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EDITORIAL

LAW, LANGUAGE, AND CULTURE

*Giacinto della Cananea**

The first editorial of the *Italian Journal of Public Law*, in 2009, clarified that the essential aim of the *IJPL* is to serve as a bridge between legal cultures, with a view to becoming part of the new, discursive, transnational network that has emerged since the last decade of the Twentieth century. This explains the choice of English as the working language, and the related intention to ensure that the Italian legal tradition will have a voice in the global legal conversation [1].

In this respect, the *IJPL* takes very seriously not only the EU Charter of Fundamental Rights' commitment to "respect cultural, religious and linguistic diversity", but also the positive obligation (now enshrined into Article 167 TFEU) laid down by the Treaty of Maastricht to "contribute to the flowering of cultures of the Member States, while respecting their national and regional diversity". Interestingly, the last part of this constitutional provision affirms that the European Union should at the same time bring "the common cultural heritage to the fore".

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[1] A manifestation of this involvement has been the interest paid to the *IJPL* by our older cousins of the *German Law Journal*: see della Cananea, G., *On Bridging Legal Cultures: The Italian Journal of Public Law*, 11 Germ. L. J. 1281-1291 (2010).

It is from this point of view, first and foremost, that the recent ruling of an Italian administrative court looks flawed [2]. That ruling endorses the applicants' claim that an Italian university may not choose English as the only working language in its teaching activities. This is an awkward decision. Nobody, I believe, would object to the decision of an Italian university to offer a fully-fledged university course in, say, Physics or Bio-engineering entirely in English. It could be objected, however, that the law is different. Unlike science, it is not a vast field of eternal laws that must be discerned on the basis of empirical analysis. It is, so the argument goes, deeply intertwined with the culture and values that identify a specific society, or so it is argued since the early Nineteenth century, after Hegel and Savigny. However, the law that Savigny regarded as applicable to the German people of his epoch was not only a national artefact. It had been deeply influenced by Roman law, as elaborated by a trans-national community of lawyers and judges. Does this mean that we should repudiate our cultural inheritance and ignore the efforts made in the last centuries to strengthen such inheritance? Clearly not. But such inheritance is not fixed and immutable like the far stars studied by the Prince of Salina. Quite the opposite, it evolves continuously, also through the interaction with other cultures. The task of an educational institution is thus to keep the open the doors to those cultures. Excluding any possibility to teach the law in English in our country is not, therefore, the right option. It is, I am afraid, but another sign of the cultural decline of the last decades [3].

There is another and distinct reason why, in my opinion, the lower administrative court's ruling is fundamentally flawed. It regards the interpretation of the Italian Constitution. The applicants alleged that they were the victims of an unlawful discrimination. According to them, the fact that their university, in Milan, had decided to offer its teaching activities in English infringed both the principle of equality and, what is more interesting for our purposes, and the protection that the Constitution gives to the Italian language. But at least one thing is

[2] TAR Lombardia, decision n. 1348/2013.

[3] See Amato, G. & Graziosi, A., *Grandi illusioni* (2012), p. 240 (arguing that the defence of "cultural identity", in a rapidly changing world, reveals the refusal to consider reality as it is).

clear – the Constituent Assembly that drafted and adopted the Italian Constitution, in 1947, did not lay down a norm according to which Italian is "the" official language of our polity. A systematic interpretation, which takes into account other norms, is of course possible. But the strict constitutional analysis, showing and emphasizing that in our Constitution there is no such thing as an explicit and univocal choice of language, has some merits. It should be considered and weighted by the courts, while the lower administrative court, immediately after acknowledging this fundamental legal reality, added that the paramount importance of Italian language is showed by the fact that Article 6 of the Constitution protects linguistic minorities. I respectfully, but strongly, disagree with the court, in that the protection of linguistic minorities is but another manifestation of the fundamental choice not to make of Italian "the" official language. Finally, using a legal provision of the 1930's, enacted in a very different cultural and political environment, as a tool of systematic interpretation is a further element of weakness of that ruling. Paradoxically, it entails that the Constitution should be interpreted in the light of the rules of the Fascist period, instead of re-interpreting those rules in the light of our post-Fascist Constitution.

Last but not least, there is a further, and I suspect even more controversial, ground of dissent with the court's ruling. The decision taken by the Polytechnic of Milan, which is contested by some of its professors, might be justified in terms of its usefulness for students. If they study the law, say, for the first three years in English, it might be easier for them to spend the next two years in another European university, such as Brussels or Maastricht, or elsewhere. However, I am not claiming that a decision of this kind should be taken because it is in the interest of students. If we think that, while providing other legal courses in our language, a fully-fledged course should be given entirely in English because that is helpful for the improvement of knowledge and the advancement of science, that is an adequate reason for doing so. If the use of English is beneficial to create a common frame of reference for researchers and teachers, also by inviting researchers and scholars from other countries, that is enough [4]. If the law is not only a

[4] See Scruton, R., *Culture Counts* (2007), p. 28 (arguing that true teachers of

national artefact, but a trans-national enterprise, in the perspective of the European legal space [5], then a trans-national teaching should not be discouraged, let alone excluded. Whether a court of law is the appropriate institutional site of authority for making such a decision is another, and controversial, question.

course care for their pupils, "but love knowledge more").

[5] Chiti, M.P., *Mutamenti del diritto pubblico nello spazio giuridico europeo* (2003), p. 321; von Bogdandy, A., *National legal scholarship in the European legal area – A manifesto*, 10 Int'l J. Const. Law 614 (2012).

ARTICLES

THE SCIENCE OF ADMINISTRATIVE LAW, JURIDICAL METHOD AND EPISTEMOLOGY: THE ROLES OF PARADIGMS IN THE ERA OF THE CRISIS OF MODERNITY*

*Fabrizio Fracchia***

Abstract

This article discusses the relationships among science of administrative law, legal method and epistemology. Its aim is to assessing the results that epistemology has achieved outside the legal sector, in order to verify if, and to what extent, they might be used in this context. This essay assumes that the science of administrative law, apart from a few isolated voices, proceeds by utilising general and different models ("paradigms") and employing them incessantly. Even in the era of the crisis of modernity, it appears very profitable to use the general approach, shaped by Kuhn and Lakatos, based on the idea of the paradigm: the science (and the legal one, too) is characterized by the application of these models to gain critical knowledge and solve riddles. As a matter of fact, if this approach undoubtedly serve to explain how science functions and progresses, it cannot be denied that the "truth" has to be present both as the final objective of the scientist, as well as an objective criterion for evaluating the science. In conclusion, this article expresses the idea that a theoretical filter which aims to be legal science, alongside its capacity to be used to solve riddles, has to admit and allow space for some residue of falsification, even if minimal.

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* The theses contain in this paper were proposed and discussed at a meeting during the Seminars on the Theory and Philosophy of Law at Bocconi University entitled *Metodo giuridico, scienza e uso dei paradigmi* on 15 November 2011: I would like to thank the organisers (Damiano Canale and Giovanni Tuzet) and the participants for the inspiration and suggestions they provided me with.

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1. *Premise: law, science and* "Weltanschauung".

Method is a question widely raised by legal science, recently too and in administrative Italian law as well[1]: aim of this paper is to

[1] S. Cassese, *Il sorriso del gatto, ovvero dei metodi nello studio del di pubblico,* in *Annuario AIPDA,* 2006, 87 ff.; G. Rossi, *Metodo giuridico e diritto amministrativo: alla ricerca di concetti giuridici elementari*, in *Dir. pubbl.,* 2004, 1 and ff; A. Travi, *Il metodo nel diritto amministrativo e gli "altri saperi",* in *Dir. pubblico,* 2003, 865 and ff.; A. Romano Tassone, *Metodo giuridico e ricostruzione del sistema,* in *Dir. amm.,* 2002, 11 and ff.; L. Benvenuti, *Metodo giuridico, autorità e consenso*, in *Dir. amm.,* 1998, 661 and ff.; S. Cassese, *Alla ricerca del Sacro Graal (A proposito della Rivista di diritto pubblico),* in *Riv. trim. dir. pubbl.,* 1995, 789 ff. (according to Cassese, it is impossible to identify "one" legal method, since it depends on the specific subject and on the characteristics of the problem); A. Orsi Battaglini, *Il puro folle e il perfetto citrullo (discorrendo con Sabino Cassese*), in *Dir. pubbl.*, 1995, 639 ff. (who conveys the idea that a particular autonomy of the legal field – and of the scientific method - might be identified). See also L. Benvenuti, *Interpretazione e dogmatica nel diritto amministrativo*, Milan, 2002. With respect to the debate that has been going on between Cassese and Orsi Battaglini, (which also involved the theoretical program of the new legal journals) see G. della Cananea, *Legitimacy and accountability in Italian administrative law: a critical analysis*, in M. Ruffert (ed.), *Legitimacy in European administrative law: reform and reconstruction,* Groningen, Europa Law Publishing, 2011, 66. The question of method is not a concern only for Italian lawyers. Consider, e.g., M. Loughlin, *Public*

analysis this problem, linking it to a more general reflection about the philosophy of science.

As a matter of fact, the basic concern that guides this inquiry is that of assessing the results that epistemology has achieved outside the legal sector.

This appears to be particularly necessary in a moment in which many certainties appear to be fading, certainly in the scientific sector, but, perhaps, even more in general, in the "Weltanschauung" which mankind employs to provide meaning to their experiences. It seems to be really difficult for lawyers to remain blind to these novelties, also because the relationship with science connotes (or, more accurately, connotes to a perhaps greater extent than in the past) many aspects of legal regulation and the work of its interpreters.

Since, as we will seek to demonstrate, the "Weltanschauung" just mentioned also has an essential role in science, it will be necessary to consider some contributions of philosophy.

Finally, and this is one of the most interesting aspects of the analysis that follows, we will have to verify if, and to what extent, each of the areas considered (philosophy, epistemology and law) might integrate with the others or, at least, offer suggestions to solve problems in their own fields.

It needs to be clarified at the outset that we are well aware that different sectors display specificities that are entirely their own, and which prevent inappropriate cross-pollination. We maintain, though,

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Law and Political Theory, Oxford, 1992, 13 and ff. (discussing the analytical method and the relationship between public law and political theory); P. Badura, *Die Methoden der Neueren Allgemeines Staatslehre,* Erlagen, 1959 (the traditional method is still considered satisfactory by Badura). On the influence of the German legal culture in Italy, see G. Della Cananea, *On Bridging Legal Cultures: The Italian Journal of Public Law,* in *German Law Journal*, 11, 2010, 1281 and ff. On the perspective of an European Legal Science, see A. von Bogdandy, *Prospettive della scienza giuridica nell'area giuridica europea. Una riflessione sulla base del caso tedesco,* in *Foro it.,* 2012, V, 54, and the comments of E. Scoditti, R. Caponi, M. Cranieri and R. Pardolesi, G. Grasso and A. Palmieri, in *Foro it.,* 2012, V, 242 and ff.

that a common denominator, albeit a limited one, can be traced and that this allows the identification of profiles of analogy and permits a consequent "decanting" between sectors.

2. *Various scenarios, beginning with an intuition of Pugliatti.*

In a slightly unorthodox way compared to tradition, we intend to proceed by outlining firstly some scenarios (from among the many that might be identified) in which the problem of the method and the relationship with the philosophy of science might arise. The aim is to use them as the background or as problematic starting points that might provide food for thought.

Some of these scenarios may appear to be very far removed from the themes of law and "legal science" understood in a narrow sense: nevertheless, we hope that the reader might "postpone judgment" until the point when this material will be used to support the overall argument.

In this phase of approaching the problem, however, a first, almost evocative fact might be mentioned. It has to do with the teaching of Salvatore Pugliatti, according to whom law is a practical "science": the lawyer cannot appeal to a predefined stability and unchanging foundations[2], but has to follow the flux of history.

The emphasis on the practical aspects of legal "science" is particularly interesting insofar as the idea of a frame of reference is often felt by scholars in the legal sector specifically from a methodological point of view and, in any case, emerges clearly in numerous theoretical reflections.

The relationship between a theoretical frame of reference and a changing reality constitutes therefore an essential problem that must be taken into consideration. It is important, as a matter of fact, to establish whether that flux can be organised within a model that tends towards constancy or, at least, to outline limits within which that frame remains constant.

[2] S. Pugliatti, *Continuo e discontinuo nel diritto*, in *Grammatica e diritto,* Milan, 1979, 88 and ff.

A further problem is that of identifying that "denominator" that is common to the various fields which we mentioned above, intended not as the only model of reasoning, but, at least, as a "common tendency" which cannot be overlooked.

3. *First scenario: the schools (as "groups of scholars") and administrative law.*

Filling a gap that exists in the history of our legal studies, Italian doctrine has recently outlined the evolution of the Italian science of administrative law[3].

It is thus possible to make use of an overall picture of the "schools" of administrative and public law – intended as homogeneous groups of legal scholars, basically sharing similar research programs - that have flowered, developed and eventually (which is often a negative phenomenon, as far as it increases the risk of a sort of cultural homogenization) died out in Italy.

Sometimes the "schools" set out from a very clear idea – a "world vision" or Weltanschauung - from which flow various applicative consequences[4].

Without pretending to clearly circumscribe the various Italian scientific communities, it is sufficient to consider the writings of those who are inspired by the liberal formula. Normally, they look at the administration and at its activity above all from the point of view of the threat to the liberty of citizens. They are concerned with lessening the impact of public authorities in view of an enlargement of the "publicist regime" of the activity itself. On the other hand, we should consider those voices that underline the parity of relationships between citizens and, again, those involved in drawing up in a particular way the legal situations of those who have to deal with the

[3] Cf. in particular A. Sandulli, *Le schede biografiche dei professori italiani di diritto amministrativo,* in L. Torchia, E. Chiti, R. Perez, A. Sandulli (editors), *La science del diritto amministrativo nella seconda metà del secolo,* Naples, 2009 and A. Sandulli, *Costruire lo Stato,* Milan, 2009.

[4] On the culture of Italian administrative law, see S. Cassese, *Cultura e politica del diritto amministrativo*, Bologna, 1973 (French translation by Michel Morabito, *Culture et politique du droit administratif*, Dalloz, 2008).

administration. Even in the schools where there is a great freedom in the formulation of scientific works and, in any case, an intention to rigorously respect the normative fact rather than expressing the "should be", on careful examination, a "model" is followed. Such model is characterised by the idea that those working in the legal field, the lawyer, must stick to the data, that is to say "positive law".

In the writings – obviously those that are more "considered" and methodologically "aware" - of the members (or followers) of the various "schools" the basic premises are not only widely respected, but applied with rigour and abundance in order to deal with increasingly specific problems. Proceeding along a very significant path that might even appear to be inexorable in terms of further study, these premises are utilised in a systematic way to frame particular legal institutions (from public services to property, from global law to actions that can be heard before an administrative court all the way to touching very special institutions: everything that is real puts itself forward as the object of analysis), which, seen in the light of a certain point of view, are described and placed in a wider horizon of meaning[5].

Recalling a number of aspects of the discussion that bloomed in the 18th century in the bosom of art criticism, it might also be used an expression that began to be heard in that period: "academism". The reason is that the norms that are applied draw their inspiration from a hierarchisation of reality or forms. This, however, is based on a logic of rationalisation and coherence that, often, appears as the most evident proof of the scientific character of the activity that is carried out.

There is a sort of almost inexorable demand, or, at least, tendency of the model to always seek out new problems, respecting a well-defined principle axis that represents one of its basic characteristics.

[5] What we are seeing, therefore, is an effort to lead increasingly detailed questions back to the general model (in fact, there is no lack of explicit recognition of the fact that the analyses constitute the clarification of something that is already present *in nuce* in that model), which, in turn, is clearly moulded on an idea that is strong and, it must be observed, not ideologically neutral.

Reading many of the contributions by the followers of the various schools, though, it can be noted how multiform reality (in our case: normative reality) sometimes does not bend easily in front of these premises. Nevertheless, such premises are never abandoned, as though they could not be challenged. At most, in "frontier areas", that is, in those cases that are not directly connected with the founding idea, concessions or adaptations are allowed, but hardly ever abjuration.

The effort to hierarchise reality - which we mentioned earlier - is, therefore, fairly impressive, so, to continue provocatively, we are not standing before a democratic form of experiencing the world, given that it is dominated by a cultural and theoretical structure that is very rigid and that cannot be changed.

4. *Second scenario: choices of legislative policy.*

Even if normative output, especially in recent times, often appears disorganised and uneven, some Italian reforms appear to be strongly characterised by a functional point of view. Even a quick look at changes undergone by the legislative framework governing employment in the public administration (Legislative Decree 150/2009) shows how a basic "programme" emerges and appears to be clearly defined that inspires the whole intervention, thus shaping the various juridical institutes that are disciplined.

That basic programme is often nourished by (and reflects) a specific ideological option, whose force ends up bending various legal institutions, that might assume an appearance that is different compared to the past. That appearance would appear largely incoherent where considered in isolation; however, this may be understood and explained in the light of the founding idea that inspires the reform. For instance, the reduction of the discretionary powers conferred at the senior civil servants ("dirigenti") in Italy is the consequence of the decision to impose a model based on the meritocracy. To make sure that this program works, a set of legal rules established by Parliament has been issued, absorbing – and substituting - the room for the decisions adopted by "dirigenti".

Then there are cases that are less affected by this influence (for example the recruitement): insofar as they are positioned further away from the "heart", in an ideological sense as well, of the reform, for them the maintenance of a more traditional or less-conditioned appearance does not disturb the overall design.

5. *Third scenario: that awful mess in East Anglia.*

A number of e-mails leaked – apparently following an intrusion by a hacker - from the Hadley Climatic Research Unit (CRU) at the University of East Anglia in Britain have given rise to a fierce debate about the status of science in view of the summit held in Copenhagen in 2009. Some of those e-mails, in fact, appeared to betray the concern of the senders that data would be diffused that was contrary to the thesis of global warming, even going so far as revealing an intent to manipulate that data[6].

In response to the controversy that was unleashed by this situation, the authoritative journal Science published a letter signed by numerous scientists on *Climate Change and the Integrity of Science*[7] where among other things we read: "There is always some uncertainty associated with scientific conclusions; science never absolutely proves anything…". It also added: "Scientific conclusions derive from an understanding of basic laws supported by laboratory experiments, observations of nature, and mathematical and computer modelling. Like all human beings, scientists make mistakes, but the scientific process is designed to find and correct them. This process is inherently adversarial—scientists build reputations and gain recognition not only for supporting conventional wisdom, but even more so for demonstrating that the scientific consensus is wrong and that there is a better explanation. That's what Galileo, Pasteur, Darwin, and Einstein did. But when some conclusions have been

[6] These events were discussed by M. Tallacchini – to whom I am therefore grateful - during the course of the conference *Il cambiamento climatico: una nuova sfida per il giurista,* held on 19th November 2010 at L. Bocconi Univeristy, Milan.

[7] *Science Magazine,* 7 May 2010, vol. 328.

thoroughly and deeply tested, questioned, and examined, they gain the status of *well-established theories* and are often spoken of as *facts*".

Science, therefore, does not offer certainties. This leads to a rethinking of its own epistemological status[8]: law too should take note of this.

To view the problem from the very restricted and particular position of administrative law, we can observe that there are evident reflections flowing from such a consideration on many legal institutions. The most important ones are those concerning the causal connection and the distinction between technical evaluations and technical verifications.

6. *Fourth scenario: the judge and the access to the fact.*

One of the most significant problems at the heart of the Italian administrative process, before the Administrative Court[9], is constituted by the investigative powers of the administrative judge.

The new code for Administrative Process (Legislative Decree No 104/2010) has undoubtedly increased such powers, even though uncertainties and criticisms remain with reference to some evidence and the overall architecture of the investigation stage (think of witness, allowed only in written form; therefore the possibilities of using this source of evidence are more restricted than in civil trial).

Here we intend to underline the legal provision concerning the non-contestation of the facts affirmed by the adverse party. Such legal provision has been introduced in an unsatisfactory way by Art. 62, para. 2, Legislative Decree 104/2010: "Except in the cases provided for by law, the judge has to employ as the basis of his decision the evidence provided by the parties as well as the facts not specifically contested by the parties".

This is a rule for judgment and, therefore, a formal "anti-epistemological" restriction[10], in the sense that it impedes the judge

[8] In general, cf. the observations of D. Morgan, *Beyond Epistemological Pluralism: Toward an Integrated Vision of the Future*, in *Futures,* 19 May 2011.

[9] In general, see F. G. Scoca, *Administrative Justice in Italy: Origins and Evolution,* in *IJPL*, 2009, 119 and ff., available at http://www.ijpl.eu.

from verifying the fact by ascertaining its truth. Consequently, the rule might lead to a variance between what emerges in the trial (where, in principle, only what is proven is considered true) and truth *tout court*, prejudicing the fact that the truth should be a condition of justice of the decision[11].

7. *Some initial observations.*

Having reached this point of the analysis it would be opportune to pause in our discourse and make some clarifications, while confirming that the cases dealt with are very different to each other (it is one thing to talk of science, aimed at defining theoretical filters and without any prescriptive elements, and quite another to consider a legislative reform or a trial, where that aim is lacking and these contents instead prevail).

The science of administrative law, apart from a few isolated voices, proceeds by using general models and employing them incessantly. These models have a nucleus that tends to immutability and a periphery that is modifiable (see *supra,* paras. 3 and 4). In this respect, they are similar to the structure of the planet earth where there is a very dense internal nucleus (which, among other things, is experimentally unknowable) and intermediate areas until we arrive at a crust in movement.

The description of the world offered by legal science is mutable and depends in large part on the model employed. We should not be surprised by this, given that "hard science" too continues to question itself about its relationship with truth and the possibility of providing immutable certainties (para. 5). This is an

[10] To use an expression employed by M. Taruffo, *La semplice verità. Il giudice e la costruzione dei fatti*, Bari, 2009, e.g. on page 150.

[11] M. Taruffo, *La semplice verità,* cit. at. 10, 134, which also wonders about the relationship between epistemology and ideology in the judgment (cf. 131; 135-13). The trial, on the other hand, is not held to be an institution wholly oriented at the true, but, above all, one aimed at the decision: in this sense P. Ferrua, *Il giudizio penale: fatto e valore giuridico,* in S. Nicosia (editor), *Il giudizio. Filosofia, teologia, diritto, estetica*, Rome, 2000, 207. On this subject cf. S. Jasanoff, *La scienza davanti ai giudici,* Milan, 2001.

essential change, nourished by very famous events or discoveries, which have undermined the possibility of a totalising description of reality: from the theory of relativity to Gödel's incompleteness theorem (according to which there is no all-encompassing set of axioms which is at the same time complete and coherent; in other words, there exist, even in a system such as that of mathematics, elements that cannot be explained by the standards of the rules within the system itself), all the way back to non-Euclidean geometry. The difference is also fundamental for the law, both because it was used to using logical schemes adopted from hard science (it is not fortuitous that in both cases we speak of "laws"), as well as because the traditional role of the law itself was simply to act as a spokesperson for the results of science. Epistemology lays bare the uncertain character of science and, therefore, the law has to rethink its own rules (at least to the extent to which it has drawn up procedural paths taking as its inspiration the presumed rigour of science) and is forced to equip itself, autonomously it would seem, that is, emancipating itself from science at least in part, to deal with the problems that science does not resolve.

Although there is a flowering of a certain methodological scepticism in both fields and despite the fact that the theoretical elaboration of the legal method often leads to more articulated and refined results (indicated in the following paragraphs), at least from the point of view of the concrete progress of science this function is accomplished by the abovementioned models. They are regarded as instruments that serve to provide certainty, perhaps with suitable adaptations compared to the past. Nonetheless, in stating this, without underlining that the use of a very powerful means of inquiry renders uncertain that portion of reality not captured by the model, we cannot forget two other serious problems: the possibility to reach the truth and the immutability of the model.

The hierarchisation of reality, the formalisation of the rules and modelling move away from the true[12]; often, rather, in science,

[12] On closer inspection, even the Luhmannian model of the differentiated social systems employing binary codes (cf. *Rechtssystem und Rechtsdogmatik*, Stuttgart, 1974) moves away from reality, given that the code itself lets only a part of the

hypotheses do not consider reality (think of the so-called thought experiments). More generally – it is the example of legal proof (mentioned in para. 6), to which the system of powers of certifying and certification might come near – we can reach truths that, usually, are described in various ways: acceptable, trial level, provisional. These, however, do not necessarily coincide with the "truth", which, intended as a correspondence to the facts, there can only be one of[13].

On the other hand, the models are not immutable, in the sense that they can change over time. Where this happens, the past is forgotten or the "extraneous material" is marginalised. Variability also exists on a spatial level. It is sufficient to consider the framing of environmental problems in Europe and in South America to become aware of the impossibility of mechanically transferring reconstructive schemes formed by European science to a context that is marked not only by natural, but also by social and institutional characteristics that are completely different and distinguished by concerns and "world visions" that are far removed from our own.

8. *Towards a postmodern condition?*

This overall breaking-up of the framework of reference, which at an epistemological level has sometimes encouraged behaviour marked by scepticism (and we also find this in the juridical sector[14]), is no more than a specific reflection of a more general crisis which has also struck the vision of history and the experience of mankind within it.

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external complexity penetrate inside the system, that part, precisely, that the system can tolerate.

[13] M. Taruffo, *La semplice verità,* cit. at 10, 84.

[14] Given the impossibility of reconstructing here the fairly complex overview of the most recent reflections, we refer to the analyses – at least of a wider perspective – carried out by a number of scholars of Italian administrative law: A. TRAVI, *Il metodo nel diritto amministrativo e gli "altri saperi"*, cit. at 1, G. ROSSI, *Metodo giuridico e diritto amministrativo: alla ricerca di concetti giuridici elementari,* in *Diritto pubblico,* 2004, 1 and ff.; and S. Civitarese Matteucci, *Miseria del positivismo giuridico? Giuspositivismo e science del diritto*, in *Dir. pubblico,* 2003, 685 and ff.

And thus appears the third level of investigation, which was mentioned above (para. 1), which leads us to the overall consideration of the knowledge mankind has of history and reality.

With regard to this, it has become an established practice to appeal to postmodernism; it is true that this has almost become a cliché[15], used now, in numerous sectors, from philosophy to architecture[16], in opposition to the ideology of modernism; nevertheless, within the limits in which the category allows a greater clarification of the theory being put forward here, its analysis appears to be relevant in the framework of this study.

The term, while not unknown in previous reflections[17], was employed in philosophy by Lyotard[18], who is remembered for having linked postmodernism to the crisis in the great metaphysical narratives invoked to give a totalising sense to life (the Enlightenment and the various "isms" of the past: Marxism, idealism and so on) and possessing a claim to universality. These gained legitimacy through their reference to a future whose inevitable unfolding is/was foreseeable. Such meta-narratives were dismissed by Lyotard as "fables for adults"[19], even if this constitutes only a part

[15] Cf., *ex multis,* M. Ferraris, *Tracce. Nichilismo Moderno Postmoderno,* Milan, 1983.

[16] Cf. the exhibition *Postmodernism – Style and Subversion 1970-1990* at the Victoria & Albert Museum, London.

[17] See the indications of M. Köhler, *"Postmodernismo": un panorama storico-concettuale*, in P. Carravetta and P. Spedicato (eds), *Postmoderno e letteratura. Percorsi e visioni della critica in America,* Milan, 1984, 109 and ff. and U. Mattei and A. Di Robilant, *International style e postmoderno nell'architettura giuridica della nuova Europa. Prime note critiche,* in *Riv. critica dir. priv.,* 2001, 92.

[18] J. Fr. Lyotard, *La condition postmoderne*, Paris, 1979.

[19] The contributions of later authors have been essential, such as Beck and Bauman: U. Beck, *What is Globalization?*, Cambridge, 1999 and Z. Bauman, *Modernity and the Holocaust,* Cambridge, 1989; given the impossibility of paying proper attention to all the lines that have evolved, it is enough to underline the extent to which the delimitation of what we intend by postmodern appears to be dubious. This, in fact, depends on the identification (an operation that is anything but easy) of its correlation, that is, of the concept of the modern, which is distinguished by the characteristics of rationality and subjectivity, which postmodernism intends, if not to surpass historically, at least to fight in the light of an awareness of the significant fracture that began to take place from the 1970s onwards, which would render it impossible to establish an objective meaning of reality.

– the best-known - of his analysis: above all, in fact, Lyotard emphasises the profound changes (social, institutional and technological) that have marked the last few decades and that have brought about the end of the "fables". That is, he observed that those meta-narratives that had dominated modernity, did not survive the collision with history. The examples are infinite: not everything that is real is rational; communism spectacularly betrayed its promises; the market has not always favoured homogeneous enrichment.

Such a complex of events has led to a situation – the current post-modern one – in which, without the comfort of those stories, the legitimisation of rationality cannot derive from an ultimate foundation. The meta-narrative, in other words, has ceased to perform a legitimising function. As a consequence, rationalisation in concrete terms is not the only criterion for identifying man's meaningful experiences.

On the other hand, the myth of progress appears to have been superseded[20], with the consequent reflections on the idea of a constant domination of nature, while knowledge and morality are deprived of their essential foundations; using a series of pairs of opposites, it follows that the means win out over the ends, apportionment and differentiation over unity and homologation, dissent over consensus, the periphery over the centre, deconstruction over construction[21], incompleteness over universalistic completeness[22].

The perception, in such a context, of the impossibility of knowing the ultimate truth has in the end led to a marked scepticism.

The point of view of the inquiry that has as its essential axis the postmodern has obviously not spared legal science, which, perhaps more in the past than in our own epoch, has sometimes been enchanted and conditioned by it. Although we can debate the exact

[20] G. Chiurazzi, *Il postmoderno,* Milan, 2002, 7 and ff.

[21] On the relationships between post-structuralism and post-modernism cf. F. D'Agostini, *Poststrutturalismo e postmodernismo,* in *Analitici e continentali. Guida alla filosofia degli ultimi trent'anni,* Milan, 1997, 405 and ff.

[22] Cf. G. Fornero, *Postmoderno e filosofia,* in N. Abbagnano, *Storia della filosofia,* IV, 2, Turin, 1994, 377 and ff.; P. Rossi, *Paragone degli ingegni moderni e postmoderni,* Bologna, 1989, I. Matteucci, *Il postmoderno,* Naples, 2009, 9 and ff.

borders of juridical postmodernism[23], that point of view, above all in America[24], has taken aim at the legal structures of modernism[25] and, bringing to an end neopragmatism[26], has sometimes encouraged positions that are both sceptical[27], and anti-foundational, supporting the idea according to which the law, indecipherable in itself, would only consist of interpretation, an operation that is always arbitrary[28]. Effectively, rejecting the myth of the completeness of the system and the possibility of discovering absolute and universal truths, in the absence of a universal foundation of the law (as well), it would not be knowable as objective reality on the part of the subject and could not put itself forward as the object of a theoretical reflection: hence the flowering of a sceptical epistemology.

The question is widely investigated, above all by the philosophers of law (far less by administrative lawyers), to whose reflections we turn[29], though it has to be emphasised that the

[23] Cf. P. Barcellona, *Diritto e nichilismo: a proposito del pensiero giuridico postmoderno*, in *Riv. critica dir. privato,* 2005, 207 and ff. and P. G. Monateri, *"Jumping on someone else's train". Il diritto e la fine della modernità,* in *Riv. critica dir. privato,* 2001, 123.

[24] As regards the European "novelty", constituted by its attention to current law and doctrine of pre-natural law, cf. P. Barcellona, *Diritto e nichilismo*, cit. at 23. On the issues in the text cf. also U. Mattei AND A. Di Robilant, *International style e postmoderno nell'architettura giuridica della nuova Europa,* cit. at 17, 89 and ff.

[25] P. G. Monateri, *"Jumping on someone else's train",* cit. at 23, 129. cf. also A. Di Robilant, *Movimenti e scuole post-realiste negli stati uniti d'America,* in *Digesto IV – Discipline privatistiche. Sezione civile (Aggiornamento II),* Turin, 2003, 894-895.

[26] R. A. Posner, *The Problems of Jurisprudence*, Cambridge, 1990.

[27] M. Ronsenfeld, *Interpretazioni. Il diritto fra etica e politica*, Bologna, 2000.

[28] The debate is boundless. Cf., *ex multis*, the observations of E. Gliozzi, *Postmodernismo giuridico e giuspositivismo*, in *Riv. trim. dir. proc. civ*., 2003, 03, 801 and, on opposite fronts, the positions of P.G. Monateri, *Interpretare la legge* (i problemi del civilista e le analisi del diritto comparato) , in *Riv. dir. civ.,* 1987, I, 531 and ff. and of F. Gallo, *L'interpretazione del diritto è "affabulazione"?,* in Collana di Diritto Romano, 2005.

[29] Cf., as well as the authors already mentioned, B. Romano, *Relazione e diritto nel postmoderno - Una discussione iniziale*, in *Riv. internaz. filosofia diritto,* 1988, 735 and ff.; C. Douzinas, *Postmodern Jurisprudence: The Law of Texts in the Text of Law,* London – New York, 1991; E. Jayme, *Osservazioni per una teoria postmoderna della comparazione giuridica,* in *Riv. dir. civ.,* 1997, I, 813 and ff.; G. Minda, *Teorie postmoderne del diritto*, with presentation by M. Barberis, Bologna, 2001, in part. 367 and ff; M. G. Losano, *Sistema e struttura nel diritto,* III, Milan, 2002; V. Scalisi, *Categorie e istituti del diritto*

panorama is fairly articulated and that the total arbitrariness of the interpretations is a formula declaimed – and perhaps only by a few - rather than truly professed.

For our purposes it is worth underlining that a paradigmatic sector, not by chance of growing interest for the law as well, that seems to express many of the characteristics of postmodernism is the environment, which in fact we have already mentioned for other reasons (para. 5): it is sufficient to mention here how, faced by environmental problems, we can see the abandonment of blind faith in science and progress and the surpassing of the meta-narrative of endless progress[30].

In summary, a significant correspondence appears between the "shattered world vision", science that has lost its certainties and legal science, characterised by an epistemological status that veers towards methodological anarchy: have we therefore entered the age of post-modernism? The answer would appear to have to be emphatically negative, as we will try to explain in the come course of the next few paragraphs.

9. *The urgency of a different world "vision" and the assistance of philosophy of science.*

In reality, postmodernism too is not immune to criticisms and objections, at least to the extent to which it becomes a critique that remains anchored to the presuppositions of the modern, limiting itself to recording the failure of its internal logic; on the other hand, the will which runs through it to abandon the requirement to find a rationality and a possibility of knowledge lays it open to the

civile - Nella transizione al postmoderno, Milan, 2005 (significantly inspired by Pugliatti); ID., *Regola e metodo nel diritto civile della postmodernità,* in *Riv. dir. civ.,* 2005, I, 283 and ff.

[30] F. Fracchia and A. Marcovecchio, *Il cambiamento climatico: problema e opportunità per il diritto*, in F. Fracchia and M. Occhiena (editors), *Climate change*: *la risposta del diritto*, Naples, 2010.

accusation of neo-conservatism, becoming a choice to flee from the world[31].

What we intend to highlight here is however the fact that postmodernism, insofar as it is not yet definable in a chronological sense, but as a "vision" that is different with respect to modernism, becomes a new type of meta-narrative, in different ways often inspired by deconstructionism. The urgency to identify a horizon of meaning, therefore, remains and, as will be said again, creates a tension – we spoke earlier of a "common denominator" - which can also be detected in the other sectors being looked into here.

In reality, there is also a need to discuss the absolute novelty of postmodernism, that is, about the fact that the thinkers of the early 20th century (therefore long before the era of postmodernism itself) still naively believed in the "narrations"[32]; on the other hand, there is no shortage of examples from the past in which the old unitary narrations appeared to have been surpassed, opening phases that led to a new narration all the same[33].

In any case, it has been underlined how postmodernism does not yet represent the surpassing of modernism, but rather its radicalisation[34], its internal deterioration and, thus, a weakening of its essential traits[35].

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[31] This is the criticism of J. Habermas, *Moderno, postmoderno e neoconservatorismo,* in *Alfabeta,* 1981, 15 and ff., quoted by I. Matteucci, *Il postmoderno,* cit. at 22, 18.

[32] Cf. M. Taruffo, *La semplice verità,* cit. at 10, 34. An early example of awareness of the crisis of modernity can be found in A. Tilgher, *Relativisti contemporanei*, Rome, 1921.

[33] Think of the crisis that the history of thought experienced during the 14th century with regard to the expectation – which evolved in the 13th century thanks in part to the use of Aristotelian logic - of being able to have access to a totalising construction and elaborating great unitary syntheses capable of organising knowledge of all aspects of human experience. The awareness of this crisis was very acute in Pertrarch and Ockham: in the centuries to follow it however a new form of narration would emerge, that of the Renaissance.

[34] A. Giddens, *Le conseguenze della modernità. Fiducia e rischio, sicurezza e pericolo,* Bologna, 1994, 57.

[35] G. Vattimo, *Nichilismo e postmoderno in filosofia,* in G. Vattimo (editor), *La fine della modernità,* Milan, 1987.

The criticism is of interest insofar as it leads us to view with caution the points of view that intend to liquidate the past totally, almost as though a new "phase" might excise all connections with the past[36] and, above all, exhort us to distrust the idea according to which today there lacks the tension towards a "unity" of meaning.

The truth is that, even when the narratives of modernism – think of political ideologies - have had to endure the harsh lessons of history, they were not completely abandoned, but underwent a transformation, perhaps changing from a criterion to describe reality objectively to an axiological element that is useful in indicating the "ought to be", but always within an overall scheme of investigation.

It is fairly essential to recuperate whatever is useful in the critique elaborated by postmodernism of modernism, exhorting scientists to emerge from their naiveté. Think, for example, of the fact that the former reproached the latter for employing a model of interpretation that was too closed and complete, while multiform reality imposes a more "open" model. We could also add that its methodological restlessness and propensity to see the single sectors of knowledge as linked with one another, are reasons that postmodernism exalts and that scientists cannot ignore, just as they cannot ignore how much postmodernism pitilessly exposes, and it matters little that this is no more than a degeneration of modernism. Consider the emergence of new problems, such as the awareness that development is not limitless. Consider also the diminishing importance of some typical structures of modernism, such as sovereignty and the relationship with science and space, juridical space as well, that has to be guaranteed to emerging countries.

It is very significant that many of these reflections, located on the level of philosophy, could well be applied – and have been applied - to the other two levels under consideration here (that of science *tout court* and that of legal science[37]), in confirmation of the

[36] This aspect is also very evident in the passage between various "regimes" and institutional structures: cf. P. Grilli di Cortona and O. Lanza (eds), *Tra vecchio e nuovo regime. Il peso del passato nella costruzione della democrazia,* Bologna, 2011.

[37] For a specific critique of postmodernism in the juridical field see P. Barcellona, *Diritto e nichilismo,* cit. at 23, 220 and ff. See also *infra,* para. 11.

close relationship that unites the various sectors, a relationship rendered more meaningful by the fact that the theme of the world vision has immediate reflections on all forms of human experience, starting with science.

If this is true, taking up again the methodological position outlined in the course of para. 1, we might even think it is possible to draw from one of these sectors certain minimal elements that would be capable of clarifying the problems that are of interest to the others.

With reference to the theme of the new world vision ("Weltanschauung"), the "problems" lie precisely in the fact that there was no lack of urgency in identifying a «criterion», a «horizon of meaning» and a «foundation» to order reality in the "postmodern" context (even to explain the passage from modernism to postmodernism, the subject of a new narration) and to gain knowledge. This, all the same, has to consider the new complexity and, above all, scientific uncertainty, without that necessarily leading to a perspective of mere deconstruction of the real and the total abandonment of a hierarchical frame of reference.

Fundamental assistance for identifying a new foundation arrives in the shape of epistemology, which for some time has dealt with the problem of identifying models that offer "unity of meaning" or, at least, has sought to respond to the relative urgency.

10. *The new epistemological model: from science to philosophy.*

Science is not empirically verifiable. Thanks above all to Popper the model of so-called inductive ascent has been rejected, a model which, on the basis of a supposed principle of induction, from hypotheses created from empirical facts and repeated observations, arrives at general laws[38] that can be verified[39]. Having heeded the

[38] K. Popper, *The Logic of Scientific Discovery*, London, 1959. Inductive generalisations - all swans are white - can always run up against a counter example: the black swan.

[39] All the other hypotheses would have to be excluded, which is normally impossible.

warning to not make the same mistake as the naïve inductivist turkey (who, even on Christmas Eve, was convinced he was going to get a good feed every day), it has to be added, though, that the falsificationism of Popper[40] has also entered a crisis, once it had been acknowledged that the state of science he had imagined was unlikely to be that of a "permanent revolution", which moves from the definition of conjectures to falsifications which, in turn, determine the abandonment of the hypothesis. Against the fact that it appears to be counterintuitive to affirm that science should work to demonstrate that a thesis is mistaken, it has been observed that a large part of the activity of the scientist is not aimed at a "critical revision" of the paradigm, but rather at its "exploitation". Where the scientist identifies an answer that, in reality, does not correspond to the model, they do not modify it, but "change" reality, in the sense that they minimise those answers or interpret them differently, introducing perhaps auxiliary hypotheses.

That is, Popper's criterion pushes the existence of "normal" research into the shadows. This is the position of Kuhn[41], according to whom normal research is a convergent activity that leans heavily on a permanent consensus acquired through scientific education and reinforced by successive activities in the scientific profession[42]. Reality is always filtered by a paradigm: science ("normal" science at least) consists in an activity that is aimed at solving the "riddle" in the light of that predefined "paradigm". That activity, then, is recognised by the scientific community.

The scientific revolution takes place when the paradigm changes, determined by an excess of anomalies (failures of the paradigm, which is unable to explain reality) which cause a crisis in

[40] Which, for the purposes of the definition of what science is, surpasses the criterion of verifiability - so magic would also be science – asserting that only refutable theories are scientific. Later, Popper partly modified his previous position: *Poscritto alla logica della scoperta scientifica*, Milan, 1984.

[41] T. S. Kuhn, *La struttura delle rivoluzioni scientifiche,* Milan, 1962.

[42] To do what they do, scientists "must assume a complex group of intellectual activities"; "divergent" thinkers are therefore numerically limited: T. S. Kuhn, *La tensione essenziale*, Turin, 1985, 246-247

the research programme. In this case, the world vision mutates, as does the language and, often, the geography of academia.

The last step we intend to underline here leads us to Lakatos[43] (we do not therefore go as far as the methodological anarchy of Paul Feyerabend), who turns to the idea of the research programme, identified by his basic "metaphysics", which led to a negative heuristics (which paths of research are best avoided) and a positive heuristics (which paths to follow). The nucleus of the research programme, made up of non-falsifiable hypotheses, is called hard core, and, in certain ways, corresponds to the Kuhnian paradigm; but to this is added a protective belt, made up of auxiliary hypotheses destined to experience the impact of controls, and be the object of continuous adaptations. A corollary of the thesis is that according to which the "progressive" programmes (which allow a better explanation of new facts) prevail over regressive ones, exactly as happens in a conflict between "schools" of thought.

For our purposes it is of interest to underline that Lakatos' model allows the "absorption" into the "metaphysics" which inspire the hard core of a number of ethical assumptions, as well as ideologies, prejudices, interests, symbolic aspects and political lines of the scientific community.

Science, furthermore, would not necessarily be able to reveal the complete truth or to offer absolute certainties, which was of course confirmed by the events that began with East Anglia case.

These motives also seem to be extremely interesting on the level of philosophy and world visions: the idea of science that works by paradigms, although perhaps incapable of defining all the characteristics of science itself, provides useful starting points for understanding not only how scientists work, but also their behaviour on the level of the vision of history, where – as we mentioned - the analogous urgency of the unity of meaning has not, in reality, vanished.

The paradigms correspond in part to the meta-narratives: a view of history continues in the successive models, elaborated by communities of individuals, who give sense to human experience. A

[43] I. Lakatos, *The methodology of scientific research programmes*. Cambridge, 1978.

harsh lesson from history is not enough to justify a total deconstruction and the abandonment of previous hypotheses. The models are needed to hierarchise reality, at least to the point in which the anomalies are not excessive and uncontrollable; these, though, are not completely closed and complete models (allowing for modifications and failures in the protective belt), nor are they neutral, insofar as they possess an ethical-ideological-political hard core, which is often the result of the transfiguration of the past.

The interpretative models which best allow for the explanation of new facts tend to prevail over the others.

Modernism and postmodernism too, like the other great narrations of the past, are no more than paradigms, whose sustainability, from the perspective indicated now, has to be obtained in relation to the fact that they constitute traces (impregnated with values) that are useful to frame, explain and resolve the problems tied to the experience of man in history.

11. … *to arrive at legal science.*

A similar pattern of analysis can be adopted for the legal scholars' work, considered as "science" [44].

We intend therefore to go beyond the sometimes convincing criticisms aimed at postmodernism in the law, which repeat, though in part transfiguring them, the doubts raised in philosophy and that we recall here very briefly, using an analogy.

On closer inspection – in its most extreme form at least - postmodernism can be reproached because the doctrine of natural law, sapping its foundations from within, moves towards historicism (but also sometimes towards relativism)[45]: if it is not possible to approach reality and universal truth, then historicism itself is debatable, so it cannot be demonstrated that man is a mere accident

[44] As regards the possibility finding methodological models that are common to the natural sciences and historical-social sciences, cf. E. Campelli, *Da un luogo comune. Introduzione alla metodologia delle scienze sociali,* Bologna, 2009.

[45] Cf. L. Strauss, *Diritto naturale e storia,* Genoa, 1990, *passim*.

of history and found on this a single theory that is superior to any other.

Postmodernism too, at least admitting that it repudiates the existence of true and totalitarian interpretations, remains harnessed to the following alternative: the assertion (and thus the negation) is true, but in this way it would fall into the same vice it reproaches modernism for, contradicting the fact that everything is the result of interpretation; on the other hand, this is a mere interpretation and, as such, it is empty of epistemological value: it does not find a "terrain" on which to reside and impose itself on other interpretations and, in any case, it is not suitable for founding a theory[46].

In any case, as we said, what matters here is not dwelling upon such well-known profiles, also because such rigid historicism is probably not a type of behaviour that is found in daily juridical reflection, where a healthy dose of "realism" is not often lacking[47]. It proves to be more interesting to proceed along a different path, that is, employing the theses of Lakatos and Kuhn, observing how before judgment these have not been used in a generalised way up to now by Italian juridical culture, though it often refers to them[48]. In truth, perhaps more accurately, it could be observed that, although not "theorised", the paradigmatic model is often actually applied concretely, to the extent that the Kuhnian perspective integrated with correctives *à la* Lakatos allows, with a fair degree of accuracy, the description of the "isms" present in juridical reflection and the analyses of the philosophy of law.

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[46] P. Barcellona, *Diritto e nichilismo,* cit. at 23, 224 and ff. In truth, and this is highly significant thinking back to what we clarified previously, it is not even correct to affirm that in all cases the outcomes of postmodernism in philosophy have been that of denying the possibility of "knowledge" or that some form of foundation, while denied verbally, was all the same invoked (perhaps referring to economic rationality). The tension towards transcendence and the necessity to find "something" behind mere interpretation, therefore, does not spare postmodernism: cf. again the critical analysis of P. Barcellona, *Diritto e nichilismo,* cit. at 23, 212 and 214.

[47] Albeit in the field of a richer and more articulated position, cf. *ex multis* R. Guastini, *L'interpretazione dei documenti normativi*, Milan, 2004, in part. 100.

[48] Cf. e.g. A. Travi, *Il metodo nel diritto amministrativo e gli "altri saperi",* 868, note 9 and V. Villa, *Costruttivismo e teorie del diritto,* Turin, 1999, 19.

In any case, in this way, the model outlined in the paragraphs above allows us to confront, by simplifying it, a series of problems that in the course of these thoughts have so far remained hidden, but that have all the characteristics of being unavoidable: is the work of a lawyer scientific or, better yet, do they act according to modalities that are analogous to those that a scientist employs? Are there criteria to prefer one model over another?

12. *Some characteristics of legal science and the criteria for evaluating the models.*

Working on the hypothesis that science is not the necessary discovery of the truth[49] (which is, at most, the horizon of the scientist's investigation), but rather the application of paradigms to gain critical knowledge and solve riddles, by means of an initial approximation (cf. next para.), the task of the scholar of law would be scientific, irrespective even of the revelation of an external truth or the achievement of the result of a universal knowledge.

It can then be admitted (and this, in fact, constitutes common experience) that legal science is not monopolised by a single theoretical filter. The models, furthermore, are variegated in terms of their depth and extension: some filters are concerned with specific sectors (the environment as duty; power as authority; the administration in an objective sense), while others have a much wider extension.

From these points of view – the lessening of the urgency to find the truth and universal explanations, pluralism of models - more than one analogy with postmodernism can be detected[50] , but it is not

[49] On this subject cf. D. Marconi, *Per la verità. Relativismo e filosofia*, Turin, 2007.

[50] Which does not mean forgetting the peculiarities of juridical science compared to other sciences (or to the activity of lawyers as practical operators of the law), which have already been listed on other occasions, recalling, among other things, the profile of its *object* (in law we find the essential mediation of the language which transcends natural phenomena), which also influences the fact that, unlike the other sciences, lawyers do not limit themselves to influencing the image of their own "object", but *model* it, going beyond the mere "fruition" of a language. The legal scientist, then, compared to other operators of the law, beyond the fact of using a

necessary to adhere to this to reach these conclusions, which are compatible with the point of view of the paradigms.

It is, thus, sufficient, if necessary, to introduce a few secondary but important correctives: in particular, it is worth repeating, there is no monopoly of a model and, rather, the various paradigms often share certain aspects, in a sort of cross-pollination (for example, the concept of public interest), and then differentiating themselves in other areas of the filter of which they are the expression, thus providing a much more agitated picture compared to the idea according to which, in a given period, there exists a single winning model.

It still has to be observed, though, that, despite the negation of the existence of an objective external reality (the law as distinct from its interpretation), pure postmodernism too still employs paradigms; moreover, methodological anarchy is also a model and not a factor that leads to divergences between models.

It is true that other schools apply the model of a more "solid" reality, that is, of a law that is seen as "other" compared to the interpretation and/or whatever emerges after having made the paradigm work. Nevertheless, the fact that the "anvil" on which the "hammer" falls is more consistent in the theories that offer objective importance to juridical reality would not in itself be an indication of the greater dignity of science, precisely because, according to Kuhn, to achieve that the "true" would not be essential: the epistemic framework, in fact, seems safe where the model is made to work with rationality and coherence (a concern which is also present in postmodernism as it is in the economic analysis of the law) to resolve problems.

Therefore are all the theoretical filters equivalent (including, as well, that which is outlined and followed here, and which sees in legal science the collective application of research programmes with the abovementioned characteristics)? Would it not be a sin of pride to

technical filter, has the possibility of effecting a *free choice* in terms of the object of knowledge and enjoys a greater *distance* from subjective involvement and the contingent case.

imagine a hierarchisation among these and that one "knowledge" might teach something to the others?

The answer appears to be negative, for seven groups of reasons, sufficiently explored by the philosophy of science.

First, the paradigms can be classified, bearing in mind their internal coherence and the rigour with which scientists operate[51]. The postmodernist theoretical filter at its purest, as we said, appears unconvincing to the extent that it falls into the vicious circle summarised above (para. 11).

Second, referring to Lakatos, progressive research programmes, that best allow the explanation of problems and new facts, are superior to those that are recessive (think, from this point of view, of the extreme "power" of the thesis of the plurality of the systems). In any case, a model that draws on a solid reality (norms, institutional facts, living law and so on), which, therefore, offers greater resistance and, above all, is external, so to speak, allows the hypothesising of many more riddles to solve and provides a greater number of answers. Compared to the most extreme postmodern model, then, this will always be able to raise a further problem in relation to this theme, that of the difference between natural reality, juridical reality and interpretation[52], an articulation that is in turn simplified by those who render law and interpretation indistinct.

Third, a model rejects the existence of an "anvil" would retreat from the possibility of a paradigmatic revolution in the style of Kuhn and, therefore, would appear essentially conservative, relegating the possibilities of evolution only – so to speak – to its own internal dynamism.

Fourth, again on the basis of the "recording" of the problems to which the scientific paradigms offer a solution, the models which reject uniform and abstract perspectives will be better, forcing themselves instead to take into account the plurality and differentiation of the contexts, just as those that in some way allow the presentation of evidence as regards the question of the role of the

[51] On the operations of the lawyer, cf. F. Carnelutti, *Metodologia del Diritto*, Padua, 1939.

[52] The three levels are recalled by P. Barcellona, *Diritto e nichilismo,* cit. at 23.

spurious material in relation to the law appear preferable (e.g. ethics, ideology of ethics, "unofficial" elements, experiences that might be distant from science and so on), rather than those which seek to avoid it. The importance of metaphysics – in part already grasped by Popper[53] – and philosophy is that of directing the construction of the hard core: this is always present in legal science (cf. para. 2), as it is in the other sciences. Can it be denied perhaps that there exist very precise world visions behind the theory of relativity or, previously, that of atomism?

Fifth, where then the theoretical filter refers to other sciences, it has to take into account the characteristics of the science. There is no such thing as the dogma of immaculate observation, so, for example, the law cannot merely act as the spokesperson for an objective science.

Sixth, if science is a collective operation and not the fruit of individual action, the theoretical filter must be open to the contribution of the various subjects, and declare itself willing to accept criticism and dialectics. Even if this appears to be antidemocratic, it is however natural, and to some extent salutary for the functioning of science itself, that the community should stem the criticisms aimed at radically weakening the foundations of the research programme and, as a result, bringing about the extinction of the same. Obviously, what has been said (for reasons of coherence if nothing else) must never lead to behaviour that is obstructive or censorial, which is the negation of the "declaimed" framework of science.

Finally, it does not seem to be impossible to order the paradigms in the light of their correspondence to "facts" and, therefore, to the truth. This is quite a delicate issue, which leads to a solution that is perhaps unexpected in the light of the premises outlines here so far. It is held, then, to be necessary that, at least where it is possible, as happens in law (it would be a different matter with the so-called thought experiments), that there should exist a minimum connection to reality (in this case, juridical: norms, institutional facts and so on, that take their place "before" arriving at

[53] K. Popper, *Realism and the Aim of Science,* London, 1983.

the natural facts), bearing in mind that if the control provides a positive result, the hypothesis is not verified absolutely, but only provisionally, while awaiting further controls.

On the other hand, science and scientists are unlikely to be willing to welcome the paradigmatic idea uncritically, given that they too claim the search for truth as one of the essential elements of their own horizon. We have come a long way, therefore, from the ideas of Kuhn and Lakatos. If these undoubtedly serve to explain how science functions and progresses, it cannot be denied that the truth has to be present both as the final objective of the scientist, as well as an objective criterion for evaluating the science.

In general, the reason for this affirmation can be understood, once again by making a "leap" between levels, and thinking of the Holocaust: if the correspondence to reality were irrelevant, if everything were merely the fruit of interpretation, we would fall into an inadmissible relativism which might lead, on the historical level, even to denying terrible events and a utilising criticism to obscure irrefutable facts. Adhering to this order of considerations – the real world is always out there - permits the immediate introduction of a criterion of judgment and evaluation among paradigms as well. What is preferable – as, on the other hand, Popper said when criticising Marxism - are the models that admit and allow space for some residue of falsification, even if minimal. Certainly the facts (which in law are the objectified fragments of normative reality in all its declinations, including that of case law) can be interpreted in turn by the theoretical filter, which has precisely this specific task, but it is not permitted to eliminate them from the horizon of reference. For example, this is what happens when a scientific conclusion comes into open contrast with a norm or assumes the inexistence of a jurisprudential direction that is equally valid.

It will be objected that here we are going back to Popper, in the sense that the anomaly leads to the rejection of a theoretical filter, opening up to a phase of revolutionary science, or that, by stating this, it enters into an irremediable contradiction with the presuppositions outlined above, where it was stated that the paradigm would be insensitive to anomalies (it is not insignificant

that the discovery according to which neutrinos go faster than the speed of light has not led to the debunking of the theory of relativity). In truth, in order to avoid antinomies, a few simple correctives in the paradigmatic model would appear to suffice.

First of all, it should be noted that Lakatos' thesis also admits that, at least in the protective belt, the model has to endure the clash with reality and might mutate: the auxiliary hypotheses have precisely the function of defending the nucleus, identifying the adaptations of the hypotheses (the auxiliary ones, in fact) without abandoning the research programme[54].

Second, however, the connection to reality, in order to avoid complete relativism, goes further, in the sense that when the number of anomalies is excessive the hard core is changed as well or (which is not that different) the research programme is abandoned, not unlike what happens when a fundamental change is registered in an institutional system that leads to the appearance of a new structure irrespective of the formal limits of a previous Constitution.

Third, it seems there is another level, an intermediate one between the two extremes outlined so far, constituted by the confirmable hypotheses, given that a scientific theory seeks to last in time and not to simply be dispensed with[55].

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[54] From this point of view the analogy with the autopoietic theses is clear (cf., *ex multis*, H. Maturana and F. Varela, *L'albero della conoscenza,* Milan, 1987; J. H. Holland, *Adaptation in Natural and Artificial Systems,* University of Michigan Press, 1975; cf. also G. Bocchi - M. Ceruti, *La sfida della complessità,* Milan, 1985), according to which the external environment is the source of perturbations, but it is always the system that selects those stimuli with a view to its own survival. The intention is therefore to affirm that scientific paradigms are similar to "autopoietic organisations" which do not adapt docilely to the environment, but elaborate their own internal response to stimuli.

[55] We could, for example, sound the content of the paradigms or research programmes with a view to identifying their "strata", perhaps working on the model proposed by D. Gillies and G. Girello, *La filosofia della scienza nel XX secolo*, Bari-Roma, 2010, 266 and ff. This is articulated on four levels: that of the assertions observed (through a comparison with experience), that of the assertions that are confirmable but not falsifiable, that of the falsifiable laws and that of the metaphysical assertions.

A theoretical filter which aims to be legal science, alongside its capacity to be used to solve riddles, has at least to admit these various possibilities, without rejecting them *a priori*, although it is often easier to find out a mistake than to reach the truth.

13. *An overview: science and second life; science, philosophy and law; science and truth.*

Thus we have identified a final criterion for evaluation and, even more than that, for qualifying a model as scientific: the habit of confronting reality and the connection with the same, which is sounded with a impressive obstinacy thanks to the natural aptitude of science for solving real riddles coherently. Science – at least there where reality is accessible - is not the equivalent of "second life": in fact, it is not sufficient to employ an abstract linguistic game for it to exist. In all the cases it comes up against the metaphysical and/or philosophical heart of the model.

This minimum of shared traits can also be found in philosophy and legal science, where the reality is objectively in the norm. Incidentally, it is important to add that if philosophy nourishes science (which then influences legal science), these also exists an inverse movement, which goes from science to metaphysics. The theme in fact is not totally new to scholars of the philosophy of science. Here we can underline that legal science, with its anthropocentrism, can help philosophy and ethics, reminding them – for example, in the environmental field, but the warning also applies for the economic sciences - to place man at the centre of their reflection; on the other hand, it (and the law that is its object) can dictate rules and protocols to "manage" situations of epistemic uncertainty (think of the principle of precaution, elaborated specifically with this aim).

It is useful all the same to insist on the theme of the connection with reality and the correspondence to the true.

It can probably be hypothesised that this correspondence is not a condition that opposes science; stating otherwise, all those who over the previous centuries maintained with rigour, passion and

method theses that were then proven wrong by reality would not have been scientists.

We will attempt to answer this question in para. 14; for now we add that we have to expect scientists, when they apply the paradigms to solve a riddle, have as their final horizon the truth, which is pursued in the light of the premises and argumentations that are typical of the model, even if there will always a margin of uncertainty, without which, among other things, science might not even be able to justify itself. The correspondence of the assertions to events (and, therefore truth) becomes a criterion for evaluating the theory when it is possible to gain access to the truth; a residual criterion is, in the other hypotheses, the tendency of the theory to reveal the truth (conformability or verifiability of the assertions).

Therefore, the progressive research programme is not thus only because it explains new facts, but also and above all because it formulates assertions that correspond to the truth.

The landing place for these reflections lies in the sense that a thesis that accepts the connection to reality and the possibility of its being superseded, or, in any case, that demonstrates a capacity to learn from the errors of the past, is preferable to one which denies this confrontation, in the same way that one which defines with clarity the verifiable assertions, the falsifiable ones and those that are not falsifiable but conformable is superior to the models that are ambiguous. Moreover, as we said, no scientist, interrogated about the aims of their work, could seriously affirm that it is not that of discovering reality and approaching the truth, so realism is a good criterion for ordering research programmes, in legal science as well, where the reality is that of the institutional facts, norms and living law.

We could ask ourselves if the connection to reality also exists at the other levels we have dealt with (that is, the process and vision of human history and experiences).

In the process, by its very nature, the reply ought to be positive, with the warning that here the operator also has as his reference final "factual" reality and not just an objectified fragment of juridical will. As a consequence, the paradigms that, bringing too

much proceduralisation to the action and impeding a confirmation or a falsification, or referring again to a truth reached by means of a simple agreement, moving away from reality and are, therefore, unsatisfactory; this is also an indicator to criticise legislative choices – having considered the difference to a scientific theory - relative to the access to the fact on the part of the judge. Certainly it could be objected that it is a problem of ideology – once again - to accept the risk of a deficit of truth, sacrificing its relative value on the altar of efficiency, of simplification and of the urgency to ensure a decision in any case[56]. As regards legal proof, though, the criticism can reinforce itself recalling the trap of the inductivist turkey: the regularity on which they are based – taking for granted that this is their origin - does not lead necessarily to the truth.

Also as regards the models elaborated to organise the world vision (the "isms"), their correspondence to reality does not seem to be irrelevant: the example of war crimes or that of the gulags confirms the importance of the denials of history.

The breadth of the non-falsified hypotheses (and, therefore, corroborated albeit only provisionally) and of those that are confirmable, despite the meagreness of the auxiliary hypotheses necessary to reduce the anomalies[57], in conclusion, constitute an excellent criterion of evaluation, to be added to the others listed earlier.

What we have observed does not lead to the definition of "one" specific theoretical filter capable of scientifically representing the juridical dimension: moreover, the aim of this paper, starting from a number of minimal indications to (also) understand how administrative science works, was that of admitting the plurality of schools (and, therefore, of paradigms) and defining a minimum basis to carry out an evaluation of the worth of the various theories, linking between them the levels of epistemology, philosophy and legal science.

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[56] M. Taruffo, *La semplice verità,* cit. at 10, 134 and ff.

[57] An elementary canon of economics, in fact, renders preferable those theses that do not require continual adjustment because of the addition of auxiliary hypotheses.

Rather it should be noted that scientists and, more generally, thinkers, follow the paradigms in which they are immersed.

Nevertheless, there are those who have the strength to change point of view from time to time, to overturn the logical connections of discourses or use ironic strategies, standing out as a "free thinker"; analogously, whoever manages to grasp the hard core of various models appear like someone who is able to "understand the points of view of others": perhaps, though, more correctly, they are, above all, able interpreters of a postmodernist or deconstructionist paradigm.

14. *Some final thoughts on the theme of academia, appearance, aesthetics and phlogiston.*

It absolutely cannot be stated that the best filter (because it is the most coherent, most powerful, able to solve new problems and more firmly anchored in reality) will necessarily be the one that wins.

What is certain is that, in the competition between models, one filter takes the place of or lines up alongside another, not necessarily less structured, so that we cannot share the idea according to which research and the "world vision" develop along the line of the weakening of the previous paradigms. Nevertheless, the prevalence of the models and schools, juridical as well, giving that we are dealing with a social undertaking, also and above all depends on the strength of those who propose the theoretical filters and – on the theme of comparative legal analysis – on the importance of the original juridical system.

The plurality of the schools corresponds to the fragmentation of scientific theses, to the impossibility of necessarily gaining access to the "true", but also to the complexity of the structure of the "Academia". This leads to the elaboration of specific languages that are used inside them. A sort of "code", in fact, that is the semantic reflection of the theoretical filter.

We mentioned briefly comparative legal analysis. If the theoretical filter has to measure itself against reality, the reasoning cannot be constructed following only a structuralist model. Alongside the existence of invariable constants, the connection with the real

appears, also for the purposes of defining the basic elements to be subject to comparison. The analogy between linguistics and comparison is well-known, the latter having often belonged to the categorical apparatus, mutated precisely by the oldest form of structuralist linguistics, which evaluated a term on the basis of its position within the system[58], rather than on its correspondence to reality. Thus, as suggested by the other part of linguistics[59], it is instead necessary to organise the elements that form part of the categories gathered round a prototypical centre. The prototype should be identified taking into account perceptive salience, that is, indications from reality, as well as their relationships with the culture and ideology within which to identify its function. The theme is taken up again here[60] because it corresponds to the paradigmatic model and the foundationalism that runs through the previous reflections. From the first point of view, the prototype exhibits strong analogies with the hard core; instead the other elements of the category – think of the case of colours - fade towards the edges, contaminating themselves (the protective belt). From the second point of view, the premise is that there exists a world "out there", just as there exists an anchorage to reality for the categories as well – the use of the term "table" rather than "furniture" is not arbitrary - used by linguistics, but also by law and comparison to conceptually organise their own object of study, as well as values and ideologies (which are so important in the realities that are the object of comparison). The categorisation employed, taking its inspiration from the use of the paradigmatic system, used to identify the best and most efficacious level of comparison, appears to give adequate importance to these assets. In any case, categorisation has a pre-linguistic value and this also has to be applied for juridical language and the related comparison.

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[58] V. A. Gambaro, P.G. Monateri, R. Sacco, *Comparazione giuridica,* entry in *Digesto priv.*, 1989, II, 54.

[59] We refer here to the works of E. Rosch; v. in particular *Cognitive Representation of Semantic Categories*, *Journal of Experimental Psychology,* 1975, 192-233. but cf. also R. Langacker, *Foundations of Cognitive Grammar,* Stanford, 1986.

[60] Allow me to refer to my book *Elemento soggettivo e illecito civile dell'amministrazione pubblica,* Naples, 2009.

It could be objected that the system that we have outlined claims to have an application that is too wide and transversal with regard to phenomena that are quite different to each other: from the world vision to science, to legal science and linguistics[61].

Having re-emphasised that the minimum common denominator is made up not of a single paradigm, but rather of the tension towards the paradigmatic behaviour and the search for a unity of meaning that repeats certain structurally recurrent characteristics, such an ability however does not appear to be a defect.

Rather, this manifests itself in other fields as well. Think of aesthetics[62] and art, which can be rebuilt following a similar pattern. We will limit ourselves, for obvious reasons of containing the discourse, to offering a mere suggestion, on the basis, among other things, of a number of assumptions that cannot but be expressed apodictically[63].

Art – to quote a successful definition[64] - is characterised by its own internal legality, in the sense that the artist produces the work contemporaneously with the definition of its "law" and, therefore, never acts randomly, but forms the product. This "body of precepts" is fairly similar to the paradigm, with the peculiarity that the paradigmatic panorama is much more complex: if, in fact, there often also exists an artistic "thread" in whose furrow the artist locates himself, it cannot be denied that the specific model can also be created from time to time and prove to be the result of individual initiative (not only: often it does not exist as an abstract idea before

[61] As regards normative reforms, they share with science the definition of a model soaked in ideology, but they do not have the truth as their horizon, since they sometimes have to regulate relationships, produce juridical effects, resolve conflicts and so on.

[62] These is no shortage of connections between philosophy of science, epistemology and art: cf. for example the experience and work programme of Sarat Maharaj (*In other's words*), which were pointed out to me by D. D'Orsogna (to whom I owe a debt of gratitude for other suggestions as well).

[63] On the theme of aesthetics, given the impossibility of conducting further investigation, we limit ourselves to mentioning S. Givone, *Storia dell'estetica,* Rome, 1988.

[64] L. Pareyson, *Estetica. Teoria della formatività*, Turin, 1954.

the work of art), so that paradigmatic revolutions are much more frequent and complicated than elsewhere. It is significant then that the model should have its own very evident ethical hard core *à la* Lakatos. It seems to be necessary here, furthermore, that the paradigm should have the capacity to be "applied", and, in fact, that legality does not remain an end in itself, but guides an experience and a creative and expressive "work" of the artist that, in the end, can be judged as "achieved" (*je ne cherche pas, je trouve*, said Picasso) specifically in relation to the paradigm.

Obviously there are differences. A specificity of art is that the paradigm has to be nourished not only by metaphysics, but also by what we might call the talent or expressive ability of the artist, so that – while aware of the delicacy of the theme – it is held that to be art it is not sufficient to have an idea, even a brilliant one, if it is married to a banal talent in realising it. On the horizon of the work then appears its relational capacity, that is, its communicability with respect to its user. This, furthermore, unlike the classic Kuhnian paradigm, is created not to solve a riddle (rather, it usually creates a problem or a tension that it offers to solve and overcome itself or, on the other hand, to nourish: hence its self-referential and autopoietic character), but with different aims, which it is not possible to analyse here[65]. Finally, the work need not necessarily correspond to reality: rather, this disparity sometimes measures its value and never determines the mutation of the paradigm, but the "changing" of reality[66].

According to Pareyson's thesis, therefore, the respect for the rules that the artist has employed – and that is very similar to the "paradigm" - is the criterion with which to evaluate the work, while it is indifferent whether or not it conforms to an external set of precepts or to the truth. The analogies with the first impression that was obtained from the paradigmatic formulation, therefore, continue. This finds correspondence in the fact that the users of the art, as

[65] Among philosophers we find disparate indications: to represent a completed experience, produce an expressive effect, know, grasp the objectified will, reveal the truth of the myth and so on.

[66] As regards the problematic borders between "work of art" and "real world", let's consider the idea of Seurat to paint the wooden frame of his pictures.

Heine had foreseen, placed in front of the work, should to some extent abandon their own legality (and, therefore, also a judgment of truth), precisely because they have to entrust themselves to the legality created and proposed by the artist.

Within certain limits, the artistic experience approaches the thought experiment of the scientists, where there lacks the possibility of emerging into the real (which does not, however, prevent evaluating whether or not the paradigm is coherent) .

The allusion is of interest for us, insofar as, according to Pareyson, art is the only experience governed only by the criterion of the result in relation to its own internal legality: and it is no coincidence that the author leads it back to a fact that is essentially interpretative.

We thus arrive at an essential indication that is able to overcome the limits of aesthetics[67]: the mere respect of an internal legality, in the law as well, irrespective of its external connections, would resolve itself in an "artistic" form.

On the other hand, though, referring to common experience, in aesthetics too an external foundation (it can be discussed whether this relates to beauty, pleasure or some other factor) is often important to guide the judgment of the user of the art. This allows us to confirm a further reason for useful reflection from a wider perspective: the paradigm can be viewed from inside (or, at least, as a mere paradigm) or as an external object of recognition (and it is no coincidence that the studies of semiotics in relation to art are very advanced[68]) and in the world.

And it is by employing the creation-contemplation of art pairing that we perceive that the final judgment can change,

[67] There are, however, interesting attempts to pass from the aesthetic level into other fields (one case: that of political philosophy): cf. A. Ferrara, *The Force of the Example. Explorations in the Paradigm of Judgment,* New York, 2008.

[68] From another point of view, cf. N. Bourriaud, *Estetica relazionale,* Milan, 2010. Obviously important is the reference to U. Eco, *Opera aperta. Forma e indeterminazione nelle poetiche contemporanee,* Milan, 1962, where the interpretability of the work renders it open, underlining though the necessary characteristic of objectivity of the interpretation itself as a condition for opening, implying a minimum of "order" in order to avoid incommunicability.

suggesting the rejection of unitary and universalising formulations. Looking at the creative moment ("production") and, therefore, at the model and its success on completion, we can form a particular judgment on the work of art; placing ourselves in the position of the user, once the process is concluded or has taken place ("contemplation"), art is no longer just a process of the application of the model, but is condensed, in the external world, in its effective success, which, in turn, can be compared with a different parameter (the "external connection", as happens for science).

Art too, therefore, can suggest something to the other levels, in particular to science, with which is shares the paradigmatic approach: in not wishing to a consider the two distinct moments, there is a risk of falling into an inadmissible relativism (looking only at the first point without being concerned about the ability to guarantee a correspondence to the world), or into an excessive contraction of the constitutive characteristics of science, marked by the single criterion of the truth.

In conclusion, the status of science has also to be granted to the activities carried out by the scholars of the 17th century who, rigorously applying a paradigm, came up against the mysterious phlogiston (an element that was believed to be present in all combustible bodies and which was invoked to explain the very processes of combustion), but we cannot but recognise that *ex post* that turned out to "bad" science.

THE RULES ON PUBLIC CONTRACTS IN ITALY AFTER THE CODE OF PUBLIC CONTRACTS*

*Marcello Clarich***

Abstract

The approval of the Code of Public Contracts, in implementation of the European Directives, has changed the traditional approach of the Italian legislator to the regulation of public contracts. However the public contracts sector is still unstable from a legislative perspective and the application of the rules is characterised by uncertainty and variations. All this has negative repercussions on the activities of the contracting authorities, the undertakings and, more generally, legal operators. The author calls for a legislative moratorium in order to stabilise and complete the regulatory framework.

1. Introduction.

Under Italian law, the execution of a contract with the public administration is preceded by an administrative procedure in which the contractor is selected (the "tender process" or "*public tender process*"). Therefore, negotiations with private entities take place in accordance with public law in implementation of the relevant European directives.

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Thus, while the selection of contractors in agreements between private parties is left to the individual's transactional autonomy in accordance with the Italian Civil Code Italian law and is, therefore, tendentially free, the public administration is required to act through administrative measures and procedures in accordance with a series of principles of European origin (freedom of competition, equal treatment, non-discrimination, transparency, proportionality, advertising, etc.) which are intended to protect the public interest that it represents.

The current tender process rules on the selection of contractors are contained in the Code of Public Contracts, which was adopted by Legislative Decree no. 163 of 11 April 2006 and includes all the relevant provisions that were previously contained in separate laws[1]. The legislator has also implemented in the Code of Public Contracts the new European Directives 2004/18/EC, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts in ordinary sectors, and 2004/17/EC which coordinates the procurement procedures of entities operating in the water, energy, transport and postal services sectors (so-called special sectors)[2].

The Code is a detailed, complex act (more than 250 articles) and is supplemented by the implementing Regulation, which is primarily dedicated to the execution of public works (more than 350 articles contained in Presidential Decree no. 207 of 10 October 2010).

From an institutional perspective, the Code of Public Contracts is of great significance as it brings together in a single

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[1] Legislative Decree no. 157 of 17 March 1995 was dedicated to public service contracts, Legislative Decree no. 358 of 24 July 1992, to public supply contacts and Law no. 109 of 11 February 1994, to works. The rules for the excluded sectors (now defined as "special sectors") were contained in Legislative Decree no. 158 of 17 March 1995.

[2] For a general framework about the discipline of European Directives no. 2004/18/EC and no. 2004/17/EC, see S. Arrowsmith, *The Law of Public and Utilities Procurement*, Sweet & Maxwell, 2005; C. Bovis, *Public Procurement in the European Union*, Palgrave MacMillan, 2005; J.M. Hebly (ed.), *European Public Procurement: History of the 'Classic' Directive 2004/18/EC*, Kluwer Law International, 2007; S.E. Hjelmborg and P.S. Jakobsen, *Public Procurement Law – the EU directive in public contracts*, Djøf, 2006; R. Nielsen and S. Treumer (eds), *The New EU Public Procurement Directives*, Djøf, 2005.

text the rules on works, services and supply contracts. Just the name "Code", which the Italian legislator has recently used in many sectors (environment, electronic communications, insurance, consumers, etc.) [3] ought to suggest a stabilisation of the rules after a series of legislative amendments that have not always been properly coordinated.

As for its general objectives, the Code's approach is to promote a greater opening to competition in the sector and it is permeated by principles of European origin which are intended to lend greater flexibility to the procedures.

This does not mean that the Code contains uniform rules that apply to all public contracts. In fact, the public works sector, in particular, is characterised by specific rules (such as, for example, those relating to the contractual relationship following the award procedure), which must be taken into account. Even contracts whose value is below the European threshold are subject to particular, simplified rules, although many aspects are regulated in the same way as contracts that exceed the threshold.

The first few years of the Code show that there is still uncertainty as to its application and the period of adjustment has been difficult. Indeed, three corrective legislative decrees have been issued since the Code came into force in 2006. These legislative decrees were envisaged by the original enabling law for the issue of the Code which, like many enabling laws, grants the Government a considerable amount of time in which to make the necessary amendments to the legislative decrees so as to take into account any difficulties that may have emerged during the initial phase of their implementation[4]. Moreover, the aforementioned implementing regulation of the Code was only adopted in 2010; it

[3] Article 1, Law no. 229 of 29 July 2003 envisages the Code as a general instrument for reorganising the laws in force, rather than a Consolidated Law, which is instead envisaged by article 8 Law no. 50 of 8 March 1999, which has now been repealed. In practice, there are no particular differences between the two instruments, except for their names.

[4] The corrective measures were introduced by Legislative Decree no. 6 of 26 January 2007, Legislative Decree no. 113 of 31 July 2007 and Legislative Decree no. 152 of 11 September 2008, which were necessary, *inter alia*, to address certain objections to the rules by the EU Commission. In particular, the Commission had objected to several provisions in the Code relating to project financing in a letter of formal notice, no. 2007/2309.

contains detailed rules on the individual procedures and its issue was the pre-requisite for the application of various provisions of the Code. Essentially, the entire codification process has taken more than four years.

Further amendments to the rules in the Code were introduced by Legislative Decree no. 53 of 28 March 2010 which implemented European Directive 2007/66/EC on review procedures, whose purpose was to speed up and improve the effectiveness of the remedies available to undertakings that take part in tender processes. These rules – which are now largely contained in the Code of Administrative Procedure, which was approved by Legislative Decree no. 104 of 2 July 2010 – introduce many innovations and, in particular, affect the procedural rules for judicial review and the powers of administrative courts.

Even more recently, the legislator has, as we shall see, intervened on several occasions with amendments to provisions in the Code, mainly with the aim of addressing the financial crisis and promoting economic development by acting on the public administration's demand for goods, services and works, which mobilises huge resources[5]. In reality, the recent measures introduced by Parliament (e.g. speeding up and streamlining the procedures for large-scale works and the involvement of private resources in the execution of public works) are not entirely new. In fact, they have been attempted several times in the past, for example with the so-called *Obiettivo* Law (Legislative Decree no. 190 of 2002), with a view to speeding up the procedures relating to

[5] Starting from *Decreto Legge* no. 70 of 13 May 2011, which was converted with amendments by Law no. 106 of 12 July 2011, there has been a series of legislative intervention: *Decreto Legge* no. 6 December 2011, no. 201 which was converted with amendments by Law no. 214 of 22 December 2011; *Decreto Legge* no. 1 of 24 January 2012, which was converted with amendments by Law no. 27 of 24 March 2012; Law no. 3 of 27 January 2012; *Decreto Legge* no. 5 of 9 February 2012, which was converted with amendments by Law no. 35 of 4 April 2012; *Decreto Legge* no. 16 of 2 March 2012, which was converted with amendments by Law no. 44 of 26 April 2012; *Decreto Legge* no. 83 of 22 June 2012, which was converted with amendments by Law no. 134 of 7 August 2012; *Decreto Legge* no. 52 of 7 May 2012, which was converted with amendments by Law no. 94 of 6 July 2012; *Decreto Legge* no. 95 of 6 July 2012, which was converted with amendments by Law no. 135 of 7 August 2012; Legislative Decree no. 169 of 19 September 2012; *Decreto Legge* no. 179 of 18 October 2012; Law no. 190 of 6 November 2012.

the major infrastructure projects and are now contained in the Code.

2. The traditional approach to regulating public contracts and the new European perspective.

In order to understand fully the new approach of the Code of Public Contracts, a brief mention of the traditional approach to the rules is required.

The idea of promoting competition between economic operators has always, at least since the start of the last century, been a feature of the rules on the award of public contracts.

However, the rules, above all, originally served the financial interest of the Administration, in that the tender process was seen as the most effective way of preventing the waste of public money. It is not a coincidence that the relevant provisions were contained in laws that regulated public accounts and, in particular, spending procedures[6]. In other words, public contracts were mainly considered with a view to properly regulating income (revenue-producing contracts, such as the sale of public property) and expenditure (purchases by ministries and other public administrations)

From the legislator's standpoint, the rules on contracts were also required to prevent corruption, which was particularly widespread in the sector. Indeed, the Italian Criminal Code has always envisaged crimes, such as bid rigging (*turbativa d'asta*), which are specifically intended to protect the freedom of action imposed on, or agreed to by, parties participating in tender processes (*libertà degli incanti*). Since corruption continues to be a major problem, the Italian legislator has recently extended the range of crimes still further, for example by punishing undertakings that attempt to condition the contents of a tender notice in their favour.

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[6] Initially, before European integration, the legislation on public tender processes was distributed among several acts of primary or secondary legislation. In general, the main acts were the Law on Public Accounts, Royal Decree no. 2440 of 18 November 1923, and its implementing regulation, Royal Decree no. 827 of 23 May 1924.

Over the last twenty years, the system defined by the provisions of public accounts legislation has been flanked and gradually superseded by the different approach of the superseding European law. In fact, in the 1980s and 1990s, European law started to take into account the impact on competition that public authorities have when they act as purchasers or grantors by introducing rules to prevent market distortion[7]. Indeed, it is not only in the interests of the contracting authority, but also in the interests of undertakings to be able to participate in the public contract market on an equal footing.

In the European authorities' view, competition serves two purposes. On the one hand, it promotes the free circulation of goods and services, including those required by the public sector, within the community, with the consequent positive effects on demand in terms of greater quality and value of the awards. On the other hand, it helps undertakings that are European in scope to develop in such a way as to allow them to compete with non-EU undertakings at a worldwide level. The creation of "European champions" was one main argument, in support of a single public contract market.

Alongside the contracting authority's interests, the position of the individual would-be contractor is also of supreme importance, i.e. the protection of its interest in not being discriminated against and being able to take part in a competitive process. In practice, Italian law has had to adjust to the new meaning of the principle of competition by providing for more guarantees of transparency and advertising, more opportunities to take part in tender processes and by neutralising any discrimination arising from the demand for exclusionary technical services.

Thus, for example, as a result *inter alia* of judicial rulings inspired by the new principles of European origin in the 1980s, special rules (which were often contained in regional laws) that only allowed undertakings registered in the relevant territory to take part in tender processes were repealed as they not only

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[7] An analysis about the effects of public award on competition is made by Office of Fair Trading, *Assessing the Impact of Public Sector Procurement on Competition*, vol. I, London 2004.

discriminated between Italian and European undertakings, but also between undertakings operating in different parts of Italy.

Another indicator of the different foundation upon which the European law on public contracts is built is the broad scope of application of the provisions that regulate tender processes. Unlike the laws on public accounts, the Code also applies to bodies governed by public law entities and, in the special sectors, to public enterprises and to private operators with special or exclusive rights, which are not public administrations in the traditional meaning of the term and not necessarily even public economic entities.

In particular, while the pro-competitive objective in the ordinary sectors goes hand in hand with the traditional objectives of the procedural rules (selection of the most efficient operator to which to assign public resources and the fight against corruption), in the special sectors identified by European law (gas, electricity, post, ports, etc.) such objective emerges even more clearly.

Indeed, operators engaged in the special sectors may be purely entrepreneurs and, therefore, the issue of the efficient assignment of public resources does not arise. Nor is there an issue with corruption, since these operators do not exercise a public function and do not manage public services. The issue of prevention and repression of corruption in relationships between private parties has long been ignored by the Italian legislator and only recently has Parliament addressed the problem (Law no. 190 of 6 November 2012).

Moreover, as in practice the special sectors gradually become more open to competition, there is less need to apply the rules on tender processes. In fact, the special sectors have been traditionally run as monopolies by the winning entities, which, without the mechanism of the public tender process, could distort competition. Therefore, in the event that these sectors are liberalised and are no longer run as monopolies, the role of the tender process in promoting competition is superfluous as the market dynamics themselves will neutralise the winning bidder's potential power to distort the market.

The protection of competition as the most important fundamental principle of the rules on public contracts, which has also been reiterated on several occasions by the European Court of Justice, has emerged as a primary public interest which is

expressed by numerous provisions in the Code. Indeed, the Italian Constitutional Court emphasised the pro-competitive approach of the Code when it rejected a series of petitions submitted by the Regions which claimed that the Code was detrimental to their legislative competence (judgement no. 401/2007). The *Consiglio di Stato* was even more peremptory, when it stated that the pro-competitive approach has "*resulted in the end of the conception that the procedure for the selection of contractors should be exclusively dictated by the administration's interests* " (see Cons. St. Plenary Session, judgement no. 1 of 3 March 2008).

3. The impact of European Law.

At a national level, this change of perspective has also had an impact on the methodological approach to the regulation of public contracts in the Code.

On the one hand, the traditional conception of the rules on public contracts relied on a complex system of strict rules that ruled out any discretion (for example, in the identification of anomalous bids). Instead, the pro-competitive vision of European law grants the contracting authorities more flexibility by introducing opportunities for cooperation, i.e. interaction with the private entities with the aim of rectifying the one-sidedness of the information available. In fact, the administration is often not in the best position to know in advance the actual conformation of the goods or the services that it wishes to procure. This occurs when such goods or services are complex and the administration is not able to assess all the features. The most obvious case is that of the "competitive dialogue"[8], which is permitted under European law, but is disliked by the Italian legislator and the courts as it is deemed to be too flexible and to jeopardise the principle of equal treatment of the undertakings.

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[8] Competitive dialogue is an important new kind of procedure characterized by a flexible structure. About competitive dialogue see C. Kennedy-Loest, *What Can be Done at the Preferred Bidder stage in Competitive Dialogue?*, in Public Procurement Law Review, 15, 317, 2006; A. Rubach-Larsen, *Competitive Dialogue*, in R. Nielsen and S. Treumer (eds), *The New EU Public Procurement Directives*, Djøf, 2005; S. Treumer, *The Field of Application of Competitive Dialogue*, in *Public Procurement Law Review*, 15, 307, 2006.

Moreover, according to the traditional approach, which is based on strict rules and inspired *inter alia* by a lack of confidence in the moral integrity of the contracting authorities and the undertakings, formal compliance with the *lex specialis*, which comprises detailed rules that guarantee the *par condicio,* was more important than the need to allow the administration to assess the best-value choice on the basis of more substantive criteria. Frequently, bids submitted in breach of formal provisions of little importance envisaged by the *lex specialis* (for example, regarding the manner in which certain requisites are certified) were excluded from the procedure with the bidders being denied any chance to correct them. As a result, the contracting authority was deprived of the opportunity to compare the contents of a greater number of bids.

On the contrary, the approach adopted by the European directives envisages a different balance between discretion and formal rigour, with the administration having greater room for assessment and flexibility. It also permits dialogue with the undertakings for the purposes of acquiring information (as is the case with the competitive dialogue procedure). From this perspective, discretion is a value that should be cultivated as it permits the administration to make the best choice in relation to the actual individual circumstances. Moreover, the formalistic application of the rules contained in the *lex specialis* is discouraged.

The Code expresses this new balance in several central institutions: the criterion of the economically most advantageous bid as opposed to that of the lowest price; the gradual specification of the bid assessment criteria; the discretionary assessment, including consultation with the tenderer, of the verification of anomalous bids. In these and in other cases, the contracting authorities have considerable room for discretion, which the administrative courts normally tend to respect.

Another defect of the traditional Italian approach to the rules on public contracts is, as mentioned, the formalistic application of the rules. This type of approach favours the exclusion of bids with even minimal formal errors and may lead to the annulment of entire procedures which are vitiated by errors that are, in reality, not fundamental.

A more substantive vision, based on the new European approach, is emerging in some rulings by the *Consiglio di Stato* and

the Regional Administrative Courts with regard to exclusionary clauses, which are envisaged by many calls to tender and which provide that any failure to comply with any clause of the *lex specialis* will automatically result in exclusion from the process.

Indeed, a recent tendency by the courts is to restrict this type of "*error hunt*". According to the most recent ruling, formal irregularity does not imply the exclusion from the tender process of operators which essentially meet the envisaged requirements (according to the "innocuous falsehood theory").

The European law has conditioned two further aspects of the Italian rules on public contracts.

In the first place, the civil liability of the public administration for unlawfully awarding public contracts is greater than that envisaged by the Italian Civil Code and applied by the administrative courts with regard to the issue of unlawful measures. The latter is construed as a case of tortious liability of the public administration pursuant to article 2043 of the Italian Civil Code for which wilful intent or negligence is required on the part of the agent. However, in the public contract sector, a contracting authority may be held liable even if the administration has not been shown to have been negligent, precisely to ensure the effectiveness of the protection envisaged by the European directives. Recently, the *Consiglio di Stato*[9] expressly upheld, exclusively with regard to the public contract sector, the concept of objective liability, in accordance with the indications of the European Courts. As a consequence, any undertaking that has been unlawfully excluded from a tender process and is unable to obtain judicial assignment of the contract (specific performance) will automatically receive compensation, which is an important incentive for the administration to manage the process properly.

In second place, from a procedural standpoint, Directive 2007/66/EC (the New Remedies Directive)[10] made the Italian legislator introduce a special proceeding for public contracts,

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[9] *Consiglio di Stato*, Sect. V, judgement no. 5686 of 8 November 2012.

[10] An analysis about the New Remedies Directive is given by J. Golding and P. Henty, *The new Remedies Directive of the EC: standstill and Ineffectiveness*, in *Public Procurement Law Review* 17, 146, 2008; P. Henty, *Is the standstill a step forward?: The proposed revision to the EC Remedies Directive*, in *Public Procurement Law Review* 15, 253, 2006.

which envisages very different procedural rules and powers of the administrative courts (now contained in articles 120-124 of the Code of Administrative Procedure). As mentioned, the proceeding is particularly rapid (with procedural deadlines reduced to a minimum) and is intended to guarantee the effectiveness of the remedy either through correction of the infringement that caused injury to the interests or through full compensation. Moreover, administrative courts may issue rulings with a range of contents, such as, for example, annulling the contract and establishing that the annulment is not retroactive.

Under Italian law, undertakings in the public contract sector and, more generally, the application of the competitive principles contained in the Code enjoy an additional level of organisational and institutional protection, which is not required by European law. The first few articles of the Code regulate the organisation and the tasks of the Public Contract Regulator, which was set up to monitor contracting authorities' activities, to disseminate best practices and to resolve certain disputes between undertakings and contracting authorities out of court. The Code has extended the Regulator's field of action, which was originally limited to public works, to include the entire public contract market. The very recent anti-corruption law (Law no. 190 of 6 November 20120) provides that the Regulator has to collect and compare on its website a large amount of data regarding contracts awarded by the contracting authorities (winning economic bids, number of participants, etc.), so as to allow more effective supervision of the public contract market. The regulator's action is accompanied by the prerogatives of the Italian Antitrust Authority which has on several occasions used its power to report anti-competitive legislation and practices to the Government and Parliament and to request amendments.

4. The most recent legislation.

As mentioned, the economic crisis has led to numerous legislative interventions on the framework outlined above, which have amended various provisions of the Code of Public Contracts, especially since May 2011 (up to the aforementioned very recent anticorruption law).

Some of the amendments are of a structural nature in that they have an impact on aspects of public tender processes in accordance with the four guiding principles that are destined to condition the subject for a long time to come: the reduction of the costs of public works; the reduction of the time taken to execute public works and the simplification of procedures; a more effective supervisory system; the reduction of disputes.

Thus, for example, restrictions have been introduced on the objections that an undertaking that has been awarded a public works contract may raise during the execution of the works (which may give rise to an increase in the costs for the contracting authority) and an expenditure ceiling has been envisaged for "variations" during the execution of the works, which often make the execution of the works more costly; the threshold amounts envisaged for the award of contracts through the negotiated procedure have been raised; there is a strict list of causes of possible exclusion from the award procedure and the contracting authorities are prohibited from adding others in the calls for tender; there are sanctions for parties that start "reckless" disputes, i.e. which bring manifestly unfounded legal actions.

Particular consideration has been given to small and medium-sized enterprises in the legislation that has been issued to address the economic crisis. In particular, the legislator has issued provisions with the force of general principles on the subject that require contracting authorities to subdivide, where possible and economically advantageous, the contracts into functional lots so as to encourage small and medium-sized enterprises to take part in the tender processes. Moreover, the execution of large infrastructure works, and the associated supplementary or compensatory works, must guarantee procedures for the involvement of small and medium-sized enterprises (article 2, paragraphs 1-*bis* and 1-*ter* of the Code, introduced by article 44, paragraph 7, Law no. 214 of 2011).

Various criticisms may be made with regard to these last provisions.

Firstly, provisions of this type appear to go against the original plan on which the European law on public contracts is based, i.e. the need to create "European champions" that are increasingly able to compete on a worldwide scale. Secondly, although the fragmentation of public contracts may have a

positive impact on competition as it increases the number of participants and reduces entry barriers and risks of collusion between undertakings, it could also produce side effects with regard to competition. The creation of contracts with a low economic value makes such contracts less attractive, with the consequence that increasingly fewer operators will be willing to take part in tender processes outside their traditional field of action. Therefore, if it is always the same small and medium-sized enterprises that take part in the processes, this will have potentially negative effects on relations between contracting authorities and contractors, in terms of quality and efficiency of the performance of contracts[11] and also on the efficiency of the undertakings themselves, which will have no incentive to develop their organisation or to expand.

Indeed, according to the Italian Antitrust Authority, subdividing contracts into lots is not always compatible with the pro-competitive principle. In particular, there are two restrictions which would have a beneficial effect on the subdivision of contracts: the number of lots should always be lower than the number of undertakings that may be expected to take part in the tender process; there must be no limit on the number of lots that each participant may be awarded as "*a limit such as this could encourage forms of coordination between the participants of the tender process with the objective of dividing up the lots for which the bids will be submitted* ".

Therefore, the introduction of the new provisions raises certain doubts, In fact, if interpreted too strictly in favour of small and medium-sized enterprises, it could distort competition.

5. Brief conclusions.

In conclusion, the approval of the Code of Public Contracts, in implementation of the European Directives, has changed the traditional approach of the Italian legislator to the regulation of public contracts as the Code is less inspired by need to protect

[11] In this brief article there is no time for discussing about an important subject such as the performance of public contracts. For a good analysis focused on this theme, see A. Giannelli, *Performance and Renegotiation of Public Contracts*, 2013, on www.ius-publicum.com.

competition and more favourable to undertakings. Moreover, there is still a tendency to interpret the provisions on the tender processes in a formalistic manner and, where possible, contracting authorities prefer tender processes with a low level of discretion, as is demonstrated by the fact that institutions such as the competitive dialogue are almost never used in practice. Finally, the legislator continues to introduce amendments to the Code, sometimes with objectives that are inconsistent with the general framework of the latter.

In essence, the public contracts sector is still unstable from a legislative perspective and the application of the rules is characterised by uncertainty and variations. All this has negative repercussions on the activities of the contracting authorities, the undertakings and, more generally, legal operators. Despite the attempts to discourage judicial disputes, even through remedies of dubious appropriateness (such as the increase in the taxes and costs of filing applications), the level of litigation is still extremely high.

At this point, it would be best to impose a legislative "moratorium" in order to allow the rules to stabilise. Instead, there is much that should be done at a sub-legislative level to maximise the spread of best practices and to improve the professionalism and technical expertise of the contracting authorities. The Public Contracts Regulator has a fundamental role to play in all of this and it has now been given sufficient powers to monitor the public contracts market.

SHORT ARTICLES

THE NEW SYSTEM FOR RECRUITING PROFESSORS IN ITALIAN UNIVERSITIES: STRENGTH AND WEAKNESSES

*Claudio Franchini**

TABLE OF CONTENTS: 1. Inconsistency and contradictoriness of the legislative interventions on the recruitment of university professors. – 2. The new system introduced by Law no. 240/2010. – 3. Fantasy of the lawmakers and myth of the reforms.

1. Inconsistency and contradictoriness of the legislative interventions on the recruitment of university professors

The various regulations that have governed the system for recruiting university professors over the years have always been heavily criticised. Hence, the intervention of lawmakers has always been invoked. And, unfortunately, the inconsistency, contradictoriness and ineffectiveness of the solutions adopted were always borne out. Tracing the evolution of the regulations makes this easily clear.

For a long period, starting in 1859 and lasting into the late Seventies of the last century, the regulations on competitions for university chairs remained basically unaltered. During this time span, competitions were announced upon request by the individual departments concerned; judging committees were made up of five professors elected from among professors of the subject; the judgements were to be made and three suitable parties indicated, who may then also be called by other universities.

Not until the years 1979-80 was the selection system changed in order to eliminate the undue influence of academic corporations on the choices of the committee members. Thus, in one way, it was established that the recruitment would take place through a national, and no longer local competition based on

scientific qualifications and, in another way, that the judging committees be appointed based on mixed criteria, election of twice the number of candidates by professors of the subject and, subsequently, lots drawn for the exact number of candidates. However, in their practical implementation, the new regulations revealed various critical areas: the impossibility to plan the competition, very lengthy times for carrying out the procedures, randomness of choosing committee members, rather limited role of the universities concerned and a high number of conflicts.

As a consequence, a further regulatory intervention was required with the intention of ensuring the " standardisation" of the competitions and definition of new rules for carrying out the comparative procedures. So, in 1998, the rules were changed once again: the competitions were decentralised and jurisdiction over the calling of the competition announcement and the carrying out of the comparative evaluation was ascribed to the individual universities. Provided for, more specifically, was that the committee be composed of an internal member appointed by the department concerned and four other components, elected on a national level, whose task it was to identify up to three suitable candidates, who, over the three years thereafter, could be called up by any university. Once again, however, the system did not offer satisfactory results, due both to practically unending rounds of voting and limited selections, in which excessively prevailing local interests assured a privileged position for the "internal" candidate, with possible "exchanges" with other "academic schools" interested in the remaining preselected ones. It is interesting to note that this system was introduced by a centre-left Government and retained, thereafter, by a centre-right Government.

In 2005, the regulations on this subject were changed again, with the purpose of eliminating rampant localism, pathological logics of co-optation within individual academic groups and scant meritocracy in the competition procedures. A different recruitment system for professors was introduced, based on a process divided into two phases. Firstly, the candidate was to have attained the "national scientific qualification", on the basis of procedures carried out on a State level, in consideration of the demands of the individual universities, due to judging committees appointed using mixed criteria (election of a triple number of

members and drawing lots). Secondly, there was to be a comparative evaluation procedure for selecting the persons to be called to fill the positions announced, carried out by each university on the basis of its own, in-house rules. A legislative measure, subsequently issued, further specified the principles and criteria required for attaining the national scientific qualification, but the ministerial decrees for implementing the law were not adopted. The result was that the latter could not have any effect.

Within this context, the fantasy of the lawmakers is abundant: in fact, in 2007 an inevitable decree-law was adopted that temporarily removed the block on the situation, thus allowing universities to announce other competitions using the previous rules. The result was a paradoxical situation: instead of introducing the provisions necessary for permitting the application of a law approved by Parliament, the Government preferred acting with urgency. This way an epic undertaking was accomplished: the resurgence of a regulation was enabled, that of 1998, that had been repealed by the law of 2005. Hence, once again, two Governments with different political ideologies agreed on the formation of this regulation, in an expression of a bipartisan policy.

On this matter, however, there was no end to the surprises. To cope with the block on competitions that was created, the n^{th} law by decree was adopted in 2008. It actually intervened on the standard competition procedures, by changing the rules of composition of the judging committees, with all due respect to administrative legitimacy. Specifically, it provided that judging committees be formed by the appointed member as well as four regular professors chosen at random from a list of three times the number of committee members with respect to the total committee members necessary.

The last act of an event was reached that matches any theatrical performance. At the close of 2010, and at the end of a long parliamentary debate, law no. 240 was approved (so-called "Gelmini law", after the proposing Minister). One of the aspects, amended by the reform, was again that of recruiting university professors, although the choices made at the time were substantially in line with those outlined by the law of 2005.

2. The new system introduced by Law no. 240/2010

The current system is founded on a two-phase process. The first is the national scientific qualification: during this phase, the candidates are judged by a single national committee, for each sector of the competition, so as to verify their suitability for performing the function of first or second level professor, without setting any limit to the number of competitors to qualify. The second phase takes place at the individual universities: it allows for calling up professors, following a specific comparative procedure, in which only professors who have attained the national scientific qualification may participate.

Specifically, article 16 of law no. 240/2010 instituted the national scientific qualification, hereby establishing its basic rules; this law referred to one or more rules to control the methods for performing the procedures for attaining the qualification, and defined the criteria; it provided that the criteria and parameters be set forth and differentiated by function and subject field, in order to analytically evaluate the qualifications and scientific publications presented by the candidates as well as the criteria aspiring committee members were to comply with in preparing their résumés.

In short, the national scientific qualification is accredited following an analytical evaluation of titles and scientific publications, expressed on the basis of criteria and parameters differentiated by function and subject field, defined in the decree by the Minister, without fixing the number of competitors that could qualify. The qualification does not grant a right to a permanent appointment, but only constitutes a necessary condition, although not sufficient, likened to professional qualifications, since the individual universities are called to choose autonomously: a kind of compulsory "prerequisite" for participation in the recruitment procedures carried out by the individual universities.

Several months passed before the new system was made effective and the ministerial decrees for implementing the law were adopted, so that the first announcement of the national scientific qualification could not be called until late 2012.

Among other things, the itemised rules sanctioned by the legal implementation decrees provided that: the procedures for conferring the national scientific qualification be called annually,

without fail, in the month of October; the term of qualification be four years, starting from its attainment; non-attainment of the qualification preclude participation in the procedures called for the same competitive sector of the same level, or a level above, over the next two-year period; the procedures be carried out at universities identified by drawing lots; the pre-established process for forming a national committee for each competitive sector be initiated during the month of May; said committee be composed of five members drawn from a special list made up of the professors who presented the request; the aspiring committee members respect the criteria and parameters of the scientific qualification, consistent with those requested of the candidates to the qualification for the first level; the confirmation of the qualification of the aspiring committee members be carried out by National Agency for the Evaluation of Universities and Research Institutes (ANVUR); the fifth committee member be chosen at random from within a special list, composed of at least four academics or experts, working at universities in a country belonging to the Organisation for Economic Co-operation and Development (OECD). In addition, it provided that, for evaluation purposes, internationally recognised parameters be used, that is, specifically, bibliometric-type indicators in the competitive sectors for which they are available; the maximum number of publications that each candidate may present, for the purpose of attaining the qualification, be fixed, but differ depending on the various subject fields; the process for forming the committee be by drawing lots within a predefined list; it be specified that only persons who hold a scientific qualification consistent with the criteria and parameters set forth by the regulations, pertinent to the competitive sector, and who have published their résumés on the Ministry of Education, University and Research site, may form the committee.

Moreover, alongside this means of access, another was provided for, although with a partial time limitation. It dealt with the provision in article 24 of law no. 240/2010 referring to new fixed-term researchers and open-ended researchers as well as associate professors already on the job. It was established that recruitment of the latter occur through a simplified procedure, without any comparative evaluation, but directly after judgement

by the pertinent university, if they possessed the national qualification.

3. Fantasy of the lawmakers and myth of the reforms

Now, two years after its coming into effect, can a judgement be made on the recruitment system introduced by law no. 240/2010? Is it possible to verify, whether the new means of access has compensated for the negative aspects of the previous situation, that is, the contradictoriness of the guidelines, absence of an overall evaluation of the problem, ill-omened consequences of the lack of competition among universities and existence of a limited rate of mobility?

After having stated that the qualification phase is still in progress, since the committees were not formed until late 2012, one can already make observations, but limit them to the most relevant points.

As regards the national scientific qualification, a forecast can be made that the procedures be called without the need of request by the universities concerned, that is, without any limitation or planning of accesses thereto. Thus, the number of "national scientific qualified persons" is open and disregards the choices of the individual universities. The elimination of the connections between the granting of tenure and the requirement of calling for competitions results in two risks: aggravation of the problem of the quality of the selection, since there is less competition (and, hence, the results are inferior), and limitation of future access by young researchers, who may be driven towards less uncertain paths, there being no secure prospects.

As for the criteria and parameters to be used for the evaluations, there have already been considerable problems in identifying them, taking into account that discussions have been going on for years about the possibility of fixing objective evaluation methods and, specifically, introducing them into the field of humanities.

Regarding the committee for attributing the national scientific qualification, the participation of an academic from a foreign university seems impractical, to say the least: in fact, taking into account the arduousness of the task and, for some

subjects, the language barrier, acquiring accessibility could be quite gruelling.

As for the granting of tenure, a general rule is missing that imposes recourse to parties in the position of being a third party and of neutrality: in fact, provision is made that the public selection procedures, with the comparative evaluation of scientific publications, résumé and teaching activities of the candidates, be regulated by the rules of the individual universities and the call made based on a proposal of the competent department and approved by the board of directors.

In summary, according to the intentions of the lawmakers, the new system is supposed to ensure a balance of the various national and local exigencies, in order to confirm the principles of merit and competition. However, it is doubtful that this objective can really be reached.

Primarily, it is doubtful that an effective selection can be ensured, since the recruitment decisions are even less subject to restrictions, hereby leaving wide discretion to the individual universities regarding the procedures, and, thus, the possibility of conditioning continues and makes the elimination of so much regrettable localism uncertain, to say the least.

In the second place, it is doubtful that the standardisation of university competitions will be ensured, seeing as the possibility of realisation of the new recruitment system shall be linked to resources to be earmarked for the sector on the basis of the political policies of future Governments. This will translate into an objectively difficult situation, considering the current public financing conditions, because a sufficient number of resources from the individual universities will not result from the national qualification phase.

And, finally, it is doubtful that the attempt to precisely define the times for completing the competitive procedures will be successful: it is enough to remember what was verified during the first application, as refers to the times necessary for starting up the procedures for forming the committees and attaining the qualification.

In conclusion, the regulations for recruiting university professors shows that lawmaking is once again a victim of the myth of the reforms, with the consequence that they had once again to tackle the situation with imaginative insight.

Substantially, a choice was made to follow up on the outline of the law of 2005, but introduce extensive amendments, when it may have been more timely to follow a different path and implement the existing law rather than making a new one, naturally with some necessary supplementary interventions.

Norberto Bobbio used to illustrate the vicissitudes of human life with three metaphors: the fish in the net, the fly in the bottle and the labyrinth. The fish in the net fights to get out, but there is no way out. The fly could get out of the bottle, but he's stupid and cannot understand where the opening is. The labyrinth has an exit, but one must be intelligent to find it. It makes one wonder which of these metaphors best describes the conduct of lawmakers on matters of recruiting university professors, even if, unfortunately, it seems that there are few uncertainties about the answer: excepted the first, the other two remain.

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The great debate on the competition system is dealt with in detail on various internet sites that are easily accessed by means of any search engine. Among these sites is *Roars - Return on Academic Research* (at the web site *http://www.roars.it*), where one can find many contributions by A. Banfi, as well as the Research Institute on public administration – Irpa – where there is a forum on the university; various documents can also be found on the same site.

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amministrativo, in Associazione italiana dei professori di diritto amministrativo, *Annuario 2007*, Napoli, Editoriale Scientifica, 2007, 281 et seq, as well as the remarks contained in various contributions published in *Munus. Rivista giuridica dei servizi pubblici*, 2011, no. 3, 567 et seq.

The Magna Carta Foundation published some proposals for reforming the university system, entitled *Più merito nell'Università*, Roma, March 2009, which can also be read on the web site *www.magna-carta.it*. On this subject, one can also consult the Vision report entitled *Italian and European Universities within the Innovation Global Market: Internationalization, Governance and Ranking*, presented to the Chamber of Deputes on 20 April 2009 (see the web site *www.vision-forum.org*), as well as, finally, *Dossier CUN Giugno 2012 no. 1*, edited by the Italian National University Board, entitled *L'abilitazione scientifica nazionale*, which contains a wealth of documents and regulations on the subject.

Of singular importance is the reading of the document from the European Union Commission, entitled *European Charter for Researchers and a code of conduct for the recruitment of researchers*, Comm. 2005/251, Bruxelles, 11 March 2005.

Statistical data on the teaching staff at universities is derived from the site of the Ministry of Education, university and research (*http://statistica.miur.it*) and from the National Committee for the evaluation of the university system (*http://www.cnvsu.it*).

IN PRAISE OF SOVEREIGNTY

*Tommaso Edoardo Frosini**

Abstract

This article analyzes the concept of Sovereignty, that is an ever-changing one: whilst it was initially absolute and exercised by one single power, over the course of history it has been associated with a territorial dimension involving the government of the State, following which it came to be vested in the people according to the precepts of liberal constitutionalism. Therefore, popular sovereignty must be regarded as a keystone principle of contemporary liberal democracies as all forms of citizen participation are grounded on it, including not only the right to vote but also fundamental rights and constitutional freedoms.

1. For some time there has been talk of sovereignty in decline, or even of sovereignty eroded by supranationality or smashed on the rocks of globalisation (or by "walled" states[1]). The long-standing concept of sovereignty has been placed under stress by the demands of new sovereign powers, which have not yet been well defined but are located outwit the territory of each individual state. These assertions are made in the conviction that certain elements of state sovereignty are currently being detached in favour of other institutions, from supranational bodies through to the global capital markets. The crisis of sovereignty may also be discerned in the economic and financial crisis of nation states, or in the loss of control over the management of national accounts.

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1 See, W. Brown, *Walled States, Waning Sovereignty*, Zone Books, New York 2010

Thus, an already established sovereignty of the European Union is invoked, along with the relative loss of decision-making powers by the Member States. This process is legitimised by the Treaties which abolished national currencies in favour of a single European currency, or created the figure (and status) of the European citizen, vested with fundamental rights and judicial guarantees. Whilst all of this may be sustainable from a factual and legal perspective, does it really mean the end of sovereignty? Moreover – and above all – which sovereignty do we mean here?

2. Sovereignty is a difficult concept, which has its roots in a demanding and closely-argued theoretical debate starting from Thomas Hobbes and Jean Bodin[2]. The characteristics of sovereignty may be identified in the following terms, albeit in summary form: supremacy, perpetuity, decision-making power, absoluteness and completeness, non-transferability and the determinacy of jurisdiction.

The concept of sovereignty is an ever-changing one: whilst it was initially absolute and exercised by one single power, over the course of history it has been associated with a territorial dimension involving the government of the State, following which it came to be vested in the people according to the precepts of liberal constitutionalism. The 20th Century demonstrated the Janus face of sovereignty, as initially state sovereignty and subsequently popular sovereignty. Whilst state sovereignty characterised a political doctrine rooted in totalitarianism (Fascism conceptualised solely and exclusively State sovereignty), popular sovereignty allowed for a re-expansion of the rights and freedoms of the sovereign individual through institutional pluralism. The Constitutions created in the latter part of the 20th Century, which were rooted in liberal democracy, place the principle of popular sovereignty at the apex of their constitutional architecture (as a kind of *Grundnorm*), because a democratic and liberal constitution cannot have any meaning unless it draws upon the source of sovereignty, which lies with the people: all powers emanate from the people and are exercised in the forms and subject to the limits

2 The debate in D. Quaglioni, *La sovranità*, Roma-Bari 2004

of the constitution and of laws. Thus, *popular sovereignty is interrelated with constitutionalism*[3].

3. In order to appreciate the decline of sovereignty and its resurgence, it is necessary to look back into the past and revisit the classic contributions to legal thinking from the 20th Century. Hans Kelsen concluded his magnum opus, *The Problem of Sovereignty and the Theory of International Law*[4], with a suffered invitation to renew the concept of sovereignty at root because «this is the resolution within our cultural conscience which we need first and foremost!». However, the removal of the concept of sovereignty was a consequence of the assertion of the Kelsenien theory of the pure theory of law, under which the only sovereign is the legal system as a whole, as a logically coherent single unit. Kelsen writes that «sovereignty cannot mean – whether consciously or not – anything other than the fact that the coercive order which is known through law and which is customarily personified as the State is premised as the supreme autonomous being». However, it should be pointed out that it was subsequently Kelsen himself, more than forty years later, who ended up asserting in a paper prepared by him for the second *Österreichischen Juristentag* in 1964 entitled *Die Funktion der Verfassung*[5] that the Constitution is the genuine *Grundnorm* of a legal order, and therefore that sovereignty is vested not in the legal order as a whole, but in the Constitution, from which the legal system emanates through the *Stufenbau* system.

Kelsen's initial theory – i.e. that from 1920 – was opposed, as is known, by Carl Schmitt with his claim that the «sovereign is the body which decides on a state of exception», and the doctrine of decisionism. It is not the intention of this paper – and it would indeed not be possible – to provide an account of the stages of Schmittian thinking, which has now moreover been enriched by a vast literature; however, the renowned and famous phrase that the «sovereign is the body which decides on a state of exception» –

3 See, T.E. Frosini, *Sovranità popolare e costituzionalismo*, Milan, 1997

4 H. Kelsen, *Il problema della sovranità e la teoria del diritto internazionale* [1920], tr.it., Giuffrè, Milano 1989; Id., *The Principle of Sovereigny Equality of State as a bases for international organization*, in *The Yale Law Journal*, vol. 53, 1944

5 H. Kelsen, *Die Funktion der Verfassung*, in *Forum*, Heft 132, 1964

which appeared in the Schmittian volume on *Political Theology* from 1922[6] – must in my view be read in conjunction with the equally renowned and famous Article 48 of the Weimar Constitution, which provided for the issue of presidential *Reichsgebiete-Verordnungen*, the abuse of which led to Germany's "shaky democracy", as it has been most effectively defined[7]. Thus, whilst Kelsen called for the twilight of sovereignty, Schmitt by contrast discerned a decisionist revival. Within these countervailing *Weltanschauungen*, the matter under discussion regained its force, specifically the concept of sovereignty, or its theoretical and political nature and its place within constitutional theory.

4. It may indeed be asserted that the concept of sovereignty revived precisely with the Weimar Constitution and through the works of scholars from the "Weimar laboratory" (including, in addition to Kelsen and Schmitt, Smend, Preuss, Triepel, Fraenkel and Kirchheimer). It revived because it drew strength from that dialectic between relativisation and absolutisation which had strongly distinguished the history of the idea of sovereignty in one sense or the other[8]. In fact, the democratic Weimar Constitution asserted that "sovereignty emanates from the people", thus depriving sovereignty of its typical configuration as a power originating from above and rather vesting it, within the context of a State founded on a democratic and pluralist legal order, with the characteristic of legitimacy originating from below. Furthermore, the strong winds of totalitarianism which were blowing through Europe in the 1930s, and which culminated precisely in Germany, were able to bend this notion of sovereignty back towards the original concept, understood as a strong and absolute decision adopted by a single subject vested with that power. However,

6 C. Schmitt, *Teologia politica, Quattro capitoli sulla dottrina della sovranità* [1922], tr.it. in Id., *Le categorie del "politico". Saggi di teoria politica*, a cura di G. Miglio e P. Schiera, il Mulino, Bologna 1972, 29 ss.

7 V. Frosini, *La democrazia pericolante (Note sull'art. 48 della Costituzione di Weimar)*, in *Scritti in onore di Egidio Tosato*, vol. I, Giuffrè, Milano 1984

8 See, P. C. Caldwell, *Popular Sovereignty and the crisis of German Constitutional Law. The Theory and Practice of Weimar Constitutionalism*, Duke University Press, Durham and London 1997; for a critical to "Weimar doctrine", M.S. Giannini, *Sovranità (diritto vigente)*, in *Enc. dir.*, vol. XLIII, Giuffrè, Milano 1990

with the advent of the liberal democratic constitutions in the aftermath of the Second World War, it became necessary to move beyond – and thus to leave behind – this conception associated with a system of government in which there must in all cases be one individual who decides, or worse who commands, and who will therefore be the sole and only sovereign. Within liberal democratic constitutional systems, there is no space for absolute authority, for the myth of the sovereign decider who grasps the sceptre of power. In fact, liberal democracies are such precisely because they do not recognise one single power, but rather a multitude of mutually divided powers, which are structured and arranged within a pluralist society. Within this perspective, the meaning or semantic scope of the concept of sovereignty must be radically different; and it is for this reason that it is vested in the people, understood not as a politically unitary subject in whose will the general interest (which is destined to prevail over each individual desire) expresses itself, but rather as a subject comprised of a multiplicity of individuals, groups and small social bodies; moreover, it will retain this multi-faceted nature also after expressing a unitary position through elections. The recognition and assertion of popular sovereignty led to a significant reduction in the scope of State sovereignty, which remains only with regard to international relations with other states. However, at present this aspect too is on the wane[9].

5. Whilst it is certain that sovereignty has entered a twilight age, this can only relate to one of its two "faces", namely state sovereignty. This therefore leaves us with popular sovereignty. This must be understood essentially as a general principle which determines the forms of legal, social and political participation of citizens in the consolidation of a liberal democratic State, and which renders participation effective through constitutional structures that enable the people to express their views in both individual and collective form. It is clear that this can only occur within the confines of the Constitution because, as Carlo Esposito writes, «outwith the Constitution there is no sovereignty, but

9 A. Chayes and A.H. Chayes, *The New Sovereignty: Compilance with International Regulatory Agreements*, Harvard University Press 1998; for new prospective, G. Della Cananea, *Al di là dei confini statuali*, il Mulino, Bologna 2009

popular arbitrariness, there is no sovereign people, but the masses with their passions and weaknesses»[10]. It is therefore necessary to place the sovereign people within the Constitution, letting go of the original view of the people as the author of the Constitution, and grafting it onto the democratic principle of popular sovereignty as one of the fundamental principles of the Constitution located alongside the other essential principle of the inviolability of fundamental rights. This means that the sovereignty of the people – understood as a multiplicity of individuals, groups and small social bodies – represents a form of pluralism reaching far beyond the sole framework of the structure of government and operating in a complex manner within various institutions – including specifically local bodies – in which the interests of citizens may be satisfied. This is because a complex society cannot and must not look for solutions to its legitimate needs solely and exclusively within the political and parliamentary circuit. To do so in fact would be tantamount to enshrining the primacy of politics, and even attributing to it a unity and centrality which appears to contrast with an open society acting within a constitutional State where it is the rights and freedoms of citizens which have genuine primary status.

6. The principle of popular sovereignty permeates the entire constitutional order and by is by no means exercised solely during elections of members of Parliament. Therefore, popular sovereignty must be regarded as a keystone principle of contemporary liberal democracies as all forms of citizen participation are grounded on it, including not only the right to vote but also fundamental rights and constitutional freedoms. In fact, sovereignty cannot be encapsulated solely within representation: whilst it is certain that elections represent an essential moment within a democracy, they are only one of the manifestations of the process of the formation of the popular will, which is expressed spontaneously in elections, but the contents of which are nourished from the rights and freedoms according to which the citizen is sovereign of himself, the exercise of which

10 C. Esposito, *Commento all'art. 1 della Costituzione*, in Id., *La Costituzione italiana. Saggi*, Cedam, Padova 1954, 6 ss.

constitutes a permanent expression of popular sovereignty. This is a vision which enables the people to be conceived of as sovereign *within* the Constitution, as the only addressee of its terms through a form of constitutional pluralism in which the people – either as individuals or as organised groups – take on a central role within the constitutional system. Therefore, the content of popular sovereignty results from the overall body of constitutional legal interests which citizens are empowered to exercise either individually or in associate form. It is considered that, at the present moment in history, this is a model which provides a suitable basis upon which to revitalise the principle of popular sovereignty, and also to praise it in a convincing manner.

BOOK REVIEW

THE EUROPEAN UNION AFTER THE LISBON TREATY

Matteo Gnes[*]

Hermann-Josef Blanke & Stelio Mangiameli (eds.), *The European Union after Lisbon. Constitutional Basis, Economic Order and External Action*, Berlin, Springer, 2012, p. xix, 582

How has the European Union changed after the enactment of the Lisbon Treaty? What are the perspectives of the European Union in the light of a federalist development? Which (new) principles govern the European Union since the entry into force of the Lisbon Treaty? Those are few of the questions that the book edited by Hermann-Josef Blanke and Stelio Mangiameli seeks to answer.

Many books and articles have been published since the signing of the Lisbon Treaty in December 2007 (and its entry into force on 1 December 2009). Among the many books published, most deal with specific aspects of the Lisbon Treaty (e.g. as concerns the external dimension of the Union; the protection of fundamental rights; the role of Member States or of national parliaments, etc.), and quite a few try to provide a general and comprehensive picture of the institutional improvements.

With the exception of few but quite significant monographs (as those by P. Craig, *The Lisbon Treaty. Law, politics, and Treaty reform*, Oxford, Oxford University Press, 2010; J.-P. Piris, *The Lisbon Treaty. A legal and political analysis*, Cambridge, Cambridge University Press, 2010; P. Bilancia, *The dynamics of the EU integration and the impact on the national constitutional law. The European Union after the Lisbon Treaties*, Milano, Giuffrè, 2012 and G. Guarino, *Ratificare Lisbona?*, Firenze, Passigli, 2008), most of the studies are the result of collective researches or the publication of conference proceedings: e.g. D. Ashiagbor, N. Countouris and I. Lianos (eds.), *The European Union after the Treaty of Lisbon*,

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Cambridge, Cambridge University Press, 2012; A. Biondi and P. Eeckhout (eds.), *EU law after Lisbon*, Oxford, Oxford University Press, 2012; S. Dosenrode (ed.), *The European Union after Lisbon. Polity, politics, policy*, Farnham, Ashgate, 2012; F. Laursen (ed.), *The EU's Lisbon Treaty. Iinstitutional choices and implementation*, Farnham, Ashgate, 2012; M. Trybus and L. Rubini (eds.), *The Treaty of Lisbon and the future of European law and policy*, Cheltenham, Edward Elgar, 2012; M. Carbone, *National politics and European integration. From the Constitution to the Lisbon Treaty*, Cheltenham, Edward Elgar, 2010; F. Bassanini and G. Tiberi (eds.), *Le nuove istituzioni europee. Commento al Trattato di Lisbona*, Bologna, Il Mulino, 2008 (and 2010); S. Griller and J. Ziller (eds.), *The Lisbon treaty: EU constitutionalism without a constitutional treaty?*, Wien - New York, Springer, 2008.

As in most of the other collective studies, also in the reviewed book an introductory chapter providing for hints and the common thread, or leitmotiv, of the collected essays is not included. In a very short foreword the editors explain that the volume "aims to analyse the constitutional basis of the European Union and the normative orientation of the Common Foreign Security Policy (TEU) as well as the central economic and monetary provisions (TFEU) after the reform Treaty of Lisbon". Moreover, they explain that the essays are the outcome of two conferences, organized in the preparation of this project, held in Erfurt in 2008 and in Rome in 2010.

As the book consists of 24 essays, each dealing with a different topic, this review will not attempt to provide an in-depth scrutiny of each; indeed, it will try to find out and to focus on the broad picture of the institutional architecture of the European Union that comes out.

By reading the index of the volume, the reader may think that the volume is not a "European Commentary on the Treaty of Lisbon", as it was meant by the editors. However, after a careful reading, it emerges that, although it is not a law commentary in the traditional meaning, that is, a treatise analyzing article by article a legal text (as the commentary that the two editors are preparing: H.-J. Blanke and S. Mangiameli, eds., *The Treaty on European Union. A Commentary*, Berlin, Springer, forthcoming in 2013), it is not even a simple collection of conference proceedings. Indeed, the essays, written by researchers from eight Member

States, provide an impressive fresco of the institutional and constitutional developments brought by the Lisbon Treaty.

The book is divided into three parts. The first, which takes more than half of the book, is devoted to the study of the constitutional basis; the second to the Economic and Monetary Union, and the third to the Common foreign and security policy (CFSP).

This review will focus only on certain aspects dealt by some essays. In particular, it will concentrate on those essays that provide more specific hints as to the progress and future developments of the European integration.

The essays may be divided, of course only for descriptive purposes, in four different sets. The first set concerns the general political and institutional framework of the Lisbon Treaty and the future institutional developments; the second is about the idea of European Constitution and its principles and values; the third regards the economic and monetary constitution of the EU (part II of the volume); and the last regards the CFSP (part III of the volume).

The first set of essays pays attention to the political and institutional framework that led to the approval of the Lisbon Treaty and to the future developments. A general fish-eye overview of the new institutional framework is provided by Stelio Mangiameli in the essay on "The Institutional Design of the European Union After Lisbon", which is significantly concluded with a paragraph posing the question on who actually heads the Union. The widespread idea of the lack of democracy and the incorporation of democratic principles in the Lisbon Treaty is scrutinized in the essay of Jiří Přibáň on "Desiring a Democratic European Polity: The European Union Between the Constitutional Failure and the Lisbon Treaty". Whilst the role of national parliaments – in an historical perspective and taking account especially of the new links between European and national parliaments and of the horizontal cooperation between national parliaments – is examined by Rudolf Hrbek in the essay on "The Role of National Parliaments in the EU". Then, three extremely important issues are examined by Albrecht Weber ("The Distribution of Competences Between the Union and the Member States"), Luis Jimena Quesada ("The Revision Procedures of the Treaty") and Anna Wyrozumska ("Withdrawal from the Union").

A second set of essays concentrates on the idea of the Treaties as a constitution, which provides for some basic principles and values.

First of all, the idea of a "European Constitution" is discussed broadly in the essay of Antonio D'Atena on "The European Constitution's Prospects". After stressing that the existence of a "constitution" may be affirmed (in a substantive sense) even if some formalistic characteristics are missing, the author points out that, also in the European Treaties, certain rules resembling a state constitution, and providing for some basic organization rules, may be found. Even if it may not be compared to that of federal states, a European multilevel constitutionalism may be found, although it encounters the obstacle of the continuing sovereignty of the Member States (which have maintained areas of sovereignty). This prevents national and European constitutional levels to be placed within a single hierarchical structure.

The concept of the Union legal personality and especially its external profile are discussed in the essay by Daniel Thürer and Pierre-Yves Marro on "The Union's Legal Personality Ideas and Questions Lying Behind the Concept", which focuses on the phenomenon of the pooling of sovereignty.

As concerns constitutional rights, principles and values, Hermann-Josef Blanke examines, in the long and detailed essay on "The Protection of Fundamental Rights in Europe", the evolution and the problems of the multilevel constitutional governance, characterized by multiple and overlapping layers of regional and national governance: the relationship between national constitutional courts and the European Court of Human Rights, within the European judicial dialogue, and their cooperation, are examined taking account of the different national case law. Francisco Balaguer Callejón, in his essay on "The Relations Between the EU Court of Justice and the Constitutional Courts of the Member States", after stressing how Member States sovereignty has been reinforced by supranational institutions (as governments may exercise competences that previously could not be exercised because of limitations imposed by the democratic rule of law in the domestic sphere) and the false image of "constitution" as opposed to "integration", examines the break of the dividing line between internal constitutional systems and the

EU legal order (especially by the creation of a direct link between European institutions and citizens), caused by the Lisbon Treaty and the consequences on the dialogue between national constitutional courts and the European Court of Justice.

The consequences of the European citizenship provisions are further examined by Margot Horspool in her essay on "The Concept of Citizenship in the European Union". After describing the evolution in EU law of that concept, the essay focuses on the introduction of the "citizenship initiative" (article 24.1 TEU), which, although often neglected by commentators, is indeed an important tool, whose effect will depend on how it will be interpreted and operated in practice.

A special attention is devoted to fundamental rights, with specific regards to the rule of law (in the essay of Jens Meyer-Ladewig on "The Rule of Law in the Case Law of the Strasbourg Court"), their drafting in the EU Charter (in the essay of Eduardo Gianfrancesco on "The Charter of Fundamental Rights of the Union as a Source of Law") and their protection in Europe (in the cited essay of Hermann-Josef Blanke on the protection of fundamental rights). Although the justification for limiting the research of the rule of law only to the Strasbourg Court is not so convincing, it is clearly explained how this principle underlines the whole Convention. The drafting and role of the EU charter is, indeed, clearly explained, as well as the important role undertaken by European courts (including national judges applying European law): although a clear fundamental decision is missing, the author shows that the current system is the only possible one, and "probably not such a bad one".

An important principle of European legal integration is scrutinized by Stelio Mangiameli in the essay "The Union's Homogeneity and Its Common values in the Treaty on European Union". Homogeneity, is regarded as a fundamental principle (more than a value) of the Union, for many different reasons: for example, it gives to the Treaties "a certain level of rigidity", by committing Member States not to affect the same Union identity even in the revision process; and it affects the membership of new Member States. Although certain dangers may arise from the unification and homogenisation process, its establishment and judicialization (through the amendments to articles 7 and 46 TEU) are an important step in the trend towards federalisation, as it

shows a development from a "federal coercion" model to a "federal execution" model.

Although the success of Europe cannot be measured on the level of success of the monetary union and of the common currency, nor the failure of the euro may constitute a failure of the European integration project, it may not be doubted that an extremely important feature of the development of European integration is provided by the economic and monetary union and by the common economic policies. The second part of the book is devoted to the economic and monetary constitution of the Union: the three essays of this part discuss the question, the first, from a general point of view; the second, specifically taking account on the economic and monetary union; and the third concentrating on the issue of state aids.

The essay of Hermann-Josef Blanke on "The Economic Constitution of the European Union" provides an important sketch of the main developments, that can be summarized along three main lines. The first, is the change of the competitiveness paradigm of the Union after the Treaty of Lisbon (as the competition principle, though still mentioned, is somewhat blurred); the second, is the change of the concept of the internal market (which takes the place also of the concept of the common market); the third is the establishment of a triad of economic fundamental rights of the Union in the European Union Charter of fundamental rights; the fourth, is given by the changes in the Economic and Monetary Union mechanisms. Although the essay is not updated to the most recent changes (as the adoption of the so-called six-pack of November 2011 and the Fiscal Stability Treaty of 2012) it clearly underlines the strength of European instruments, such us the stability and growth pact, the European stability mechanism – ESM and the coordination and surveillance of the budgetary discipline and the fact that, in the minds of the Germans, the role of the European Union in global politics has replaced its role as a simple economic union.

Ulrich Häde, in the essay on "The Treaty of Lisbon and the Economic and Monetary Union" describes the institution and evolution of the economic union, concluding that the Lisbon Treaty preserved much continuity.

The second part of the book is concluded by the essay of Paul Adriaanse on "Public and Private Enforcement of EU State Aid

Law", which describes the evolution of such a policy, without, however, explaining how it has been affected by the Lisbon Treaty.

The third part of the book, devoted to the study of the Common Foreign and Security Policy (CFSP), includes seven essays, which describe the functioning of this policy: Piergiorgio Cherubini on "The Role and the Interactions of the European Council and the Council in the Common Foreign and Security Policy"; Eileen Denza on "The Role of the High Representative of the Union for Foreign Affairs and Security Policy"; Ramses A. Wessel on "Initiative and Voting in Common Foreign and Security Policy: The New Lisbon Rules in Historical Perspective"; Daniel Thym on "The Intergovernmental Branch of the EU's Foreign Affairs Executive"; Aurel Sari on "Decisions on Operational Action and Union Positions: Back to the Future?"; Sebastian Graf von Kielmansegg on "Permanent Structured Cooperation: A New Mechanism of Flexibility"; and Günter Sautter on "The Financing of Common Foreign and Security Policy – on Continuity and Change".

The picture emerging from the book resembles an impressionistic painting, where an exact and precise drawing is not given, but the observer gets the colours and emotions that the artist wants to inject to others. The essays provide many important hints on the developments brought by the Lisbon Treaty; however, the trends and prospects may be imagined and reconstructed by the reader, as a complete general picture is not provided. The most significant developments, like those related to the emergence of an European Constitution, the "constitutionalization" of principles and rights, the development of federative principles, like the homogeneity principle, the increasing loss of economic, monetary and budgetary sovereignty by the Member States, are clearly – but separately – described. However, it is left to the reader, or to the researchers that will profit a lot from reading this interesting book, to find out the perspectives and possible developments of the European Union. But, of course, this is the shortcoming – and, at the same time, the advantage and benefit – of most collective books.