residual) and the main legislative matters. It also describes the main models and tools used to harmonize the expressed purpose of legislation.

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1. Factual assumptions and jurisprudential evolution

1.1 Premise. Delineating the extent of the investigation

This study describes how the framework of legislative powers in Italy has evolved due to the constitutional amendment of Title V.

It should be noted right at the start that state and regional legislative powers in Italy are inevitably intertwined with the history of its regions (special statute regions to start with, ordinary regions to follow) and with the slow, continuous evolution of Italian regionalism.

The factors that have determined the rather difficult constitution of a credible regional state since 1948, at various levels (political, legislative, administrative, and financial) are diverse, and have been effective at different times in the constitutional history of the country.

As a matter of fact, the «regional issue» is deeply rooted in the ways in which the unification of Italy (whose 150th anniversary was celebrated in 2011) was pursued, achieved and implemented by the liberal state.

In order to fully understand the complex issues the constitutional reform has tried to address, the juridical analysis offered below needs prefacing with a detailed description of the evolution of the Italian regional system spanning the twenty years from the strenuous effort in making up the regions[1] during the constituent assembly, through the laying out of an implicitly ambiguous (especially as far as the legislative power granted to the regions[2] is concerned) Constitutional Charter in 1948, to the delayed provisions relating to the establishment of ordinary regions[3] in the late '60s.

The preface should be complemented with a close juridical analysis of the legislative powers distributed between State and

[1] Further details on the topic are available in E. Rotelli, *L'avvento della Regione in Italia (1943-1947)* (1967).

[2] For an in-depth study, refer to: V. Crisafulli, *La legge regionale nel sistema delle fonti*, in Riv. trim. dir. pubbl. 262 et seq. (1960); L. Paladin, *Problemi legislativi e interpretativi nella definizione delle materie di competenza regionale*, in 1 Foro amm. 3 et seq. (1971); S. Bartole, *Supremazia e collaborazione nei rapporti tra Stato e Regioni*, in 1 Riv. trim. dir. pubbl. 84 et seq. (1971); A. D'Atena, *Legge regionale (e provinciale)* in *Enc. dir.*, XXIII (1973), 969 et seq.

[3] A detailed analysis of these issues is offered in L. Paladin, *Diritto regionale* (1992); E. Spagna Musso, *Diritto regionale* (1992).

regions in the thirty years from the effective implementation of the ordinary regions to the (third) Constitutional Law of 2001[4].

However, only a short list of what cannot be discussed here[5] is provided in order to point out that the amendment of Title V has not devised Italian regionalism «from scratch». Many of the developments that followed the amendment can only be explained on the ground of the burden placed by the former institutional evolution onto the state-regions relationship as redesigned by the constitutional reforms in the years between 1999 and 2001. In this article we will discuss what has happened since 2001.

Also in this respect, it should be pointed out that the article will only incidentally discuss the growing role of the impact of EU legislation on state law – partly due to the new wording of Const. Art. 117, par. 1[6] – and its consequences in the relationship between State and regional legislation, as it would deserve a comprehensive analysis that we cannot carry out here[7].

1.2. The amendment to Title V and the new framework of legislative powers

What Constitutional Law (CL) No. 3 of 2001 deliberately intended to do when it amended the whole Title V of the Constitution (Articles 114 through 133) – along with the previous CL, No. 1 of 1999 – was to redefine the system of relationships

[4] A detailed analysis of the topic is provided in R. Bin, *Legge regionale*, in A. Barbera, L. Califano (ed.), *Saggi e materiali di diritto regionale* (1997), 59 et seq. Further remarks on the several attempts at amending the constitution are available in C. Fusaro, *La redistribuzione territoriale del potere politico nel dibattito parlamentare dalla Commissione Bozzi alla Commissione D'Alema (1983-1998)*, in S. Gambino (ed.), *Stati nazionali e poteri locali* (1998), 493 et seq.

[5] An in-depth study is offered in S. Calzolaio, *La legge regionale fra materie e competenze* (2008).

[6] See A. Barbera, *Corte costituzionale e giudici di fronte ai "vincoli comunitari": una ridefinizione dei confini?*, in 2 Quad. cost. 335 et seq. (2007); for a broader perspective, see A. Ruggeri, *Rapporti fra fonti europee e fonti nazionali*, in P. Costanzo, L. Mezzetti, A. Ruggeri (ed.), *Lineamenti di diritto costituzionale dell'Unione europea* (2008), 285 et seq.

[7] For further details, see P. Zuddas, *L'influenza del diritto dell'Unione Europea sul riparto di competenze legislative tra Stato e Regioni* (2010).

between State and territorial authorities, specifically between State and regions.

It should be noted, in a comparative perspective, that the underlying reasons that make the relationship between State and Regions rather unstable and in need of continual adjustments also in terms of constitutional norms, are common to almost all decentralized systems[8].

Space constraints will not allow us to discuss the quantity and quality of the amended provisions at length, but for those aspects which more directly affect the system of legislative powers. However, to provide a brief overview of the Constitutional Reform (or, if you wish, of the overambitious underlying reforming intent), it will suffice to compare the different formulation of Const. Art. 114, par. 1, which reads "*The Republic is divided into Regions, Provinces, Municipalities*" in the Constitution of 1948, with the amended version (in force) suggesting a more emphatic approach: "*The Republic is composed of Municipalities, Provinces, Metropolitan Cities, Regions and the State*"[9].

Apparently, the former implies a simplistic framework of territorial subdivision of the Republic – this term being used as a synonym for «State». The latter clearly separates the concept of «State» from the concept of «Republic», considering that this is seen as consisting of all territorial authorities, including the State.

In this perspective, all territorial authorities – from municipalities to the state – are claimed to be deliberately brought onto the same level of formal and substantial equality.

The provision that draws our attention most – i.e. Const. Art. 117 – further develops this claim and extends it to the exercise of legislative powers while following the framework introduced by the so-called « Bassanini Law»[10].

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[8] For further remarks, see A. D'Atena (ed.), *I cantieri del federalismo in Europa* (2008), and P. Bilancia, *Stato federale, unitario, regionale: dalle diverse origini storiche alla confluenza dei modelli*, in Scritti in memoria di L. Paladin (2004), 269 et seq. On the evolution and development of Federalism in the U.S., see the recent C. Bologna, *Stato federale e "National interest". Le istanze unitarie nell'esperienza statunitense* (2010).

[9] Further information on this topic is available in A. Barbera, *Dal "triangolo tedesco" al "pentagono italiano"*, in 1 Quad. Cost. 85 et seq. (2002).

[10] Reference is made to Act No. 59 of 1997, adopted with the intent to complete the devolution of administrative powers from State to regions and local authorities (it is, in fact, the 3rd body of laws concerning the devolution of

The first paragraph of the provision applies restrictions to the legislation as such (whether state or regional) – which appears to be big news (it notably tended to achieve regulatory equality between state and regional lawmakers) if compared with the past formulation, which placed limits on the regional lawmaker only: "*Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations*"[11].

The subsequent paragraphs contribute to identify the three types of legislative powers that are being exercised, at least formally: *exclusive powers* (i.e. the list of subject matters on which only the state can legislate: Art. 117, par. 2), *concurrent powers* (i.e. the list of subject matters for which – based on the old Art. 117 – the State will enforce the fundamental principles, while the Regions will enforce the implementation rules: Art. 117, par. 3); *residual powers* (which do not refer to any list of subject matters, but are based on the «residual policy», according to which all subject matters that are not enumerated or provided for in the former lists fall within the Regions' full legislative powers: Art. 117, par. 4).

A formal survey of legislative powers would therefore report the State as only having legislative authority over those subject matters which are expressly related to its exclusive powers, or referring to the fundamental principles in matters under concurrent powers.

The residual policy is called upon in all other subject matters that are not enumerated; over these the Regions acquire

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powers, following the first two in the '70s). What is of interest here is that the real novelty introduced by the law consisted in the method for devolving powers, since the traditional criterion of distribution of powers and duties between the state, on one side, and the regions and local authorities, on the other, was subverted: in short, Bassanini Law provided the legal framework by which the state was to maintain its administrative powers over a definite set of enumerated matters while the remaining matters were to be granted to other local authorities through appropriate decrees.

[11] For further details on the analysis of the limitations deriving from the EU system and international obligations, refer to E. Baroncini's contributions, *La fonte internazionale* and *La fonte dell'Unione europea*, in L.Califano (ed.), *La costruzione giurisprudenziale delle fonti del diritto* (2010).

general jurisdiction, as they are vested with legislative powers[12]: the state and regional legislative roles therefore seem to have been inverted if compared to the past formulation of art. 117. The regional lawmaker is granted general powers, in full or in part, over those subject matters which have not been reserved specifically for the State, as per Art. 117, par. 2 and 3.

The entire system of state and regional legislative powers is consequently found to be based exclusively on the principle of the separation of powers, in accordance with the «legislative matters» assigned (or denied).

1.3. The exercise of legislative powers. Introduction to a complex system.

The exercise of legislative powers is much more complex than it may appear from the short description above.

This complexity stems from a combination of factors, the first of which is represented by the «legislative matter» definition framework adopted in Art. 117.

The first thing that can be noted while going through the lists contained therein is that the enumeration method of the legislative subject matters in the new Art. 117 is not unambiguous: it spans from objective identification (e.g. defense and armed forces: Art. 117, par. 2, letter d) to teleological identification (e.g. environmental protection: letter s).

In the former case, the subject matter implies legislative powers generally referring to a certain subject: e.g. the State is granted legislative authority on matters of «weights and

[12] The distribution of powers provided for in Art. 117 is to a great extent neither necessarily «fixed» nor immutable. Const. Art. 116, par. 3, specifies that "*other forms of self-government and special conditions of implementation, concerning*" matters of concurrent powers and matters of exclusive state powers (such as the protection of the environment, ecosystem and cultural heritage) "*may be granted" to "Regions, by means of state laws, on the initiative of the interested region, after consulting the local authorities, and in compliance with the principles mentioned in Art. 119*". The law is approved if the "absolute *majority of the members*" in both branches of the Parliament is achieved and a preliminary agreement between the state and the region involved has been reached. More on the topic in A. Morrone, *Il regionalismo differenziato. Commento all'art. 116, comma 3, della Costituzione*, in 1 Fed. Fisc. 139 et seq. (2007).

measures, standard time» (letter r). The Regions will therefore not be allowed to make laws on any of those subjects.

In the latter case, on the contrary, legislative powers are not granted mainly with reference to a certain subject, but especially with reference to a certain scope (which relates to a certain subject).

The state has legislative powers over «protection of cultural heritage»; however, its powers do not always apply to the subject matter («cultural heritage»), because concurring powers also include another subject («promotion and organization of cultural activities»), therefore also the Regions have lawmaking authority on the same subject – within the limits of the implementation rules.

What distinguishes the two powers (the «protection» governed by the state, and the «promotion» concurrently governed by the state as to the fundamental principles and by the regions as to the implementation rules) is not the subject – which is still « cultural heritage» – but the scope defined by the State or regions.

Consequently, the boundary between the relevant powers will be located at the rather uneasy distinction between the relevant scopes that the two authorities share for the same subject.

Not only. To the extent to which the subject matters impose a scope, they tend to cross the border that can be hypothesized for themselves and supersede the established order of the (other) powers as it has been identified according to the objective criterion.

For instance, the Constitutional Court ruled that the subject matter «fishing» falls within the residual powers of the regions (Case No. 213 of 2006), while the state has exclusive powers over the «protection of the environment and ecosystem».

Who will then be granted lawmaking power with respect to sustainability measures for the «fishing effort» applicable to a certain stretch of the sea and to some of the fish species living there?

It is beyond our scope to provide an answer to this question here – the reader may refer to Case No. 81 of 2007 for more detail. What is most important is that we underline that the teleological subject matter naturally tends to «cut across» the objectively identified powers.

In other terms, in the case discussed above, both the state and the region can be said to have powers, virtually: the regulation of the «fishing effort» belongs to the subject matter «fishing», but it also inevitably concerns «ecosystem protection», because the regulation of this peculiar aspect of the subject matter «fishing» involves safeguarding the natural habitat of the fish species[13] – in other words, it involves «ecosystem protection».

We should also add that the classification of legislative matters is not completed by either the objective or teleological criterion as they are particularly wide-ranging: several sub-classes can be found in Art. 117, such as «regulatory subject matters» (e.g., civil and criminal regulation: letter l), «coordination subject matters» (as in Art. 117, par. 2, letter r) and, to some extent, also the «"relating-with" subject matters», which alone raise some difficulties as to the identification of a well-defined, objective, material substance.

We should especially consider those subject matters identifying a coordinating function: isn't this after all an intention to be pursued, a goal to be achieved? To what extent, even if only conceptually, will the power assigned affect a specific sector in which the assignee performs a coordinating function? The impression we get is that this classification embodies some kind of a mixed type lying between the identification by an objective criterion and the identification by a teleological criterion.

The problem becomes more serious if we consider a «coordinating subject matter» of some substance: e.g. «coordinating the public finance and tax system» – which can also be found among concurrent powers.

According to the discussed framework, we should be able to imagine a (state) power «coordinating the fundamental principles of the finance and tax system» and a (regional) power «coordinating the implementation rules of the finance and tax system». As one can easily guess, it is quite problematic even to think of the ways in which a regional law should be made to coordinate the implementation rules of the financial and tax systems.

[13] For further details on this topic, see B. Caravita, *Diritto dell'ambiente* (2005), 22 et seq.

The examples provided – in their paradoxical nature – contribute to introduce the theme of the role performed by «legislative matters», and their attribution, to qualify state and regional legislative powers, but also to unveil a first limitation inherent in Const. Art. 117.

1.4. Following: a premise …

The statements above lead to a first focal point, which is peculiar to the distribution of legislative powers based on the assignment of legislative matters.

On an abstract level, the assignment of a legislative matter to the exclusive or concurrent powers (or, if unenumerated, to the residual powers) is meant to separate the legislative contexts: if the state is granted exclusive powers, these are no longer available to regions; if concurrent powers are granted, the application contexts and modes shall be distinguished between state and regional (along the fundamental principles/implementation rules axis); if the matters have not been enumerated or assigned, they fall within regional powers according to the residual policy.

However, the separation of powers based on the assignment of matters only holds in abstract terms.

In concrete terms, as we have anticipated and will see in detail, even a sheer analysis of the content of legislative subject matters will inevitably produce an unpredictable amount of overlapping between legislative powers: state and regional lawmakers will find themselves to be competing with each other in nearly all contexts in which powers have been conferred based on legislative subject matters.

In other terms, the separation of powers turns out to be the exception, while overlapping powers remains the rule.

Therefore, if the framework of legislative subject matters of Const. Art. 117, seems to be directing lawmakers towards the separation of powers, as a matter of fact, subject matters will only serve to establish a relationship between the contexts of (and modes of regulating) the legislative powers conferred to each lawmaker.

We can also try and assign an abstract, predetermined content to each of the legislative subject matters, but the ensuing framework of legislative powers will be the result of the interplay

between several subject matters (enumerated or unenumerated; pertaining to exclusive, concurrent, residual powers), so that the subject matters are held together in a relationship of reciprocity, which keeps on being gradually modified while becoming more solid as it is defined through legislative action and case law.

In short, what we have is therefore dissociation between the content of legislative matters as it can be conceptualized and the content of legislative powers as it is implemented: this appears to be the common trait of both the old and new Article 117.

To use a metaphor, the abstract framework of the state and regional legislative powers as defined in Const. Art. 117, can be represented as two football teams ready to play their match. Each player corresponds to a legislative subject matter while the players' arrangement on the field is predictive of the moves of those who are going to cross the halfway line and those who are going to remain on their part of the field.

Conversely, the materialized framework of legislative powers (i.e. the space that each lawmaker will actually occupy) corresponds to the actual game dynamics: there will be a team attacking and dominating the match while the other is on the defensive – which perfectly matches what happens with the legislative powers between State and regions in a specific system.

These dynamics produces something inevitable: there will never be a system which does not display a certain separation between «subject matters» (i.e. the constitutional assignment of a certain subject to the abstract legislative power) and «powers» (i.e. the normative space which is actually occupied by the lawmaker as referred to the relevant provision).

In the legal experience, the concept of «legislative matter», however one attempts to anchor it to a solid, objective ground, ends up fading away, getting more confused or, as recently reported – but the conclusion was pretty clear even prior to the constitutional amendment – «dematerializing»[14]: accordingly, subject matters become «pure ideas» and, with their preceptive and defining content, can only preserve their worth as long as they remain in their «noumenon». In the legal phenomenology,

[14] The topic was developed by F. Benelli, *La "smaterializzazione" delle materie* (2006) and by R. Bin, *«Problemi legislativi e interpretativi nella definizione delle materie di competenza regionale». Rileggendo Livio Paladin dopo la riforma del Titolo V*, in Scritti in memoria di Livio Paladin (2004).

when they descend into the material world, they «dematerialize», i.e. they switch from being a «mental icon» to becoming a «relational property», which is based not (only) on the abstract content of something called «legislative matter», but (also) on the positions of strength that the (assumed) assignee of that matter holds and can enforce.

If the assignee lacks the strength for enforcing – according to the constitutional provisions – the assigned legislative matter in his/her relationship with the weaker, *per tabulas* non-assignee, the matter will never turn into «power», but will remain suspended in a world that does not belong to us, albeit it is going to be regulated by the hypothetical non-assignee.

Perhaps this is also the reason why the category «limitations of the legislation» defines the «legislative matter» better than the subject matter itself can do: the «limitation» more easily establishes the «relation» of power not only between subject matters, but more appropriately between assignees of those powers that can hypothetically be exercised.

To this purpose, on a conceptual level, the dynamics is explained by referring to the thorough evaluation of the «interest raised» around each legislative power and, especially, around each case of overlapped legislative matters and powers.

In other terms, a general parameter is available – which the Court has actually explicated since its very first decisions on regional subjects[15] – that can help interpret the exercise of regional legislative powers, a parameter which we could define «the regional quality of interests»: the Constitution assigns regions a number of legislative matters, yet the actual powers devolved to the regional legislative authority are those corresponding to the regional dimension of the regulated interests.

Both the statement and the interpretation are absolutely beyond dispute, though not necessarily exhaustive, as they do not account for the fact that a specific interest should be qualified as either state or regional at the outset.

We'd better go back to our metaphor then: in the example provided, the football field on which both teams are going to play is symmetrical, i.e. each team have their own «half of the field» which mirrors the other half; in fact, they are interchangeable (the

[15] See Constitutional Court, Case No. 7 of 1956.

teams generally exchange their positions between the first and the second half of the match).

A question arises: Does the same apply to the state-regions relationship as to the relevant legislative powers?

On this matter, we immediately discover that the «playing field» is anything but symmetrical and, above all, that the constitutional provisions that define its borders are not primarily those which assign legislative matters in Const. Art. 117.

In other words, the provisions concerning legislative matters are the latest addendum of a certain organizational model, and financial planning, of the state (or "republic", as it should currently be called) and of a certain model for the protection of basic rights and individual juridical situations in general, which represents the playing field where the competition between state and regional lawmakers takes place.

As a matter of fact, regional lawmakers are denied the possibility to make laws in key sectors of the juridical system (civil and criminal law, civil procedural and criminal procedural law, administrative procedural law, fundamental rights law, to name the most obvious).

As a consequence, regions find themselves in a subordinate condition as regards their capacity to make a difference in the arena of national policies, and struggle to assure the expected degree of financial independence from state decisions.

In short, the lack of a Chamber of the Regions that might affect the approach of the state legislation at its very inception[16], the lack of implementation – currently only provisional considering that Act No. 42 of 2009 delegated the implementation of the so-called «fiscal federalism» to the government – of the principles of financial independence contained in Const. Art. 119, the removal of entire sectors of the regional juridical system – but for few exceptions – through limitations of the regional legislation (which was practically achieved in the passage from the old to the new Article 117), all of this confines the exercise of regional legislative powers to a limited section of the juridical system (i.e,

[16] Among the many contributions on this subject, read the persuasive comments by S. Staiano, *Note introduttive*, in M. Scudiero (ed.), I *Le Autonomie al centro* (2007), XVI et seq. Read more in general about the topic in L. Castelli, *Il Senato delle autonomie* (2010).

recalling the football metaphor, the match is only played in the penalty area on the «regional» side of the football field).

In this perspective, the ability to regulate and distribute the actual powers related to legislative matters exemplifies a «precipitate», not a «precondition», of the overall system organization.

This issue is crucial, in our opinion, both to explaining the current situation, and to understanding the role played by the legislative matters in relation to subjects of state and regional interest.

In the latter perspective, the delimitation of the playing ground where the state and regional legislative matters are called to compete (i.e. a certain overall organizational model of the constitutional system) *ex ante* solves the bulk of power conflicts by qualifying the dimension of the state and regional interests. To which we can add that the implied qualification is anything but immutable, as it depends on the interpretation – lately, more cultural than juridical – of two decisive provisions in our Constitutional Chart: Article 3 (the principle of equality in a formal and substantial sense: to what extent can a body of legislation differ from region to region in the context of citizens' equality before the law?) and Article 5 (the principle of unity and indivisibility of the Republic and the principle of devolution: how can these conflicting principles be brought to terms, and what kind of balance can be achieved between the two?).

Once the limits of the basic organizational system are marked in a more or less regional direction – undoubtedly less so in the Italian system – the role of legislative matters is essentially recessive: they can only play their role in conferring powers in the given context. This limiting perspective for the regions will progressively restrict the interpretation of matters concerning regional legislative powers.

For this reason, as we shall see, while the whole nomenclature of the limitations to which regional lawmakers are subjected has practically changed, the amendment to Title V of the Constitution has failed (sofar) to shift the legislative power exercise axis credibly and, more generally, to assure the proper degree of regional (political) independence.

1.5. Following: … and two conclusive viewpoints

After providing a snapshot of the overall system of legislative powers and the role of legislative matters, we should throw some light onto the approach of the two agents of the institutional system who, in the praxis following the constitutional amendment, had to take a stand on its impact.

We will therefore introduce the conclusive viewpoints of both the state lawmaker and the legislative power referee (in line with the football match metaphor), i.e. the Constitutional Court.

As noted elsewhere, such a significant constitutional reform as the amendment of Title V "requires that Parliament should implement an active and coherent institutional policy, mindful of those procedures meant to assure the effective involvement of the Regions, the lack of which would result in a dangerously growing risk of dysfunctionalities and degeneration that could not be compensated by the action of any other constitutional body, in the long run"[17].

As a matter of fact, throughout the 14th legislature – and, for other reasons, even the 15th and the current one, the 16th – state lawmakers have approached the matter from a totally opposite viewpoint: far from taking the amendment to Title V seriously, they have continued to legislate as if nothing had changed.

This became clearly evident as the state legislators continued, especially in budget laws, to create and regulate funds and functions falling within regional powers, or even to try and get ahead of the newly amended constitution, especially as regards the granting of regulatory powers (otherwise removed from the state concurrent powers: see Art. 117, par. 6), by formulating unprecedented «decrees of a non-regulatory nature».

Another aspect related to the first is the extremely weak (and substantially failed) attempt at implementing a constitutional reform through Law No. 131 of 2003 (the so-called La Loggia law), which was dimidiated by the Constitutional Court[18] itself.

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[17] See U. De Siervo, *Il sistema delle fonti: il riparto della potestà normativa fra Stato e Regioni*, in 6 Le Reg. 1264 (2004).

[18] See Cases Nos. 236, 238, 280 of 2004. In particular, in Case No. 280, the Court had to face a dual proxy for the adoption of legislative measures «only meant to acknowledge the fundamental principles that can be drawn from the laws in force»: the one concerning concurrent powers, the other concerning matters of shared powers (respectively, Art. 1, par. 4 and 5), which we will discuss in the

A third, crucial aspect concerns the failed – at least on an operational level – attempt at carrying into effect the "fiscal federalism" by the relevant High Commission during the 14th legislature, which currently (and perhaps decisively) found a remedy in the implementation provisions in matters of «fiscal federalism» through proxy law No. 42 of 2009.

These three concurrent causes have produced an institutional framework in which regions have been granted more legislative powers on paper, while actually nothing has really (and automatically) changed on the level of both the administrative functions and the financial resources and independence (which are still regulated by laws in force prior to the constitutional amendment).

This, in turn, has produced – this is recent history – a very considerable amount of conflicts to be addressed by the Constitutional Court: after Title V of the Constitution was amended, the number of rulings by the Constitutional Court concerning the application of the new powers introduced in 2001 has increased exponentially, especially as regards legislative powers.

In short, it appears that the Constitutional Court has taken on the role of «referee of the legislative powers» and, more generally, of the State-Regions relationship.

To fully understand the distribution of legislative powers in the Italian system, we need to refer to the Constitutional Court's relentless work of modulating legislative powers.

We'll introduce this second viewpoint – the constitutional judge's viewpoint – because, in our opinion, in the short time elapsed since the new constitution has come into force (hardly a decade), the Court has gradually developed and changed its own approach to the amendment of Title V[19]. More specifically, after an

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next pages. In short, the Court reduced the capacity of the former to purely formal acknowledgement of fundamental principles and declared the latter constitutionally illegitimate.

[19] In this regard it should be pointed out that the reform of Title V had been hailed by most of the doctrine – understandably – as an amendment which would have radically changed the relationship between State and regional legislation in such a way as to favor the latter. See, among others, B. Caravita, *La Costituzione dopo la riforma del Titolo V* (2004), 69 et seq.; M. Olivetti, *Le funzioni legislative regionali*, in T. Groppi, M. Olivetti (eds.), *La Repubblica delle autonomie* (2003), 91 et seq. Opponents, conversely, had expressed a more

initial set of decisions which established new scenarios as compared to the former distribution system, the Court took remedial measures, probably on account of the inertial action of the Government-Parliament dyad.

In that sense, as the constitutional case law which followed the amendment to Title V is extremely varied and complex, we deem it useful to offer a quick history of constitutional case law at different time intervals, in spite of the limits that such an operation may have. Considering that the bulk of decisions we refer to is in the order of thousands, it goes without saying that what we'll be able to provide is only a general trend in case law.

In our opinion, the Court's judicial review in the area of regional powers has undergone three stages in the past years.

At a first stage, *between 2002 and 2003*, the Court maintained an attitude of open-mindedness on the innovations introduced with the constitutional amendment (while keeping silent as to the behavior that could be expected of the institutions): Cases Nos. 282 and 407 of 2002, No. 94 of 2003, as we shall see in the next pages, exemplify an attempt to make the most of the regional legislation and its prospects.

The approach that is attributed to the Constitutional Court appears to be even clearer when comparing these earlier decisions with the earliest decisions on regional matters that had been taken immediately after the establishment of the ordinary regions (reference is made to the decisions of 1971-72, which certainly point out, in several respects, the inherent supremacy of the State).

In short, the Court did not initially intend to maintain a suspicious or cautious approach to the amendment of Title V: on the contrary, it openly acknowledged the effects that the reversed division-of-powers policy had in inverting the burden of proof – meant to provide evidence for the ownership of legislative powers

problematic vision of the relationship between the new provisions of Art. 117, par. 2-4, and the reality ensuing from the relations between State and regional law. See especially the contributions by R. Bin, *L'interesse nazionale dopo la riforma: continuità dei problemi, discontinuità della giurisprudenza costituzionale*; P. Caretti, *L'assetto dei rapporti tra competenza legislativa statale e regionale, alla luce del nuovo Titolo V della Costituzione: aspetti problematici*; R. Tosi, *La legge costituzionale n. 3 del 2001: note sparse in tema di potestà legislativa ed amministrativa*; and G. Falcon, *Modello e "transizione" nel nuovo Titolo V della Parte seconda della Costituzione*, in 6 Le Reg. respectively 1213 et seq.; 1223 et seq.; 1233 et seq.; 1247 et seq. (2001).

– which, after the amendment, was placed on the State (Case No. 282/02).

At the same time, state powers were partially «relieved» of the «protection of the environment and ecosystem» – which seemed to strip the regions of a conspicuous part of their legislative history (probably the most positive part considering the normative space it occupied) – thus limiting the legislative powers of the state to setting minimum standards of protection whenever concurrent conditions occurred (407/02), which in turn introduced an argumentation scheme in the relationship between legislative powers that was generally not unfavorable to the regions.

The state lawmaker's inactiveness – as we have mentioned before – and the lack of legislative implementation expected in the long run – both affecting the modulation of relevant powers and the inherently interrelated "financial relationships" – urge that the Court, besides deciding on critical (and hence political) matters such as budget laws, found instruments to enable the independent and «comprehensive» implementation of the constitutional amendment, since the end of 2003, and throughout 2004.

The historical development of this fairly large body of Court decisions seems to suggest that a genuine choice – made necessary by events, yet meant to preserve the postulated unification (although in some cases with certain precautions) – was implicitly exercised by the Constitutional Court.

The Court decisions made at that time included:

a) Case No. 274 of 2003, by which (on the ground of Case No. 94 of 2003) the Constitutional Court confirmed the asymmetry of the questions raised by State and regions in the contestation of the relevant legislative acts before the Court (based on the evidence of Const. Art. 5 itself);

b) Cases No. 303 of 2003 and No. 6 of 2004 (the so-called «legislative subsidiarity», which will be discussed further on in this paper);

c) Cases No. 370 of 2003 and No. 13 of 2004 (the so-called principle of «institutional continuity», which will be discussed further on in this paper);

d) once more, Case No. 370 of 2003 in which the Court ruled that the residual policy was not to be applied automatically;

e) Case No. 14 of 2004 (in which «competition protection» was interpreted as a dynamic, cross-cutting subject matter that allowed the state to be in charge of economic policy management tools);

f) Cases Nos. 307 and 331 of 2003, concerning «electrosmog» (which at least partially improved the provisions of Case No. 407 of 2002 imposing further restrictions on the regional lawmaker's right to *in-melius* derogation from the state rules for the environmental protection);

g) numerous decisions which acknowledged the lack of implementation of Art. 119 and explained the principles and the resulting limitations that were imposed on the state lawmaker (since the very Case No. 370 of 2003);

h) Case No. 308 of 2003 which, following No. 88 of 2003, seemed to initiate the «season of loyal cooperation», asserting that "*in those cases in which the exercises of powers cannot be clearly defined due to their functional relationship, the principle of «loyal cooperation» will apply*".

Compared to the former period, a quantum leap in quality seems to have been taken since 2005.

The Court finally realized it had been left «alone» and, after «La Loggia» law (Case No. 280/04) substantially failed to implement the constitutional amendment, it decided to proceed, in the most absolute inactivity of the system, by referring to its own juridical precedents.

Therefore, in a number of subject matters that we are now going to analyze, the deviation from the original model is even more striking: what is achieved is no longer an evolutionary (or creative) interpretation of the Constitutional Chart, but a real «interpretation of the interpretation».

In other words, in the latest years, in many areas and in reference to various legislative matters, the parameter of the Court has no longer been a certain interpretation of the constitutional provisions (legislative matters and principles) in the amended text of Title V – though still somehow at work until 2005 – but it has rested, as the principal issue, on the interpretation of those parameters already given by constitutional judicial review, to

which further developments in the interpretation are added, predominantly based on this body of case law[20].

Leveraging the described dynamic case law, the Court – as it will be specified below – has in the past three years changed some basic interpretation guidelines as to the configuration of legislative matters of particular importance in the understanding of the relationships between state and regional powers.

This observation is useful to understand the special bond that characterizes the relationship between Government and Parliament, on the one hand, and the Constitutional Court, on the other hand, in the overall configuration of the relationship between state and regional legislation.

In fact, it is no coincidence that the expansion of certain state powers in the constitutional judicial review coincided with the approval of key state "reform" normative acts in those areas (we refer, e.g., to the Public Contracts Code and the Environmental Protection Code – respectively, Legislative Decree No. 163 and n. 152 of 2006 – and even before, the Electronic Communications Code, Legislative Decree No. 259 of 2003).

The complex amending moves necessary to match the model introduced by the constitutional amendment of Title V with the institutional and legislative practice tend to emphasize the symbiotic relationship – in regional matters – between state policies and the Constitutional Court's interpretation of the system of regulatory powers.

In this framework, we are now going to analyze the overall orientation – a detailed analysis on each subject would be impossible due to space constraints – provided by the Constitutional Court as to the system of exclusive, concurrent, and residual legislative powers.

[20] At this «third stage», the Constitutional Court's decisions would typically reserve a paragraph of the motivations to the organic reconstruction of the juridical precedents about the matter discussed in the interpretation and, based on that, the Court would release its decision.

2. Exclusive powers

2.1. Introduction. The framework of powers reserved to the state.

We have earlier mentioned the essential features of the subject matters listed in Article 117, as identified according to objective or teleological criteria.

We need now to point out that, as was noted elsewhere, the actual powers reserved to the state do not even formally find completion in the exclusive powers listed in Art. 117, par. 2[21].

Above all, it should be noted that "teleological matters", when assigned to the exclusive power of the state, tend to be considered as cross-cutting matters.

The development of Constitutional Court case law in response to cross-cutting issues calls for a double-track approach that chronologically illustrates the advances in both environmental protection and competition protection, albeit separately.

The subject matters that have not (as yet) taken on a cross-cutting connotation will follow.

2.2. Cross-cutting matters

The Constitutional Court has given full consideration to the «cross-cutting matter» concept in the case law which followed the amendment of Title V, and identified – among the subject matters listed in Art. 117, par. 2 – some issues for possible intervention by the state, which would at first sight, on the paper (i.e. according to Art. 117), appear to be reserved for the regional lawmaker[22].

We should start by saying that the mere identification of a cross-cutting issue does not necessarily imply that this will expand state powers both quantitatively and qualitatively.

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[21] It was appropriately reminded that "further areas of exclusive state legislation than those listed in Art. 117 par. 2 can be inferred from a number of constitutional provisions (Art. 33, par. 6; Art. 114, par. 3; Art. 116, par. 3; Art. 117, par. 5 and 9; Art. 118, par. 2 and 3; Art. 119, par. 3, 5 and 6; Art. 120, par. 2; Art. 125; Art. 132, par. 2; Art. 133, par. 1)": G. Scaccia, *Legislazione esclusiva statale e potestà legislativa residuale delle Regioni*, in F. Modugno, P. Carnevale (ed.), *Trasformazioni della funzione legislativa, vol. IV – Ancora in tema di rapporti Stato-Regioni dopo la riforma del titolo V della Parte II della Costituzione* (2007), 113 et seq.

[22] V. G. Falcon, *Modello e transizione nel nuovo Titolo V della Parte seconda della Costituzione*, in 6 Le Reg. 1252 et seq. (2001).

As we shall see below – e.g. in the case with the "protection of the environment and ecosystem" – the «cross-cuttingness» has sometimes come into play at a time when state powers were being withdrawn and specific legislative powers were being vested in the regions.

The (basic) matters that have been explicitly identified as cross-cutting among those falling within the State's exclusive powers include the "*protection of the environment and ecosystem*" (*leading case,* Case No. 407 of 2002); the "*essential service levels relating to civil and social rights to be guaranteed regardless of the geographical borders of local authorities*" (in this case, the cross-cutting issue was acknowledged by an *obiter dictum* contained in Case No. 282 of 2002, and referred to, inter alia, in Cases Nos. 88 and 370 of 2003); "*competition protection*" (*leading case,* Case No. 14 of 2004, later confirmed, inter alias, by Case No. 272 of 2004); "*criminal justice system*" (*leading case,* Case No. 185 of 2004).

Contrary to what might be expected, the Italian constitutional jurisprudence has not developed a unitary concept of «cross-cutting matter». The «cross-cutting» content of these subject matters is treated differently and even takes on independent meaning and scope for each of them.

In an effort to summarize, the Court actually affirmed that "*environmental protection is not to be seen strictly as a subject matter, but rather as a constitutional value which, as such, represents a cross-cutting matter; this gives rise to distinct powers, which may well be vested in the regions, while the decisions about questions demanding uniform treatment over the national territory should remain the concern of the State*" (407/02).

This substantiates the idea that vesting the State with legislative powers over environmental protection will not prevent regional laws from intervening to improve it, provided that the regions are legitimately entitled to do so by provisions in Art. 117, paragraph 3 or 4, and that these interventions fall within the minimum *standards* of protection set by state law.

In other words, the state powers over cross-cutting issues arise, as specified before, from the need to make more room for regional lawmaking; yet, as the value attached to environmental protection would suggest, not only have the *borders* become blurred, but, more importantly, the *contents* have become confused and confusing (to the regional lawmakers' advantage).

As far as essential service levels (hereinafter «ESL») are concerned, the constitutional judge specified that "*they cannot be strictly considered as a subject matter, but rather as an underlying component encompassing all subject matters, for which the state lawmaker shall be allowed to set the necessary rules in order to ensure full enjoyment of the relevant rights throughout the national territory, thus preventing any limitations or constraints that might be imposed by the regional lawmaker*" (282/02).

What the Court did was not only to identify a cross-cutting matter that touched a variety of matters, as in the case with environmental protection, but more generally it contributed to describe an as yet indefinite and *a priori* indefinable, but potentially all-encompassing "non-matter".

Accordingly, "competition protection", the Court added, "*does not show the characteristics of a definite subject matter, but those of a power that can be exercised on many different subjects, (...) hence the inclusion of this state power in Const. Art. 117, par. 2, letter e), which evidences the 2001 state lawmaker's intention to bring those economic policy tools which (…) are the expression of a unifying power solidly into the State's responsibility. The state's intervention is therefore justified by its relevance to macroeconomics*"(14/04). On this basis, it was added that "*the intervention of the state lawmaker is legitimate if contained within the limits of appropriateness and proportionality*" (345/05).

In this case, therefore, cross-cuttingness results from the macroeconomic importance attached to the state intervention, and it is through this criterion that the extent of state power and, conversely, of regional power can be identified. In reality – but we will return on this later – in the most recent case law the Court seems to have expanded the "regulatory" capacity of the matter, thus extending its scope and partly changing its identification criteria.

Lastly, the state powers in matters of "criminal justice system" imply that "*the regions do not have any powers that entitle them to make laws in order to introduce, repeal or modify the penalties prescribed by state laws on the same matter*" (185/04).

The Constitutional Court (implicitly recalling its previous case law) also added that "*the «criminal matter», understood as the set of assets and values to which the greatest protection is afforded, cannot normally be determined in advance; it comes at a time when the state lawmaker sets incriminatory provisions, and this can actually occur*

in any sector, irrespective of the division of legislative powers between the state and the regions. It is by definition an instrumental power that the State exercises and that can potentially affect the most diverse sectors, even those included in the exclusive, concurrent or residual legislative powers of the regions".

In the case at issue, under the guise of a cross-sectoral matter, a general limit that the Constitutional Court had identified since its inception is confirmed, namely the so-called «limit of criminal justice matters»[23], according to which the power to regulate legal issues in criminal cases is inherently vested in the State. Moreover, by the statement above the Court categorically reaffirms that no allotment of subject matters may affect or limit that power of the State.

We find it relevant to make a final remark, which has partly emerged before: for each cross-sectoral matter that the Court expressly acknowledged, the constitutional justice makes sure that a parameter is identified, a sort of stop-limit, which can help restrict (or at least control by means of interpretation) the expansive exercise to the damage of regional powers.

With regard to environmental protection, this function is initially accomplished – except as discussed in the next paragraph – by the principle of *in-melius* derogation (182/06) and the corresponding reference to the definition of state powers in terms of setting the «minimum standards of protection» (407/02).

With regard to «ESL», the function is accomplished by the principle of loyal cooperation, by a certain intepretation of the provisions ruling such a power and by the clear statement of the Constitutional Court according to which this power cannot be used "*to identify the constitutional basis of the state regulation of whole subject matters*" (respectively, 88/03, 370/03, 285/05)[24].

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[23] See C. Ruga Riva, *Regioni e diritto penale. Interferenze, casistica, prospettive* (2008).

[24] Of particular relevance is the Court's latest decision, no. 10 of 2010, that found legitimacy in the state provisions concerning the renowned «*social card*» issued by the state to cope with the most severe poverty situations at a time when the financial and economic crisis was growing more serious: referring to the current situation of crisis and basing its decisions on the state powers in matters of «ESL», the Court affirmed that "*in other words, such an intervention by the state shall have to be considered admissible, should it be necessary to actually ensure the protection of those people who, being in dire straits, claim a fundamental right which, as it is strictly inherent to the protection of the inalienable core of human dignity,*

With regard to competition protection, the function is accomplished (at least initially) by the macroeconomic nature of the intervention as assessed in accordance with principles of adequacy and proportionality (14/04, 345/05).

After all, even in the case with the criminal justice system, the claim that the exercise of state powers in criminal justice matters should "*always be contained within the limits of non-manifest unreasonableness (...) in accordance with the last resort criterion*" means that "*the limitation of regional legislative powers is justified when state law tends to preserve the heritage, values and interests of its entire community, on equal terms*" (185/04).

It is therefore noted that the dynamics of the three major cross-cutting matters (environmental protection, competition protection, ESL) – at this first stage of judicial review – tends to establish a relationship (peculiar to each of them) between state and regional powers, in which there is still theoretically the possibility for the regional lawmaker to intervene in areas teleologically related to such (cross-cutting) matters falling within exclusive state powers.

2.3. The new approach to the cross-cutting matters «environmental protection» and «competition protection» (2007/10)

Starting from a core of decisions in 2007, which were later confirmed, the Constitutional Court changed its approach with regard to the interpretation of the matters «environmental protection» and «competition protection».

As far as «environmental protection» is concerned, the Constitutional Court clearly stated, in contradiction to what was expressed in the mentioned Case No. 407/02, that environmental protection makes a matter of its own which regards a nationally recognized legal concern (the environment), whose discipline is vested exclusively in the state (see Cases No. 387 of 2007, No. 225 of 2009, and No. 104 of 2008 – among others – from which the following quotations are drawn).

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especially when the peculiar situations mentioned above realize, shall have to be ensured all over the national territory in a homogeneous, appropriate and timely manner, by means of a coherent regulation, appropriate to the scope".

It remains true that "*next to the environment as a nationally recognized asset, other "legal" assets can coexist which relate to components or aspects of the environment as an asset, concerning different interests that are legally protected*", and that therefore we can talk about "*the environment as a «cross-cutting matter», in the sense that different interests converge on the same subject: those related to the preservation of the environment and those related to its uses*".

In such cases, however, "*the national legislation on the protection of the environment as a general asset, which is vested exclusively in the State, prevails over that vested in the regions or the autonomous provinces, with regard to their powers which concern the use of the environment and, therefore, other interests*".

We can conclude that "*the state legislation on environmental protection «actually operates as a limit to the legislation that the regions and autonomous provinces have laid down on other matters within their powers», except when they adopt higher environmental protection rules in the exercise of powers provided by the Constitution which come into contact with those ruling environmental protection. This is therefore the sense in which the environment can be understood as a «cross-cutting matter» (as repeatedly stated in the case law of this Court; see Case No. 246 of 2006 for all), and it cannot be said, as the regions Veneto and Lombardy would like to say, that «the environmental matter cannot be understood as such in a technical sense». On the contrary, the environment is a legal asset that, pursuant to Const. Art. 117, par. 2, letter s), also serves as a dividing line between matters within exclusive state powers and matters within regional powers*"[25].

As regards "competition protection", the result is the same but with different arguments.

In short, the Court refers to competition as a means of protecting and promoting competitive assets of the market and in the market, in keeping with the EU notion itself. In this sense, and when the available state provision pursues this goal, it can be implemented in every material sector, appearing as a «cross-cutting matter». The need remains to test the appropriateness and

[25] With reference to the environmental matter, therefore, the planning of a policy and coordination function can be admitted [partial preemption] and, above all, unlike what seemed to be implied, the administrative functions, as outlined in the Legislative Decree No. 112 of 1998, can be revised in the direction of a centralized exercise of the state legislative power over environmental matters [total preemption] (see Case No. 232/09).

proportionality of the state legislative actions (as argued in Cases Nos. 401, 430, 431, 452/07).

The departure from earlier case law in both matters here deserves particular emphasis not so much because of the emerging argumentative outlines, but rather because of the consequences that they immediately produce.

As it will be clear later when discussing the use of the principle of loyal cooperation in managing the system of legislative powers, the Constitutional Court's approach clearly sets a limit to the regions' claim that they should be involved in the exercise of legislative powers and the ensuing regulatory powers in these matters.

The Court specifies that since both matters concern the exercise of exclusive – albeit cross-sectoral – powers of the State, this will not be bound to consult the regions about the legislative and regulatory acts to be adopted.

In this sense, both matters, at this point, establish a real, new limitation for the regional lawmaker – at least with respect to its extent – and actually it is a particularly pervasive limitation, as it impacts a large portion of regional powers.

In fact – and we refer to practical case law, not to an abstract interpretation of subject matters –environmental protection is typically related to a range of concurrent and residual regional powers, such as health protection, territorial government, fish and game[26].

Competition protection has no less impact since it usually relates with regional powers in matters of trade, industry and economic activities in general, and with (local) public services, to name just the best known.

In these cases, therefore, to quickly go back to the theoretical perspective, it is now clear that there is no clear-cut separation between state and regional legislation in all these areas, and it will be necessary to verify the order and nature of the state and regional regulation to qualify the subject matter that should encompass the regulatory intervention, so as to legitimize (or de-legitimize) the exercise of the relevant power.

[26] Refer to http:/www.dirittoregionale.it for examples of overlapping matters, which are numerous in this sector.

However, the relational model to which this new approach for the mentioned cross-sectoral powers refers is peculiar.

Whenever legislative power is exercised in either cross-cutting matter, the state law acts as a limit to the regional legislation, although this implies invading the regional power (which, after all, is in line with the old national interest model). This means that the space occupied by the State in these matters, even if it affects regional powers, is automatically removed from the regions, which cannot claim involvement even only in terms of loyal cooperation with the legislative power of the State, and will also lose their regulatory powers (which comply with the formal model as in Art. 117, par. 6: they are vested in the State in matters of exclusive powers).

This aspect is particularly important not only because it changes (or reinforces) the invasive outline of these powers of the State. As a matter of fact, the new element introduced by these decisions is the re-introduction of an apparently outdated relational model between state and regional powers.

However, in those cases when state and regional legislative powers overlap, a situation which is effectively depicted with the term «concurrence of powers», the Constitutional Court adopted – and keeps on adopting beyond the context of these matters – a number of decisive criteria which ensured the legitimacy of state legislation while somehow compensating the regional level by providing regional involvement in the implementation of the state legislation (usually through a statement or agreement on measures for implementing the national legislation during the State-Regions Conference).

With reference to the above mentioned cross-cutting matters, however, the relational model is quite the opposite, although the case in point is similar: as it is simple to understand, by definition, if a state power is «cross-sectoral», in operational terms, it implies overlapping powers.

On the contrary: the overlap is realized precisely in the «cross-cutting» part of the matter at issue and usually gives rise to the intertwining of powers (both state cross-sectoral powers and regional powers).

In this case, the plot is easily solved: the power is vested in the State, there is no need for any form of trustful cooperation. The state legislation introduces and acts as a limit on the regional

legislation. The regional lawmaker is stripped of the relevant legislative power.

In that regard, the Court has recently pointed out – as if it wanted to establish a parallelism between limits on the environmental protection matter and limits on the competition protection matter, and also to define its scope – that "*the pursuit of environmental protection by the regional lawmaker can only be accepted if it is a marginal and indirect effect of the guidelines adopted by the region in the exercise of its legitimate powers, provided that it does not clash with the goals set by state regulations for the protection of the environment (Case No. 431 of 2007)*".

Case No. 431 of 2007 expressed the same concept with regard to competition protection.

One last remark. If we look at the motivational content of the decisions described above, we cannot but notice some (newly introduced) convergence between the interpretive approach of the environmental and competition protection cross-cutting matters on the one hand, and criminal justice system, on the other. In either case, whenever state legislation is materialized in these areas, the limit on the regional lawmaker is confirmed (and extended): it operates in a way not unlike the limit of national interests before the amendment to Title V[27].

2.4. Potentially cross-cutting matters

A final mention should be made to two specific matters that could be defined as potentially cross-cutting: «civil regulation»[28] and «heritage protection».

The former, although not classified as a cross-cutting matter, ends up enacting, as the Court put it, the old limit of private law, which, due to its wide scope and difficult predetermination, provides a

"touch of cross-cuttingness" to the matter.

In this sense, the Court stated that "*the state's legislative power includes aspects that are inherent in relationships of a private nature, for which there is a need for national uniformity;* [that] *it is not*

[27] See A. Barbera, *Regioni e interesse nazionale* (1974); and A. Barbera, *Gli interessi nazionali nel nuovo Titolo V*, in E. Rozo Acuňa (ed.), *Lo Stato e le Autonomie* (2003), 12 et seq.

[28] See E. Lamarque, *Regioni e ordinamento civile* (2005).

excluded by the presence of aspects of specialty codes regarding code provisions; [that] *it includes the rules governing legal persons under private law;* [that] *it includes institutions which are characterized by elements of public law, yet having a private law nature*" (326/08).

The latter, «heritage protection», – usually interpreted together with another matter under concurrent powers: «development of cultural and environmental heritage» – was considered by the Court to have a cross-cutting nature, in the same sense and for the same reasons as «environmental protection», i.e. to ensure a strong link between state and regional legislation, given the overlap of powers, which only the reference to Legislative Decree No. 112 of 1998 and, more recently, to Legislative Decree No. 42 of 2004, can partly remedy (9/04 and 232/05).

Also «heritage protection» followed (actually, partly anticipated) the same pattern as previously seen in the case of environmental protection (see Case No. 367/07).

2.5. Matters with potentially defined content

What follows documents a phenomenon opposite to that of the so-called «cross-cutting matters». That is, while the Court interpreted some state-governed matters or areas or sectors in their extensive and cross-cutting nature, in other cases (not seldom, though), it identified the limits and boundaries of state legislative matters. In the case of matters such as «public order and security» (letter h), «statistical coordination of state, regional and local government data» (letter r), and «legal and administrative organization of the state and national public agencies» (letter g), the Court has so far favored a plain reading, which collocates, defines and confines these powers. Furthermore, this line of interpretation is not always resolved in favor of the regional legislative powers, but it is certainly consistent with the overall approach of Art. 117 and shows that, in some cases, the enumerated matters can be filled with contents without having to resort to interpretations that contradict the system of the legislative powers allocated to each matter.

Case No. 17 of 2004 represents a hypothesis of a strict reading of a matter assigned to exclusive state powers, such as the «statistical coordination of state, regional and local government

data». Of relevance here is the fact that a strict interpretation of the matter is aimed at limiting – in a manner favorable to the regions – the extent of the state regulation which, according to the Court, should be understood "*as granting the Minister for Innovation and Technology a power (over the regions) which is limited to a merely technical coordination task*".

The "coordination" idea, which could have been easily interpreted by the Court as expansive, was on the contrary deprived of its intrusiveness into regional powers and reduced to a "merely *technical coordination*". Therefore, while on the one hand the contested provision is not declared unconstitutional, on the other hand the Court's interpretation limits its scope to a degree of compatibility and compliance with the regional powers granted by the Constitution.

A similar attitude is reflected in the interpretation of the matter «legal and administrative organization of the state and national public agencies»: in this hypothesis, a thicker and sometimes wavering case law has explicitly ruled out that it is or can be interpreted as a cross-sectoral power; the Court has also ruled out several times that the generic reference made by state law to «public administrations», in relation to the effects of certain regulatory bodies, could be interpreted as also including non-state agencies (see Cases Nos. 31/05, 270/05, 319/09).

Last but not least, the matter «public order and security, with the exception of local administrative police» represents the first case of a restrictive interpretation of an exclusive state power after the constitutional amendment of 2001. Since Case No. 407 of 2002 the Court has stated that, in order to justify a restrictive interpretation, it suffices to "*note that the specific context of Art. 117, par. 2, letter h) – which almost entirely reproduces Art. 1, par. 3, letter l in Act No. 59 of 1997 – induces a restrictive interpretation of the concept of «public security», because of the textual connection with «public order» and the explicit exclusion of «local administrative police», as well as based on the preparatory work. «Public security», in fact, as this Court would traditionally put it, should be conceived, in opposition to the tasks of regional and local administrative police, as an area reserved to the State on measures related to crime prevention or maintenance of public order (Case No. 290 of 2001)*".

Incidentally, two distinct meanings are attached to the notion of «public order» by the Supreme Court of Appeal and the

Constitutional Court, as the notion suggested by the Constitutional Court is more restrictive.

In order to complete our analysis, it should be noted that in these matters the relational model (as referred to regional powers) is different from that of cross-cutting matters (environmental protection and competition protection): whenever state powers and regional powers intersect or overlap, the Constitutional Court tends to solve the situation by referring to the concept of «concurrent powers» only – on which we will return – therefore through the prevalence criterion and, if necessary, the principle of loyal cooperation.

2.6. State exclusive unenumerated powers: the case of «road traffic»

A special case is to be reported, in which the Court, without resorting to special tools to take on state powers, directly relates an unenumerated subject matter to its exclusive power: this is the case of «road traffic».

In Case No. 428 of 2004, the Court stated that "*road traffic, even though not expressly mentioned in Const. Art. 117, cannot be placed in the residual area of powers reserved to the ordinary regions in Art. 117, par. 4. In relation to various aspects under which it can be considered, systematic considerations suggest that «road traffic» can be traced back in many ways to exclusive state powers, in accordance with Art. 117, par. 2*".

The Court here refers to exclusive state powers in matters of «public order and security», «criminal justice system» and «civil regulation», «administrative justice» and «jurisdiction», to assert that «road traffic» is an exclusive power of the State, for systematic reasons, although «unenumerated» (on the same line of reasoning, more recently, is Case No. 9/09).

Therefore, the systematic interpretation of certain sections under state jurisdiction can bring a matter («road traffic» in this case) within the exclusive power of the State, and this too is another relational model. The complex of state powers can lead to the inclusion of a matter within the exclusive powers of the State (supplementing the list in Art. 117, par. 2).

3. Concurrent powers

3.1. The framework of concurrent powers. Introduction to the relationship between principle rule and implementation rule. The role of the implementation of Community law

The amendment to Title V of the Constitution did not make it easier to identify the content of the fundamental principles set by the State in matters of concurrent powers, which proves to be perfectly in line with the original regional structure. In Case No. 50 of 2005, the Court stated that "*the concept of «fundamental principle» (...) is not and cannot be of a strict, universal nature, because "subject matters" have different levels of definition that can change over time. It is the lawmaker's task to make choices as deemed appropriate and adjust each subject matter on the basis of essential normative criteria that the interpreter shall assess impartially without being influenced conclusively by any self-classification*".

In reality, once more in line with the original regional structure, the Constitutional Court has often allowed implementation rules to be ranked as fundamental principles. In a recent decision that has been repeatedly quoted, the Court has taken up the claims made in the mentioned Case No. 50 of 2005 and specified the role that the implementation of Community law may have in defining the relationship between principle rules and implementation rules: "*in the implementation of Community law the definition of the internal allocation of powers between State and regions in matters of concurrent legislation and, therefore, the very identification of fundamental principles cannot disregard the analysis of the specific content as well as the purpose and needs to be pursued at Community level. In other words, the goals set by EU directives, although they do not affect how the separation of powers is achieved, may in fact require a specific articulation of the relationship between principle rules and implementation rules*" (336/05).

To put it shortly, the implementation of Community law may drag the fundamental principle into establishing implementation rules, as is the case at issue.

More generally, the requirements for the implementation of EU directives – in continuity with Case. No. 126/96 – may entail centralizing implementation powers in the State, notwithstanding the internal framework for the division of legislative power (398/06).

With a view to implementing Community law, the Constitutional Court – in compliance with the law[29] – considers legitimate for the State to adopt pliable implementation rules, even in matters of concurrent and, apparently, residual powers (see Case No. 399/06).

The doubt remains that, beyond the requirements for the implementation of Community law, the state lawmaker may generally adopt implementation rules, even if pliable, on matters of concurrent powers (see, however, Cases Nos. 303/03, 401/07).

3.2. Potentially cross-cutting matters. The special case of «linguistic minorities»

Even concurrent powers include potentially expansive or cross-cutting matters. Among these is undoubtedly «territorial government», a matter which is one of the typical powers of the Region, which has gradually carved out a role for itself between the State and local authorities at a time when «territorial planning» activities were being regulated.

This accounts for the decisions which regulate the specific powers in matters of «territorial government», in particular, «city planning» (303/03), «public housing» (362/03), «public works of the Regions and Local Government» (49/04), and most of the «building amnesty» (196/04) and «land reclamation boards» (282/04).

It is a power that is recurrently invoked in judicial review, as it connects with many matters delegated to the State (environmental protection, cultural heritage preservation). For the sake of example, it is exactly the reference to the territorial government – along with other concurrent powers – that led the Court to suggest that the regions have powers over environmental matters; and it is the same matter that led the Court to «split» cases between criminal and administrative infractions in the so-called «building amnesty case». These examples account for its potential cross-cuttingness.

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[29] Law No. 11 of 2005 (dealing with "*Norme generali sulla partecipazione dell'Italia al processo normativo dell'Unione europea e sulle procedure di esecuzione degli obblighi comunitari*"); referred to in L. Califano, *Stato, Regioni e diritto comunitario nella legge n. 11/2005*, in 4 Quad. cost. 862 (2005).

The same applies to the subject matters «health protection», «education» (for the settlement of the matter: 200/09), «job protection and security».

For example, the responsibility for «nurseries» was equally shared between «education» and «job protection». (370/03, 120/05), and the very fact that «school organization» was assigned to the regional power in matters of «education» originated the need, well perceived by the Court, to develop the principle of the so-called «institutional continuity» (13/04).

Still, the Court broadly ruled out the adoptability by the State of acts of guidance and coordination in relation to matters of concurrent powers, namely in a ruling on «health protection» (329/03).

The Court has identified two types of matters among concurrent powers: «scientific research», whose contents are acknowledgedly imbued in «constitutional value», and the «harmonization of public accounts and coordination of public finance», which embodies a purposive, goal-oriented function which ultimately rests with the State.

In the former case, the Court stated that "*scientific research shall be considered not only a "matter", but also a constitutionally protected "value" (Const. Art. 9 and 33), and as such capable of getting over a framework of strictly defined powers*" (423/04, 31/05, 365/06, 178/07): in this sense, it legitimizes the potential recourse to the assumption of powers and functions by the State in subsidiarity in accordance with the procedure laid down in Cases No. 303 of 2003 and No. 6 of 2004.

Similarly, with regard to the «harmonization of public accounts and coordination of public finance», the Court believed that "*the «teleological» essence of coordination requires that the central level can not only determine the basic rules governing the matter, but also exercise the specific powers that may be necessary to concretely realize the coordination function – which in itself inevitably exceeds, in part, any possible involvement of sub-state and local levels. (...) Of course, these powers must be configured in a manner appropriate to the existing spheres of autonomy guaranteed by the Constitution, with respect to which coordination can never exceed the limits beyond which it would be transformed into management activities or undue influence on the autonomous bodies*" (376/03).

In another decision, the Court stated that "*the coordination of public finance, referred to in Const. Art. 117, par. 3, is less a subject matter than a function vested in the State, since it extends to the national level, and to public finances as a whole*" (414/04), coming almost naturally to argue that state legislation could also include particular precepts and «implementation» rules (35/05).

The Court has at the same time developed a body of case law that seeks to limit the invasiveness of state legislation – in particular, with respect to the financial autonomy of local authorities – and identified the specific requirements requested of standards of financial coordination to qualify as «principle» rules (169/07): in short, they can demand that the overall spending of local authorities be limited, but they may not «audit» individual sectors in which those authorities need to reduce their costs (very clear in this regard is Case No. 27/2010, on the financing of mountain community services boards, which resulted in a situation of "double legislation" passed in both cases under review by the Constitutional Court).

However, even in this area, the «subsidiarity principle» can always be accepted (376/03).

A final remark must be made on the recent identification of powers vested in the State and the Regions in matters of «protection of linguistic minorities» (Case No. 159/09, from which the following quotes are drawn), which "*generates a model of division of powers between State and regions that does not correspond to the well-known categories applicable to all other matters under Title V of the Constitution, both before and after the constitutional amendment of 2001*".

On the one hand, "*the state lawmaker appears to be holding the power to identify the protected minority languages, to determine the features of a linguistic minority to be protected, and the institutions that characterize this protection*"; on the other hand, "*the regional lawmaker is responsible for the further implementation of any state law that is necessary*".

That power seems to resemble the power over matters of «scientific research»: in short, it is the regions' concern to implement the state legislation in defense of a series of rights and constitutional values (but the limits implied can hardly be marked along the axis of the principle/implementation rule).

3.3. Matters with potentially defined content (enumerated and unenumerated)

Next to these matters which variously contribute to inflate the matters listed in Const. Art. 117, par. 2 and 3, there are some with a more defined content, which do not lend themselves to being interpreted as cross-cutting or constrained in their respective fields because of the impact of state powers.

These include matters of «professions» – in which one of the fundamental principles of State responsibility is also the identification of professionals (see 353/03 and 138/09 among others) – and «promotion and organization of cultural activities» – within which the responsibility of determining «actions in support of public entertainment» is brought (although for reasons of institutional continuity a state provision that regulated the relevant financial fund was then considered legitimate: 255/04). Similar considerations may be invoked for the «sports system regulation»: in Case No. 424 of 2004 the Court – excluding the relevance of other matters – listed under this label those powers relating to the regulation of facilities and sports equipment. The interpretive development of the «ports and airports» matter seems to lead to the same conclusion: the focus is less on identifying the contents of responsibility (which "*is mainly concerned with facilities and their geographical location*", 51/08), than on finding modes of cooperation between State and regions.

A phenomenon identical to that described for the «road traffic» occurs, under concurrent powers, in two subject matters not listed in Art. 117: «building amnesty» and «land reclamation boards». In both cases – except for criminal law infractions of the building amnesty regulation – the Constitutional Court brings these matters within concurrent regional powers, mainly in the area of «territorial government», thus confirming its typically «expansive» capacity: however, it should be noted that, once again, the fact that a matter is not listed does not prevent it from being assigned to a level of power other than the residual legislative power of the Region.

3.4. Matters that can hardly be regulated by regions

Finally, a few words about some powers that, apparently almost by mistake, have been added to (we'd better say, have

fallen within) concurrent powers. This statement is not motivated by a desire to be controversial, but by the fact that the constitutional judicial review that has dealt with these matters has often made use of interpretive tools to warrant centralization.

The most striking example is provided by «national production, transportation and distribution of energy»: if we looked at Cases No. 6 of 2004, Nos. 336 and 383 of 2005 in particular, we would realize that, with the only exception of those aspects – also very difficult to identify – which connect the mentioned matter to planning and, consequently, to «territorial government», the regional level is not structurally prepared to regulate the sector in question, especially in terms of implementation rules: the Court repeatedly said that technical regulations and, more generally, the guarantee of a uniform set of rules shall be considered the responsibility of the State. The regions, on the legislative front, are left with very little or nothing at all (as evidenced by Case No. 103 of 2006).

In this perspective, it is hardly relevant that state powers are ensured by resorting to the «subsidiarity principle» (Case No. 383 of 2005) or by extending, through interpretation, the scope of the fundamental principles (Cases No. 336 of 2005, No. 129 of 2006).

Much the same can be said of «rules of communication»: Cases No. 336 of 2005, Nos. 103 and 265 in 2006 (although the line of cases actually begins with Cases Nos. 307 and 331 of 2003) made it clear – e.g., with regard to ensuring a unified procedure for authorizing mobile telephony installations – that the regional role, at the administrative implementation stage, is limited to executing national rules (which in turn «execute» the Community law) [30].

4. Residual powers

4.1. The problematic nature and workability of the residual policy

The residual policy has not found «widespread» application in constitutional judicial review.

[30] Nevertheless, see the latest Case, No. 255 of 2010, in which the Constitutional Court seemed to outline a possible framework for regional intervention.

Already in Case No. 370 of 2003, which formalizes the use of the prevalence criterion, it is stated that the residual policy does not work mechanically and does not operate automatically: "*in general, we also need say that it is impossible to refer a particular subject of legislation to the application area within the residual powers of the Regions under the fourth paragraph of Art. 117, by the mere fact that this subject is not immediately attributable to any of the matters listed in the second and third paragraphs of Const. Art. 117*".

Apparently, this claim – in so far as it does not correspond to an inevitable consequential logic, by which it is obvious that some legislative regulations are part of the matters listed in art. 117, although they do not reproduce the exact header – seems to debase the major innovation introduced with the new Art. 117: residual policy, and the relevant reversed policy ensuing from the enumeration of state powers[31].

In other words, such a statement of principle – which is duly reflected in subsequent cases – makes it *ordinary* to refer (national) legislative regulations – which would more likely be ranked under the «unenumerated» matters – to individual titles under the exclusive power of the State or regional concurrent powers, while it makes it *exceptional* to assign them to residual powers (as a result of an interpretive *process* that can go as far as to attributing a matter to the regional residual powers only after unfailingly excluding any link to other «enumerated» matters). It is therefore at the level of the interpretive process that the spirit (and substance) of Art. 117 are fully mitigated.

In this sense, the recent case of «dematerialization» and subsequent «re-materialization» of the responsibility in matters of «public housing» acquires significance: in continuity with previous constitutional judicial review (starting from Case No. 221 of 1975 and in respect of all subsequent decisions), the Court derived the tripartite division of the matter at issue from an old decision, and dismembered the matter – after acknowledging its «cross-cuttingness», obviously not in the "classical" sense – to finally recompose it using existing titles, so that it partly falls within the «essential service levels», partly within the «territorial government», and partly within the residual powers.

[31] However, it had warned about the uselessness of residual policy in strengthening regional powers, S. Mangiameli, *Riforma federale, luoghi comuni e realtà costituzionale*, in 4 Le Reg. 517 et seq. (1997).

The interesting fact is that the judicial review *process* that the Court chose as the basis for its decision, which was completed before the constitutional amendment, concluded with a reference to Case No. 27 of 1996, which clearly affirmed that the regions had «*plena cognitio*», "*in matters of public housing, both administratively and legislatively (because of the similarity in functions), so that we could consider that a 'new' matter under regional powers has taken shape in the development of the judicial system which goes beyond the initial reconstruction made with Case No. 221 of 1975 – public housing in fact – and has achieved its own consistency regardless of its reference to urban planning and public works*" (Case No. 27 of 1996, in the passage drawn from Case No. 94 of 2007).

Now, as the residual policy had been called into action – at least in this case in which the new matter had been "certified" by the Constitutional Court itself – we would have expected full regional knowledgability, to paraphrase the Court. Contrary to all expectations, the Court «materialized» public housing in a new way with the aim of holding back to the state what it would otherwise have lost (as it was no longer to be referred to concurrent powers).

It must therefore be stressed how important continuity of "results" and the protection of national instances are in constitutional jurisprudence, and how heavily vesting the regions with new, truly residual powers is affected by these dynamics.

In essence, also this results in a relational model of powers and, in this perspective, the residual policy turns out to be twice as residual: the residuality introduced in the legal system with Art. 117, par. 4, as interpreted by the Constitutional Court, actually is «second-order residuality».

In order for a residual power to be acknowledged, it is not enough that a matter is not listed in paragraphs 2 and 3 of Art. 117 (i.e. the requirements of Art. 117, par. 4). It must also be ruled out, as a matter of interpretation, that the unenumerated matter can be referred to, and therefore be part of, other enumerated legislative matters.

It can be concluded that the residual matter is what remains after excluding other enumerated powers in the subsumption (as shown in the decision regarding public housing).

4.2. In search of truly residual powers

However, that has not prevented – given the circumstances – a number of truly residual regional powers from being identified over the past fifty years.

The Court recognized that matters such as agriculture; handicrafts; trade; social assistance and social services; mountain community services boards; education and vocational training (which is the only somehow «enumerated» matter, because it is expressly excluded from concurrent powers in matters of "education, except the autonomy of educational institutions and with the exception of education and vocational training"); regional public employment; regional office regulation; fisheries; local public services and tourism should be considered under regional residual power[32].

In fact, it should be noted that residual regional powers embody the "Cinderella" of the system of legislative powers: many of the powers recognized as such suffer the impact of cross-cutting matters, of the reference to national interests, of the ever-applicable «subsidiarity principle», the impact of the «prevalence criterion – principle of loyal cooperation – historic-regulatory policy» triptych, the expansion of the fundamental principles as seen before (which may also affect residual powers), and the operation of the principle of institutional continuity (as is the case with handicraft: Case No. 162 of 2005).

All these elements of flexibility, paradoxically, while introducing fuzziness in the scope of the matters listed in Art. 117, in one way or another, end up referring the legislative regulations under review by the Court to one of the numerous tags contained in Art. 117, par. 2 and 3, thus setting a limit to the role of the residual clause.

5. Models and tools to harmonize the system of legislative powers

At this point, after providing what we hope is a sufficiently articulated, and realistic, description of an objectively complex system, we can now analyze the tools that the Constitutional

[32] Refer to http:/www.dirittoregionale.it/ for a list of the decisions on each matter.

Court used for the «judicial construction of law»[33], meant to harmonize the system of legislative powers, i.e. to make it sustainable.

We will therefore go through a set of tools that we have already discussed above and will now be briefly described and explained.

In the last section we will retrace the patterns of relationships between legislative powers endorsed by the Constitutional Court.

5.1. Institutional continuity

The tool we should analyze first is the so-called «institutional continuity». It should be treated first as it clearly shows how difficult it is to confer new powers to the regions in the context of an organizational system of the state – in the broad sense in which it was discussed earlier – which has not yet been adjusted to the new legislative powers that are vested in the regions as per Art. 117.

This inevitably resulted in the previously existing system being perpetuated. The reasons for failing to adjust have already been mentioned, but it is worth resuming them briefly.

First of all, the little or no weight given to Title V by the state lawmaker (particularly in those legislative acts which are fundamental for the life of the State, such as budget laws).

Secondly, the need for implementing a constitutional reform designed to make the functions allocated by the state legislation – in particular by the so-called Bassanini reforms – "readable", starting from the wording of the amended Articles 117 and 118, and not vice versa, as has been the case so far.

By all appearances, these two aspects are interlinked, and immediately recall a third one: the issue of the financial autonomy of the Regions (particularly) and of the implementation of Article 119 of the Constitution.

In other words, the interaction of three factors (the practice of state law, the lack of legislative as well as financial implementation of constitutional amendments) led to a recurrent situation before the Constitutional Court, in respect of which it has

[33] See L.Califano (ed.), *La costruzione giurisprudenziale delle fonti del diritto* (2010).

sometimes had to adopt specific remedies involving a significant sacrifice for the legal (financial and administrative) independence of the regions.

The Constitutional Court recognized, for instance, that «school organization» (Case No. 13 of 2004) or «actions in support of public entertainment» (Case No. 255 of 2004) fall under regional responsibility in matters of «education» and «promotion and organization of cultural activities».

However, the Court itself, in the latter decision, took charge of focusing on the specifics of the problem and recognized «effectiveness» to this regional power (although only theoretically); in the case before the Court, in fact, the acknowledged regional power corresponded to a state law establishing the criteria and procedures for funding entertainment activities and the annual distribution rates for the Entertainment Fund, which inevitably had previously been established, regulated and governed centrally. The Constitutional Court said that "*what we have before us is most evidently the unavoidable necessity for the state lawmaker to significantly review the existing laws – which in cases like this can hardly be modified by regional lawmakers – in this area, as in all similar areas which have become a regional matter under the third paragraph of Article 117 of the Constitution but are still characterized by a centralized procedure, in order to meet the evolving constitutional framework*".

In the case in point, the Constitutional Court added that this was the result of "*the difficulties caused by the missing transitional provisions – in Constitutional Law, No. 3 (...) of October 18, 2001 –designed to govern the transition in those matters where a change of ownership between State and regions had taken place and especially where – as in this case – a changeover is necessary from a legislation regulating centralized procedures to forms of management of the administrative action that are centered on the regions, but where the current legislation cannot be effectively reviewed directly by regional laws alone*". Thus, it concluded that "*in view of this exceptional situation supplementing Act No. 163 of 1985, while its temporary application can be justified, it is clear that this regulatory system cannot be justified further in the future*".

Case No. 13 of 2004 provides a similar and even clearer example as it identifies the stakes raised and remedies adopted by

the Court: in this case the effectiveness of regional prerogatives is caught in a sort of «pincer movement».

After acknowledging the state lawmaker's intrusion into regional legislative power, the Court affirmed that "*the immediate repeal of the censored paragraph 3 of Article 22 (…) would lead (…) to effects (…) which are incompatible with the Constitution. Education service delivery is linked to fundamental human rights (…). This results in the obvious need for continuity in the delivery of the education service (…), which is an essential public service*".

It follows that "*the principle of continuity that this Court has already recognized to be working on the legislative level, (…) must now be expanded to meet the needs of institutional continuity, since – especially in a Constitutional State – the system does not live on rules and regulations only, but also on institutions aimed at guaranteeing fundamental rights. In matters of education, the preservation of this feature is imposed by irreducible constitutional values. The type of decision that this Court is called upon to take is suggested, in short, by the joint need of complying with the division of constitutional powers and assuring continuity of the education service. Article 22, paragraph 3 of Act No. 448 of 2001 shall thus continue to operate until each individual region will be equipped with the regulations and institutional apparatus capable of performing the function needed to distribute teachers among schools within its territory according to the timing and mode necessary to avoid disrupting the service, inconveniencing students and staff, and causing shortages in the operation of the educational institutions*."

In this way, therefore, the distribution of the administrative functions mandated by the existing legislation in relation to the constitutional review, the lack of implementation of Article 119[34] and the principle of institutional continuity coalesce at the expense of regional autonomy.

As a matter of fact, premising the specific legislative powers vested in the State (unlawfully after the amendment to Title V) in matters that may have an impact on the exercise of fundamental rights, how can the yet existing regional power ever be acknowledged if, in order to effectively exercise it, the Regions

[34] On this matter, the concept of «suspended financial constitution» is introduced by A. Morrone, *Corte costituzionale e «costituzione finanziaria»*, in A. Pace (ed.), *Corte costituzionale e processo costituzionale nell'esperienza della rivista «Giurisprudenza costituzionale» per il cinquantesimo anniversario* (2006), 624 et seq.

must not only adopt *ad hoc* regulations, but also set up institutions that can handle them, without resorting to additional resources (because of the failing implementation of Article 119)?

Clearly, in these cases the system essentially stalls, as it meets, on the one hand, the regulatory void left by the non-implemented new Article 119 of the Constitution, and the principles determining the adequacy of funds related with the exercise of the powers conferred to each local authority involved, and, on the other hand, the need to ensure continuity in the services that affect citizens' fundamental rights.

These are the reasons behind the decisions – in all but rare instances – that adopt the principle of institutional continuity, by virtue of which, while clearly acknowledging the regional authority and the lack of national authority over rules and regulations imposed by the State, these are kept effective to prevent infringement of fundamental rights[35].

Incidentally: the question remains open as to the way in which "the region can give proof of being in possession of the administrative apparatus capable of ensuring continuity of service, thus fulfilling the condition precedent imposed by the Court to the exercise of their powers"[36].

Based on all of the above considerations, the Constitutional Court appears to be powerless when confronted with such cases.

Rather than arguing that, under these circumstances, the constitutional case law concerning the pending implementation of Article 119 of the Constitution is far from being effective and that after all it lets the state lawmaker live a quiet life, it should be noted that both the effects of (any) declarations of unconstitutionality, and the Court's position in the constitutional system suggest that the only agent who can set the conditions that

[35] It is interesting to note, incidentally, how the Constitutional Court's approach, in these cases, refers to some kind of internal hierarchy of constitutional provisions, according to which the constitutional guarantee of a right (and of the continuity of the administrative structures that will allow that right to be guaranteed) prevails over other constitutional provisions conferring legislative powers.

[36] As noted by L. Violini, *La riforma del regionalismo italiano e gli orientamenti della Corte costituzionale: casi e percorsi interpretativi*, in E. Bindi, M. Perini (ed.), *Federalismo e regionalismo. Teoria e prassi nell'attuale fase storic*a (2006), 27.

make it possible to exercise regional powers is the Parliament, not the Constitutional Court through its decisions.

Sometimes the Court has been more explicit: to this regard, reasonable seems the reading of those who pointed out that the Constitutional Court maintains two different attitudes toward the declaration of unconstitutionality of the fixed funds established by the State in matters of regional legislative power.

When people's «rights» are being questioned, the Court tends to keep them alive by referring to the principle of institutional continuity (reference is made to Cases No. 50/08 and No. 10/2010 concerning the well-known «*social card*», in which the Court stated that "*the need for continuity, already considered by this Court operative on the regulatory and institutional level (Case No. 13 of 2004), may also be invoked in relation to a scheme intended to ensure a fundamental right, as the need to properly protect irrepressible constitutional values requires us to prevent, where possible, interruptions capable of violating it*").

In other cases, instead – for instance, Cases Nos. 16 and 49 of 2004 – when the problem of financial autonomy purely arose as a conflict of powers between levels of government that would not (immediately) involve fundamental rights, the Court did not hesitate to develop a clear case of censorship of that State practice.

For present purposes, we must conclude that the lack of legislative – but more specifically institutional – implementation of the constitutional amendment implies that, in significant areas currently assigned to the regional legislative authority, and expressly recognized as such by the Constitutional Court, the relevant legislative and regulatory power is stripped from the regions.

5.2. The concurrence of powers: the prevalence criterion and the principle of loyal cooperation

«Concurrence of powers» is a synthetic, but effective proposition (used by the Constitutional Court in Case No. 50/05) that refers to a different hypothesis than the one dealt with above.

Generally speaking, it refers to the frequent cases of "intertwining" of legislative powers taking place within a unified regulatory body, such that it cannot be solved by identifying a

clear boundary between the legislative powers of the State and the Regions.

To resolve these (theoretically) anomalous but (practically) recurrent cases of overlapping powers, the Constitutional Court has identified at least two criteria: the prevalence criterion and the principle of loyal cooperation.

This approach, besides being constantly practiced by the Court, it has also been theorized in Case No. 231 of 2005, as the principal issue: "*the complexity of the social reality to be governed entails that legislative acts cannot often be attributed to a single subject matter as a whole, because they concern non-homogeneous positions covered by quite different matters in terms of legislative powers (matters within the exclusive powers of the State and matters within the residual regional power, matters within the exclusive powers of the State and matters of concurrent powers). In such cases of concurrent powers this Court has applied the prevalence criterion and the principle of loyal cooperation, based on the peculiarities of the intertwining acts (Cases No. 370 of 2003 and No. 50 of 2005). Accordingly, in order to identify the matter(s) which relate to the censored provisions, the historical-systematic context to which they belong must be taken into account*".

As can be seen, to the two criteria set forth the Court also added the reference to the «historical-systematic context», which actually, in judicial review, could as well be interpreted as «historical-regulatory criterion».

If we look at the operating dynamic of the criteria laid down by the Court, we realize that, ultimately, all three – which also run on very different plans – end up "justifying" the resumption of power by the State.

The historical-regulatory criterion is used by the Court as a solid bridge to current legislation (which ultimately favors the crystallization of the legislation in force until the constitutional reform and even after it, as we have seen in relation to the changed interpretive paradigm of the matters "competition protection" and "environmental protection").

The prevalence criterion, wisely adopted along with state powers to dictate principles in matters of concurrent powers and used, in any case, to prevent unenumerated matters from "falling" into the category of regional residual responsibility, ends up promoting the total or partial assignment of the interpreted

matters to the state powers (evaluating the *ratio* of the legislative intervention).

The principle of loyal cooperation is the seal of this type of relational model of the legislative powers and seems to lead to the conclusion that, when the region is «stripped» of a power apparently given by the Constitution, it should be allowed to the decision sharing process connected to the implementation of state regulations.

The degree (opinion, weak or strong consent) and level (single region, the State-Regions Conference, Joint Conference) of the regional partaking based on the principle of loyal cooperation is the result of an essentially judicial assessment of the Constitutional Court (at least when legislative predetermination of agreed procedures is missing or considered insufficient).

Glancing through the case history, it seems that the intensity of the cooperation permitted by the Court depends upon some sort of sub-decision about the priority of matters based on the constitutional significance of the interests at stake (of which, however, the reference to legislative matters is usually an expression) or on the status of legislation – occurring particularly when powers concur in establishing or refinancing state funds affecting regional matters, which cannot sometimes not imply – except for complex reform movements – the exercise of State legislative power: if the contested law is more (as compared to other powers, otherwise the prevalence criterion would be applied) to be referred to residual or concurrent powers, then the cooperation will be stronger, while in the opposite case it will be realized in milder, mainly advisory procedures.

For instance, in a recent case (Case No. 51/08) of power concurrence in matters of airport regulation in which the overlap was between «civil regulation», «competition protection» (exclusive state powers) and «airports», «territorial government», «large transportation networks» (concurrent powers), in consideration of "*the existing connections and intertwinings*", the opinion of the Joint Conference (to be acquired before the CIPE's – Interministerial Economic Planning Committee's – decision expected in the contested provisions) was considered sufficient.

In the preceding case (Nr. 50/08, but see also Nr. 168/09), the regions had challenged certain provisions of the Finance Act of 2007 which governed the purpose of use of the Fund for family

policies. The Court recognized that "*the overall and unified purpose which is meant to be achieved through the examined paragraphs is embodied in the provision of social policy interventions*", thus establishing the reference to regional residual power in matters of «social services».

However, the Constitutional Court also stated that the contested provisions contained "*additional specific purposes*" which could be referred to the exclusive powers of the state.

It concluded, "*taking into account the unitary and indivisible nature of the Fund at issue*", in favor of the firm application of the principle of loyal cooperation consisting in – given the "*nature of the interests involved*" – the (additional) expectation of the necessary, preliminary consent of the Joint Conference before adoption of the decree concerning the distribution of the ministerial Fund for Family Services.

There is, therefore, a certain connection between the «burdensome» intrusion of the State and the model of loyal cooperation chosen by the Constitutional Court, which reveals a tendency to use «compensatory» consent procedures when concurrence of powers cannot be solved in terms of priority.

It should be noted that the concurrence of powers (with its decisive criteria) is the general model for resolving overlapping state and regional powers, but the Constitutional Court has expressly rejected its application in relation to the cross-cutting matters «environmental protection» and «competition protection» (to which what has already been said applies).

5.3. «Subsidiarity principle» (and some details about the ambiguous role of the principle of loyal cooperation)

The best known – yet not the most widely used – means adopted by the Constitutional Court to harmonize the system of legislative powers is certainly what the Constitutional Court has identified as the «subsidiarity principle»[37].

Since the celebrated Case No. 303 of 2003, the Court has acknowledged that the division of powers prescribed in Const. Art. 117, can be partly repealed, letting the state resume the

[37] For further details, see G. Scaccia, *Sussidiarietà istituzionale e poteri statali di unificazione normativa* (2009).

legislative regulation of administrative functions which, although assigned to the responsibility of the regions at the legislative level, the regions are not equipped to manage and regulate.

Therefore, under the principle of legality – which requires a legislative framework of the administrative activity – if the responsibility is "upgraded" because of the principle of subsidiarity (and adequacy) as per Art. 118, par. 1, also the level of legislative responsibility must rise, which means that it will be transferred from the regional level to the state level.

The point is that the Court, feeling the overwhelming scope of the decision, tried to mark its limits by requiring that the right of subsidiarity should be supported by an underlying public interest actually proportionate to the legislative measure adopted, should not be characterized by "*unreasonableness as in a close scrutiny of constitutionality*" and, above all, should be "*object of an agreement with the region concerned*".

Apart from the criteria of «proportionality» and «reasonableness» (which in the constitutional judicial review of regional interest are likely to be essentially evanescent or easily adaptable according to contingent needs), this partially enigmatic claim of the need for an agreement with the region concerned left open the question on the necessity that the agreement had to be prior or subsequent to the state's legislative intervention «in subsidiarity». The case law that followed implied that the agreement may be subsequent (Case No. 6 of 2004), but also confirmed that, basically, when the subsidiarity principle is invoked, consent should be "strong".

In fact, the point falls short of the degree of clarity that would be desirable, both in terms of regional involvement, and in terms of the overall assessment of the better or worse "direction" taken in the subsidiarity practice in relation to the previous limits to regional autonomy[38].

Looking at the cases from a general point of view, we can observe that the subsidiarity principle plays a partly «subsidiary» role in relation to the «concurrence of powers» resolved with the use of the principle of loyal cooperation (see preceding paragraph), often with similar procedural consequences. If the

[38] See remarks by A. Ruggeri, *Leggi statali e leggi regionali alla ricerca di una nuova identità*, in 1-2 Quad. reg. 401 et seq. (2007).

Court is not faced with such an intertwining of powers that would fully justify state legislation, after judging the interest underlying the state's legislative intervention, it can still confer power to the state on the base of subsidiarity, while deciding the necessary level of cooperation (as the degree is generally that of a strong consent with respect to acts of implementation of the legislation adopted by the State after application of the subsidiarity principle).

From another perspective, a certain way of understanding the role of «loyal cooperation»[39] helps to factually overcome the division of powers set out in Article 117: the Court stated that "*the principle of loyal cooperation shall regulate all relationships between State and Regions: its flexibility and its adaptability make it particularly suitable to dynamically regulate the relationships at issue, reducing any dualism and avoiding rigidity. However, the vagueness of this parameter, if useful for the reasons stated above, requires constant clarification and factual underpinnings. These can be legislative, administrative or judicial*" (No. 31/06).

In that respect, "*one of the most qualified agents to formulate rules designed to complement the parameter of the loyal cooperation is currently the system consisting of State-Regions Conferences and local authorities*" where "*the dialogue takes place between the two large regulatory systems of the Republic, following which agreed solutions to controversial issues can be identified*".

The Court continued by underlining that the principle of loyal cooperation "*requires parties to sign – in an institutional setting – an official agreement to abide by their commitment. Realizing the parameter of loyal cooperation through the agreements in the State-Regions Conference is also more consistent with the constitutional system of self-government, since it privileges a horizontal (collegiate) view rather than a vertical (hierarchical) view of mutual relationships*".

However, the Court, also in order to give account of the non perfectly linear trend of case law on the issue[40], made it clear on the one hand (Case No. 63/06) that collaborative procedures cannot derogate from the constitutional division of powers (thus

[39] See the reconstruction provided by da R. Bifulco, *Leale collaborazione (principio di)*, in S. Cassese (ed.), *Dizionario di diritto pubblico* (2006), 3356 et seq.

[40] See A. Carminati, *Dal raccordo politico al vincolo giuridico: l'attività della Conferenza Stato-Regioni secondo il giudice costituzionale*, in 2 Le Reg. 257 et seq. (2009).

strongly limiting the theories – and practices – that are pressing for a substantial contract system of legislative powers), and on the other hand (Case No. 378/05) that collaborative procedures can be overcome when there is a need to respond quickly to essential public interests.

In any case, a number of issues of constitutional legitimacy raised by the regions with regard to the breach of the principle of loyal cooperation were found groundless by the Court (No. 387/07), which affirmed that "*this principle cannot be invoked, as a requirement of constitutional legitimacy, with regard to the exercise of legislative power, since no constitutional basis can be identified for the obligation to adopt collaborative procedures designed to influence that power (ex plurimis, Cases No. 98 of 2007, No. 133 2006, No. 31 of 2005 and No. 196 of 2004)*"[41].

As mentioned above, frequently, when the Court is faced with budget laws containing provisions regulating funds in matters of regional concern that are likely to extend the scope of matters of state concern or the scope of fundamental principles, or that resort to the concept of «concurrence of powers» or the «subsidiary clause», the result is not a blunt declaration of unconstitutionality, but the so-called «cooperation-additive» decision with which the Court rules that the Regions (normally through the conference system) shall be involved during the implementation of those provisions[42].

Furthermore, recent rulings by the Constitutional Court on the cross-cutting matters «environmental protection» and «competition protection» (broadly bordering with – or rather, encroaching on – regional responsibilities) clarified that collaborative procedures do not extend to matters of exclusive state concern, even if cross-cutting (unless the state lawmaker provides them spontaneously).

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[41] On the other hand, in Case No. 24 of 2007, the principle of «loyal cooperation» was dilated to the extent that consent to determine the learning profiles of professional apprenticeship was deemed necessary not only between levels of government (even overlapping or concurring in the exercise of the same function or power), but also between a regional council and employers' and trade union organizations.

[42] See R. Cherchi, I. Ruggiu, «*Effettività*» *e* «*seguito*» *della giurisprudenza costituzionale sul principio di leale collaborazione tra Stato e Regioni*, in R. Bin, G. Brunelli, A. Pugiotto, P. Veronesi (ed.), «*Effettività*» *e* «*seguito*» *delle tecniche decisorie della Corte costituzionale* (2006), 365 et seq.

In this regard, it is worth noting that most of the cooperative procedures introduced by the Court or the extensive references to the conference system will end up vesting the State with the power to «coordinate» where it would not have the power to «regulate» in spite of the fact, however, that no similar (obviously non-specular) process is found in favor of the Regions, at least with reference to the cross-sectoral powers that affect, by definition, the cross-cutting matters assigned to them by the Constitution.

In this perspective, the line of case law (well supported in theory) which has greatly expanded the use of additive or substitutive decisions «of collaboration» (with the various possible formulas), while, at the technical-judicial level, it has "used the most invasive tool at disposal"[43], at the level of the relations between state and regional powers, it seems not to have overplayed its hand, by not using – for understandable reasons, given the structural weaknesses in the implementation of the constitutional amendment from the various and often cited viewpoints – the key tool in its hands: the declaration of unconstitutionality due to the state's intrusion into regional legislative powers.

5.4. From judicial case law to models of separation and distribution of legislative powers

In conclusion, it may be useful to summarize the framework for harmonization of the system of state and regional legislative powers that emerge from the analysis conducted so far.

In principle, the Constitutional Court consistently held that the identification of the matter to which a number of legislative and statutory provisions must be ascribed "*should be related to the subject and requirements of the provisions, taking into account their purpose and ignoring marginal aspects and induced effects, so as to properly identify and fully protect their interest (Cases No. 430, No. 169 and No. 165 of 2007)*" (168/09).

1) In this context, we can proceed to analyze, first, the placement of state exclusive powers compared to concurrent or residual regional powers.

[43] See R. Cherchi, I. Ruggiu, *«Effettività» e «seguito», ditto*, 381.

Exclusive state powers (in brief, without much accuracy) are of two types: either cross-cutting (and potentially cross-cutting) or with potentially defined content (even though unenumerated).

All can lead to overlapping powers.

With regard to regional powers, the former relate to each of them in a peculiar way (special reference is made to «ESL», «criminal justice system», and «civil regulation»).

On the other hand, important similarities can be pointed out that concern «environmental protection» and «competition protection», as described.

As for the other exclusive legislative powers of the state, instances of overlap (or involvement) are resolved on the basis of three criteria:

a) first, with the criteria typical of the *concurrence of powers*, i.e., as the Constitutional Court has recently stated, by conferring powers as follows: "*in the event that a regulatory provision is at the crossroads of different subject matters, assigned by the Constitution to the legislative powers of both State and Regions, the prevailing field of application must be identified. And if such a field of application cannot be identified, in the absence of criteria contained in the Constitution, the concurrence of powers comes into play and justifies the application of the principle of loyal cooperation (Case No. 50 of 2008), which is anyway expected to permeate the relations between the state and the system of local self-governments*" (No. 168/09).

In reality, both the prevalence criterion and the principle of loyal cooperation – in case law – are closely linked to the historical-regulatory criterion, namely the context of interests as dealt with and settled in the legal system (usually based on State regulation) or the regulatory «context» in which the legislative act is situated.

More realistic is therefore – even with respect to the statement cited at the beginning of the paragraph – the following statement of the Constitutional Court (concerning both the identification of legislative matters, and the resolution of a case of overlapping legislative powers): "*The decision about these issues implies prior identification of the matter to which the legislative act at issue is to be related, having regard to the object and the rules determined by the contested provisions, taking into account their* purpose*, the objectives it proposes to pursue, the* <u>context</u> *in which it was adopted, and*

identifying the interest served"(excerpt drawn from Case No. 10/2010);

b) through the *principle of institutional continuity*, which recognizes the abstract regulatory power of the regions, but also highlights the inadequacy of the regional apparatus (regulations, facilities and equipment) designed to rule and administer it. In these cases, in particular if the validity of state legislation implies the continuity of the protection of fundamental rights, the state law is not declared unconstitutional;

c) through the «*subsidiary clause*», according to which the regulation of indivisible administrative powers is resumed by the central level. In this case, collaborative procedures between State and regions should normally be provided for in the exercise of these powers.

Both in the context of the «subsidiary clause», and in the context of the concurrence of powers resolved through the principle of loyal cooperation, it was stressed that this principle – which in itself would be geared to enhancing the regional level – ends up in practice as a compensatory measure to make up for the loss of legislative powers that both harmonization models entail for the regional self-government.

In other words, if we look closely at the practical realization of both the «subsidiary clause» and the concurrence of powers (when it is resolved through consent), we note that both these tools have a «side effect» on regional self-government.

While they carve out a role for the region or, more frequently, for their «system of representation» at the central powers, at the same time they significantly reduce the margin of «individual choice» given to each of them (by the Constitution).

In this way, the regions (or rather the regional system) actually manage to reach a level of sharing in decisions concerning the use of resources or the exercise of administrative functions (to manage or co-manage), but each of them immediately loses a good portion of their legislative independence both with respect to the state, and as compared to the possibility of distinguishing their choices from those of other regions – which, as we might guess, is the true essence of regional self-government.

2) Within the domain of concurrent powers it was noted that the concept of fundamental principle is either elusive, or should be declined by each matter, considering that the self-

classification of a state rule as a « fundamental principle» is irrelevant in itself.

The internal implementation of Community law may lead to a unique modulation and, de facto, an extension of the normative scope of the fundamental principles (at the expense of regional powers). The state legislation implementing Community law may contain a pliable implementation rule (which means it can be replaced by rules established by the regional lawmaker).

Within the domain of concurrent powers we have analyzed some matters in which the Court admitted, for various reasons, that the state legislation was not exclusively limited to fundamental principles (scientific research and financial coordination, in particular).

We have also described a number of concurrent matters that we have defined «matters that can hardly be regulated by regions» in the sense that they usually give rise to decisions of the Constitutional Court to ensure a unified, national, regulatory framework in those areas, either because there are unified state regulations, or because unified technical standards are required.

As regards state and regional powers overlapping, what has previously been said applies.

3) Finally, with regard to regional residual powers it was verified that the prevalence criterion ultimately gives rise to what has been called «second-order residuality»: that is, residual powers (Art. 117, par. 4) only attract those matters that cannot be considered part of an enumerated power, based on an assessment of priority.

As was anticipated, and as summarized here, we can easily verify that the system of state and regional legislative powers operates quite differently from what we could theoretically imagine by reading Article 117.

In this area, we cannot but confirm the difficulty, as was the case under the term of the previous Article 117, in having the constitutional text effectively regulate the relationships between state law and regional law. Figuring out the solutions to these issues is not within the scope of this work.