# TABLE OF CONTENTS



* The first Symposium took place at the Suor Orsola University in Naples, on April 17th, 2015. The subject matter of the discussion was "Administrative Justice in Europe: A comparative Analysis". The second Symposium was organized in honor of Prof. Mario Pilade Chiti, in occasion of his retirement. It took place at the Istituto Sturzo of Rome on September 25th, 2015, and had as a subject matter "The changing Law".

# GUEST EDITORIAL

## THE GLOBAL REACH OF EU FUNDAMENTAL RIGHTS. DATA PROTECTION AND THE RIGHT TO AN EFFECTIVE REMEDY

*Herwig C.H. Hofmann**

The CJEU ruling in *Schrems v Data Protection Commissioner (DPC)*[1] will be subject to many discussions on constitutional matters for the time to come. It is a landmark case not only for clarifying and applying the basic conceptual understanding of fundamental rights in the EU. Schrems v DPC clarifies therein many further conditions for effective protection of a right, supervision by Member State authorities as well as the global reach of EU fundamental rights. As most essential developments in public law, this case originates from the very specific structural and substantive context of a specific policy area's administrative law details. But the consequences will radiate far into debates on pluralism of multi-level legal orders in an inter-connected world.

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[1] CJEU C-362/14 *Schrems v Data Protection Commissioner* of 6 October 2015, ECLI:EU:C:2015:650. The author represented Maximilian Schrems before the CJEU.

The background to Schrems v DPC is as follows: Supervision of compliance with EU data protection rules takes place by national authorities vested with "complete independence" [2] within the territory of each Member State. Transfer of data from the EU to a third country is possible only if that country has an "adequate level" of data protection, a fact the European Commission may certify by means of a decision.[3] In 2000, the Commission had taken an adequacy decision with respect to the United States of America, a decision became known as the "Safe Harbour Decision".[4] Upon request for preliminary reference by the High Court of Ireland in a judicial review procedure of a decision of the Irish Data Protection Commissioner (DPC) not to accept a complaint about Facebook Ireland transferring personal data to Facebook servers in the US, the Court of Justice of the European Union (CJEU) had the opportunity to review the compliance of the various elements of the data protection regime, especially the conditions of the Commission decisions declaring a third country to maintain an adequate level of protection.

This case - Schrems v DPC - has the potential to become one of the cornerstones of fundamental rights cases in Europe. The CJEU invalidated the Commission Safe Harbour Decision because it violated the essence both of the right to privacy and the protection of personal data as it arises from Articles 7 and 8 of the CFR as well as the essence of the right to an effective judicial remedy under Article 47 CFR.[5] Finding violation of the essence of a right, protected specifically under Article 52(1) CFR, means that there is no need to enter into a balancing of various limitations under the principle of proportionality. Schrems v DPC is the first case in which the CJEU invalidated an act of EU institutions on the

[2] Article 28 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281/31.

[3] Article 25(1), (2) and (6) of Directive 95/46.

[4] Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46 on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce, OJ 2000 L 215/7.

[5] CJEU C-362/14 Schrems v Data Protection Commissioner, cit. at 1, §§ 94-95.

basis of violation of the hard core of absolutely protected 'essential' elements of a fundamental right. Extending its findings also to the ancillary procedural rights of Article 47 CFR is important for possibilities of holding administrations to account. The Court found the essence of Article 47 CFR to be violated since the Safe Harbour Decision left individuals with no way of independent review of compliance with their substantive rights in the event of the transfer of data to the US and their processing by secret services.

Schrems v DPC would be famous for this alone. But, importantly for the EU's legal system, it also contains a considerations each of which are of high relevance for EU public law more generally.

A first screening of the case brings to light many points, which without doubt, will be discussed in a string of case reviews and throughout the legal debate in the years to come. Here is a small selection.

One is the international dimension of EU fundamental rights protection. Under the EU data protection directive 95/46, the right to data protection has to follow the data also when it is transferred to a third country. Third countries are authorised as recipients only where provisions are made to ensure some minimum protection. This places information rights in the age of an inter-connected world in a very special context. Although not per se extraterritorially applicable, they have to be protected on a global scale – a level of protection which has to include the right to an effective legal remedy to protect rights of access to personal data, and possibilities of rectification or erasure even in the case of transfer of such data outside of the Union.

In view of this, it remains important to find a definition under which conditions a foreign legal system can be regarded to offer adequate protection in view of EU law. Schrems v DPC illustrates that a non-EU country cannot earn the status of 'adequate protection' simply by guaranteeing the essential elements of the Fundamental Rights in question. In an echo of the 'Solange' case law of the *Bundesverfassungsgericht* and the 'Bosphorus' case of the ECtHR, the substantive and procedural

protection offered by the third country must, according the CJEU be "essentially equivalent" to the EU level[6] – a standard many EU countries fail to achieve in their national law.[7] On December 4th the European Court of Human Rights in Strasbourg (ECtHR) confirmed this reading by a judgement of its Grand Chamber (Case Zakharov v Russia, Application no. 47143/06).

Also, Schrems v DPC raises important issues regarding the degree of diligence which both national supervisory authorities and the Commission must show to comply with their obligations under the law in review of transfer of data to third countries. The case, therefore is an important reminder of the developing case law of the duty of care and the obligation to reason decisions accordingly.[8] And in asking the Commission to regularly revisit its own decision especially when there is reason to believe that conditions have changed, Schrems v DPC also contains important clarifications in EU administrative law and the exercise of discretionary powers as a whole.

Further, the case raises very important questions regarding the evolution of the relations between national Courts and the CJEU as well as between the CJEU and the ECtHR. Regarding the latter, since national laws empowering secret services of Member States in some cases are no less intrusive than the US Foreign Intelligence Surveillance Act (FISA) was, the ECtHR will take note of the ECJ judgement when it is presented with requests to review the compatibility of such legislation with the ECHR. On the other hand, the CJEU was confronted with a clearly worded statement by the Irish High Court that the findings of the Commission if reviewed by Irish law would be plainly illegal, was also not willing to fall short of those national expectations. To a certain degree, the CJEU in Schrems v DPC plays the ball back into the national field, in stating that national authorities under the

[6] CJEU C-362/14 *Schrems v Data Protection Commissioner* cit. at 1, § 73.
[7] See e.g. European Parliament resolution of 29 October 2015 on the follow-up to the European Parliament resolution of 12 March 2014 on the electronic mass surveillance of EU citizens (2015/2635(RSP)), P8_TA(2015)0388 with further references.
[8] CJEU C-362/14 *Schrems v Data Protection Commissioner* cit. at 1, §§ 63, 75-76, 96-97.

principle of effectiveness in the context of the principle of sincere cooperation (Article 4(3) TEU) must have the possibility, especially in the light of Article 8(3) CFR to "engage in legal proceedings" before a national court – but without explaining how.[9] This requirement thus sets out obligations on the national legal system and is indicative of the cooperative relation which the national supervisory authorities have with the European Commission in a quasi -composite set of enforcement procedures. Whether the developing relations might continue as a 'race to the top' with respect to the protection of fundamental rights in the Union remains to be seen.

For private parties around the globe, questions arise to the practical consequences of the case. The world-wide interest in the judgement, if that can be gauged by the press and media reactions, has possibly surpassed any case the CJEU has so far published. Eyes are now not only on the various national data protection supervisory authorities and their possible findings but also on the Commission as to how it will proceed in ongoing international negotiations. The effects of this judgement will be felt in international trade negotiations such as on the TTiP and TISA. But existing agreements such as the EU-US Terrorist Finance Tracking Programme (TFTP) and the already negotiated EU-US framework agreement on the protection of personal data when transferred and processed for law enforcement purposes will have to be reviewed in the light of the findings of the Court in Schrems v DPC.

[9] CJEU C-362/14 *Schrems v Data Protection Commissioner* cit. at 1, § 65.

# ADMINISTRATIVE LAW AND JUSTICE IN EUROPE: TWO SYMPOSIA

## THE IMPORTANCE OF COMPARATIVE LAW IN ADMINISTRATIVE JUSTICE

*Aldo Sandulli**

The question of whether the old continent is witnessing the emergence of a common legal culture is the subject of heated debate among legal scholars. Attempts to answer this question vary in terms of both solutions and content. But certainly this debate has accentuated still further the importance of a comparative approach to legal studies and, in particular, the field of administrative law.

It is common knowledge that this branch of law is a late developer in terms of elements of comparison, even if it has rightly been pointed out that it was in fact the twentieth-century "rediscovery" of the comparison of administrative law that was the latecomer, because the pioneering studies of Goodnow in the late nineteenth century show the degree of interest in comparison that there was in this field at that time.

As Mario P. Chiti noted in the first encyclopaedia entry dedicated to comparative administrative law, the field of administrative justice has always been an exception to the domestic perspective from which the subject had always been approached, in the sense that the comparative approach has always been constant and considered useful.

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There are probably two main reasons: the central role long held by questions relating to judicial protection, which, in some countries, have often taken on an all-pervading importance, and the oscillation within certain jurisdictions (including ours) between dualism and monism, often resulting in incomplete models, with the need, therefore, to look around to see what others are doing.

In recent decades, another factor has also been added, that of European integration and a drive towards convergence also in the field of administrative justice, through the dissemination of certain principles and institutions. The first of these is the effectiveness of judicial protection, which represents the strongest driving force in the sector for the integration of continental administrative justice systems as regards the fullness of protection and the range of actions as well as reduced times for the delivery of justice.

This phenomenon has certainly led to a rapprochement between administrative justice systems in terms of their ability to enter into dialogue and exchange principles and institutions (even to the point of speaking of the possibility of a European Code of Administrative Procedure), but it has also shown that, beyond the *nomen*, the substance of principles and institutions in application is often very different, since the context and the reference environment involve a process of harmonisation on the part of the "guest" principle or institute.

For all of these reasons, it remains useful to go on with the exchange between jurisdictions and between experiences in the field of administrative justice. A reading of the contributions in this issue confirms that, on the one hand, the distance between legal systems traditionally considered diametrically opposed is not so astronomical, and, secondly, that, beyond any superficial analysis, there are still numerous and significant differences in application, also in continental Europe. So far and, at the same time, so near (and vice versa).

The persistent differences between legal systems, however, do not mean that there is no point in identifying a common substrate with the aim of building an area for a shared European legal culture. They simply indicate a path towards rapprochement, still today built upon the European guiding principle of unity in diversity and showing how long the road ahead actually is.

In this sense, comparison in the field of administrative justice is of particular value, since it is a sector that necessarily has to privilege solutions that can prove effective and efficient when it comes to concrete application. It is, therefore, a convergence that cannot be regulated from above, but must be built in the field. It is technical process that takes precedence over political choices and it is the judicial function which, in the long run, imposes its nature, its history, and its tradition on the political choices of governments.

# ADMINISTRATIVE JUSTICE IN THE UNITED KINGDOM

*Gordon Anthony* *

*Abstract*

The article examines the concept of administrative justice and shows how this term does not lend itself to a singular definition, but it is generally associated with a more holistic approach to citizen redress against government in which judicial review is only one mechanism among many others. After identifying some of the primary mechanisms within the system of administrative justice (Consultation, Ombudsman, Tribunals) and showing how they interact with one another, the article outlines the main challenges that this system faces in an era of austerity. Indeed, the reduction of government spending on the mechanisms which facilitate administrative justice has the potential to hollow out the values that infuse administrative justice as a whole.

TABLE OF CONTENT



* Professor of Public Law, Queen's University, Belfast. This is a revised version of a paper that was presented at a meeting of the Italian Administrative Law Group in Naples on 17 April 2015. My thanks are due to Professors Sandulli and della Cananea for inviting me to participate at the meeting. My thanks are also due to participants at the seminar for their interesting and challenging questions on aspects of UK law - I have made every effort to incorporate answers to those questions in the text of this article.

## 1. Intoduction

One of the better-known features of UK administrative law, at least when viewed from a comparative perspective, is its relative youth as an organised system of principles centred upon the rule of law.[1] Traditionally, much scholarly interest in that system has focused upon judicial review as a means for mediating relations between individuals and the state (and as between state bodies themselves), where the courts have famously developed new grounds for reviewing the actions and inactions of public authorities.[2] However, while doctrinal developments remain the primary concern of much scholarship in the UK, recent years have also seen a growing academic interest in "administrative justice" as a framework for analysing relations between individuals and the state.[3] Although the term "administrative justice" does not lend itself to singular definition – a point that is returned to below – it is generally associated with a more holistic approach to citizen redress that regards judicial review as but one mechanism among (many) others that include tribunals, ombudsmen, and alternative dispute resolution.[4] The nature of this shift has been seen not just in an increased use of empirically grounded studies in administrative justice[5], but also in a restatement of the values that are said to condition exercises of public power.[6] Administrative justice has thus absorbed the values of legality, fairness and rationality that have historically defined judicial review whilst also making links to values that are more readily associated with governance studies – transparency, accountability, input participation, efficiency, and so on.

The corresponding purposes of this article are modest: to explain in more detail how and why the language of administrative justice has become more prominent in recent years;

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[1] See J. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (2000).

[2] For a seminal account see H. Woolf et al, *De Smith's Judicial Review* (2013).

[3] An important contribution is M. Partington, *Restructuring administrative justice? The redress of citizens' grievances,* in 52 Current Legal Problems 173 (1999), discsussed below.

[4] See generally M. Adler (eds), *Administrative Justice in Context* (2010).

[5] See, eg, S. Halliday, *Judicial Review and Compliance with Administrative Law* (2004) and R. Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (2011).

[6] C. Harlow and R. Rawlings, *Law and Administration,* 3rd ed. (2009), 483.

to identify some of the primary mechanisms of administrative justice and how they interact with one another; and to note some of the challenges that administrative justice faces in an era of government austerity. This last point is perhaps the most telling of those to be made, as reduced government spending on the mechanisms that facilitate administrative justice inevitably has the potential to hollow out the very values that are said to infuse administrative justice. This prospect has since given rise to a number of applications for judicial review in which challenges have been made either to the fact of changes in funding or to institutional failures that have resulted from a reduced capacity to provide services to the public.[7] While not all of the cases have succeeded – the principles of judicial review of course provide for judicial restraint where that is deemed appropriate – they have revealed in sharp form the tension that can exist between some of the normative and practical dimensions to administrative justice. They have, at the same time, also revealed something of an irony about the role that judicial review now plays within administrative justice: while judicial review remains the primary barometer of the legality of government choices, access to it can be affected by reduced government spending in the important social area of legal aid.[8]

The analysis begins with a short section that traces the emergence of administrative justice as a field of study and which considers one of the primary ways in which it may be defined. There then follows a section that provides an overview of consultation requirements in UK law, of the functions of the office of the Parliamentary Ombudsman, and of the roles that are played by tribunals and judicial review. Although an overview of such mechanisms can only ever offer a partial insight into their significance, the purpose of this section is to give examples of some of the ways in which the values of legality, accountability, participation and so on take form in UK law. The final substantive section returns to the matter of austerity and administratve justice,

[7] E.g., *R (Unison) v Lord Chancellor* [2014] EWHC 4198 (Admin), [2015] 2 CMLR 4 at 111, and *Re Martin's Application* [2012] NIQB 89, discussed below.
[8] For some issues see *IS v The Director of Legal Aid Casework* [2015] EWHC 1965 (Admin).

while the conclusion offers some summative points about the role and relevance of administrative justice.

## 2. Towards "Administrative Justice"

The historically dominant position that judicial review has occupied in scholarship reflects nothing more than the fact that it has defined many important developments in both the constitutional and administrative law of the UK.[9] Even before the current judicial review procedure was introduced by statute law in the late 1970s/early 1980s[10], the courts had already drawn upon the common law to identify key elements of, what Garner termed, a "coherent system of administrative procedure".[11] Central to that procedure were requirements of fairness and a prohibition on the abuse of power, and the judges also took steps to safeguard their supervisory jurisdiction in the face of apparently clear legislative overrides on access to the courts.[12] However, while such case law arguably introduced a nascent public/private divide into UK law, it was with the procedural reforms of the late 1970s/early 1980s that that divide assumed a fundamental importance.[13] In some of its earliest rulings under the new procedure, the House of Lords (now Supreme Court) variously held that public law rights and interests could be vindicated only by way of application for judicial review[14]; that the new rules on standing were intended to avoid technical distinctions that had previously governed access to remedies[15]; and that the grounds for judicial review were fluid

[9] See generally W. Wade and C.F. Forsyth, *Administrative Law,* 11th ed. (2014).
[10] For the position in England and Wales see Wade and Forsyth, cit. at 9, ch 18. For Northern Ireland, see G. Anthony, *Judicial Review in Northern Ireland*, 2nd ed (2014), ch 3; and, for Scotland, see C. Himsworth, *Judicial Review in Scotland,* in M. Supperstone et al (eds), *Judicial Review*, 5th ed (2014), 865-929.
[11] J.F. Garner, *Administrative Law – A Step Forward?,* in 31 Mod. L. Rev. 446 (1968).
[12] *Ridge v Baldwin* [1964] AC 40; *Padfield v Minister of Agriculture* [1968] AC 997; *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.
[13] Although not in Scotland: see *West v Secretary of State for Scotland* 1992 SC 385.
[14] *O'Reilly v Mackman* [1983] 2 AC 237.
[15] *R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.

and open to change.[16] While the requirement that individuals vindicate their rights and interests exclusively through the judicial review procedure proved to be unduly rigid – its effects were subsequently relaxed[17] – the approach to standing and to the grounds for review provided the basis for far-reaching development of the law. The standing rules thus came to be read liberally and in a way that facilitated applications for judicial review not just by individuals but also by pressure groups[18], while the grounds for review expanded on the basis of both the common law and in the light of European influences.[19]

The scholarly move away from studying judicial review primarily within its doctrinal parameters was prompted by a number of factors. One was an awareness that developments in relation to standing and so on tended to happen in "high profile judicial review" cases that often raised matters of considerable political importance involving central government Ministers.[20] The point here was not that the cases were wholly exceptional – they typically contained important statements about the rule of law principle that operates at the heart of administrative law – but rather that they were factually very different from the vast majority of cases that were heard by way of application for judicial review. Empirical research conducted in the 1990s, in particular, established that judicial review cases tended to concentrate in areas such as prisons, immigration and housing, and academic interest was drawn to the question whether judicial review had any discernible impact on the quality of bureaucratic decision-

[16] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410-411, Lord Diplock.

[17] *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624. See too, more recently, *Ruddy v Chief Constable of Strathclyde* [2012] UKSC 57, 2013 SC (UKSC) 126.

[18] See, eg, *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd* [1995] 1 WLR 386 and *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2012] EWHC 2579 (Admin), [2012] ACD 109. But note that the position is more restrictive where cases fall under section 7 the Human Rights Act 1998: see, eg, *Re The Committee on the Administration of Justice's Application* [2005] NIQB 25.

[19] P. Craig, *Administrative Law*, 7th ed (2012) chs 12-23.

[20] The phrase is Peter Cane's: see *Understanding Judicial Review and its Impact,* in M. Hertogh and S. Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (2004), at 18.

making in those areas.[21] While this gave rise to inevitable definitional and methodological challenges – notably how to identify and measure impact[22] – it marked a clear shift away from a positivist scholarly tradition towards one that was more socio-legal in nature.[23] The corresponding aim of the new scholarship was to fill in "gaps in our empirical knowledge" and to "consider the significance of those gaps" as part of wider debates about the role of judicial review in the UK.[24]

Another factor that prompted the change in approach was the reality that, for the vast majority of individuals, their interactions with the administrative state occurred in *fora* other than the High Court that hears applications for judicial review. At its most obvious, this was a point about the role of specialist tribunals that were established by statute and given an adjudicatory function in areas such as social security, mental health, and education.[25] Although the decisions of tribunals were (and are) subject either to a right of appeal or to judicial review – the current structures are outlined below – tribunals were intended to give individuals access to a system of justice that was more efficient and informed than that which would be provided by the ordinary courts.[26] Moreover, even before individuals could have recourse to tribunals and/or the courts, there could be an expectation that they would first engage in attempts at alternative dispute resolution or that they would avail themselves of mechanisms for "internal" reviews of contested decisions.[27] Such

[21] See, perhaps most famously, the Public Law Project's *Judicial Review in Perspective: An Investigation of Trends in the Use and Operation of the Judicial Review Procedure in England and Wales* (London, 1993).
[22] See further Cane cit. at 20.
[23] On which shift see further, eg, C. Hunter (ed), *Integrating Socio-Legal Studies into the Law Curriculum* (2012).
[24] M. Sunkin and G. Richardson, *Judicial review: questions of impact*, in Public Law 79 (1996).
[25] See further Wade and Forsyth, cit. at 9, ch 23.
[26] See the *Report of the Committee on Administrative Tribunals and Enquiries*, 1957, Cmnd 218 (the so-called "Franks Report").
[27] On alternative dispute resolution see S. Boyron, *The rise of mediation in administrative law disputes: experiences from England, France and Germany,* in Public Law 320 (2006). For an example of internal review see Freedom of Information Act 2000, ss 45 and 50(2)(a), as read with the Government issued Code of Practice at https://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/code-of-practice.

requirements, which have been said to have become "*de rigueur*" in recent years[28], were intended to deal with disputes at their source and in a way that allowed individuals to participate more directly in any reconsideration of a decision that affected them.[29] Outside of such pre-action and court-based remedies, there remained the possibility of recourse to a number of other mechanisms for raising grievances, notably commissions, ombudsmen, and inquiries.[30]

The argument that these mechanisms should be viewed holistically – and from the perspective of "administrative justice" – was made by a number of commentators who included Martin Partington.[31] For Partington, administrative justice was a concept that, while admittedly difficult to define, embraced "the whole range of decision-taking from first decision to final appeal, not simply those processes that can be labelled 'adjudicative'".[32] Partington's concern here was that, if attention were to be given only "to what happens at stages after the initial decision has been taken", this "would be to ignore the fundamental challenge of administrative justice, to get the decision right first time round".[33] Of course, this begs the anterior question of how to ensure that decisions can be "right the first time round", and Partington noted the importance of key values and principles such as participation, transparency, fairness, efficiency, consistency, rationality, equality, and choice and consultation.[34] While other commentators have rightly cautioned that the out-workings of such values are crucially affected by matters of institutional culture[35], Partington's

[28] P. Birkinshaw, *Grievances, Remedies and the State – Revisited and Re-appraised,* in Adler (eds) cit. at 4, 353.

[29] But compare D. Cowan and S. Halliday (eds), *The Appeal of Internal Review: Law, Administrative Justice and the (non-) Emergence of Disputes* (2004).

[30] See further T. Mullen, *A Holistic Approach to Administrative Justice,* in Adler (eds), cit. at 4, 383.

[31] N 3 above, and, eg, M. Harris and M. Partington (eds), *Administrative Justice in the 21st Century*, Hart Publishing, Oxford, 1999. See also, eg, M. Adler, *A Socio-Legal Approach to Administrative Justice,* in 25 *Law and Policy* 323 (2003).

[32] M. Partington, cit. at 3, 176.

[33] M. Partington, cit. at 3, 178.

[34] See also R. Thomas, *Administrative justice, better decisions, and organisational learning*, in Public Law 111 (2015).

[35] On which idea see S. Halliday and C. Scott, *A Cultural Analysis of Administrative Justice,* in Adler (eds), cit. at 4, 183, and references therein.

approach posited a continuum along which the values of participation and so on could be protected at any time from administration through to adjudication. On this reading, administrative justice might fairly be described as "the overall system by which decisions of an administrative or executive nature are made in relation to particular persons including (a) the procedure for making such decisions, (b) the law under which such decisions are made and (c) the systems for resolving disputes and airing grievances in relation to such decisions".[36]

It is important to note that Partington accepted that there is no set definition of administrative justice and that his contribution was made with that point very much in mind.[37] His definition does, however, still offer a useful framework for analysing the role of the various mechanisms of administrative justice, albeit that two comments might be made about his approach. The first concerns the difference between "administrative justice" and "administrative law", as the above description of administrative justice would plainly suggest a large degree of overlap with the body of (administrative) law that regulates the exercise and non-exercise of power by public bodies.[38] On this point, Partington himself acknowledged the extent of overlap but suggested that the difference was ultimately to be found in administrative law's primary focus on judicial review as compared to administrative justice's interest in "a much wider variety of activity and values than simply the work of the higher courts".[39] Whether this is where the real dividing line between the two is to be found may, however, be doubted, particularly given Peter Cane's analysis of the difference between the two. In his seminal book on administrative law, Cane suggests that administrative justice is, in some respects, "narrower" than administrative law because of its "focus on the making of decisions about individuals". While Cane

[36] Tribunals, Courts and Enforcement Act 2007, Sch 17, para 13; since repealed by Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013/2042, Sch 1, para 36.

[37] M. Partington, cit. at 3, 174. For some of the different approaches to the concept see the contributions in Harris and Partington (ed), cit. at 31. See, also, the website of the UK Administrative Justice Institute at http://ukaji.org/.

[38] For some of the possible definitions see Harlow and Rawlings, cit. at 6, ch 1, and Craig, cit. at 19, ch 1.

[39] M. Partington, cit. at 3, 175.

also accepts that administrative justice's focus upon individual engagement at the administrative stage perhaps lies beyond traditional understandings of administrative law, he notes that administrative law continues to regulate areas of very real significance that apparently do not come within the ambit of administrative justice. As he writes: "One of the most significant aspects of public administration is the making of legal rules (secondary legislation) and the development of general policies (soft law), and administrative law has quite a lot to say about bureaucratic law-making and policy-making".[40]

The second comment concerns the values and principles that exist across Partington's administration-adjudication continuum. It has already noted in the introduction that these values and principles represent something of an amalgam of those that have historically been found in judicial review and in governance studies. While it is inevitable that some of the values and principles will have much greater import at different stages on the continuum, the passage of time may well have resulted with judicial review absorbing and mobilising some of governance's values at the adjudication end of the spectrum. An example here may be transparency, which, for some, has entered the lexicon of more traditional public law scholarship.[41]

### 3. Administrative Justice – Some Mechenisms

Turning to some of the primary mechanisms that underlie the workings of administrative justice, there are four that fall for consideration in this article: consultation requirements; the Parliamentary Ombudsman; tribunals; and judicial review. As will become apparent below, these examples have been chosen because they reveal something about the nature of the administration-adjudication continuum, as well as about the manner in which the various mechanisms for redress link together. They also reveal something about how disputes might be solved at source before recourse is had to more formal mechanisms: to take judicial review as an example, there is a well-

[40] *Administrative Law*, 5th ed (2011) 18-19.

[41] See C. Howell, *Is There a General Principle Requiring Transparency about How Decisions Will be Taken?*, in 16 Judicial Review 322 (2011).

established pre-action protocol that must be observed in almost all cases before proceedings can be brought in the High Court.

### 3.1 Consultation

Consultation requirements in the UK are underpinned both by traditional common law principles of fairness – sometimes also referred to as the rules of natural justice – and by a more recent emphasis on participation as a value that should inform decision-making. Certainly, the common law has long been synonymous with the right to a fair hearing, which, while historically linked to a more narrow protection of rights and interests, now potentially applies whenever "(anyone) decides anything".[42] This broadening of the scope of application of the rules of fairness has been one part of the doctrinal narrative that has emerged around judicial review, where the courts have noted the importance of hearing rights even in the difficult context of national security cases.[43] However, it is also true that consultation requirements are not the sole preserve of the common law, as they can be imposed by a statute that delegates a power of decision to a public decision-maker.[44] They can also feature at the level of what might be termed "soft law", *viz* where government bodies decide that best practice in any event requires that they should actively to seek to ascertain the views of those who will be affected by a decision that is to be taken.[45]

The rationale for fair hearing rights/consultation and participation in decision-making has been considered in two recent rulings of the UK Supreme Court. The first was *Re Reilly's Application*, which concerned the elements of the right to a fair hearing when prisoners come before a panel of Parole

[42] *Board of Education v Rice* [1911] AC 179, 182, Lord Loreburn. See further P Leyland and G. Anthony, *Textbook on Administrative Law*, 7th ed (2013) ch 17.

[43] Eg, *HM Treasury v Ahmed* [2010] UKSC 2 & 5, [2010] 2 AC 534 (albeit as read in the light of the the Terrorist Asset-Freezing Act [Temporary Provisions] Act 2010 and the Terrorist Asset-Freezing Act 2010) and *Bank Mellat v HM Treasury* [2013] UKSC 38 & 39, [2014] AC 700.

[44] See further Leyland and Anthony, cit. at 42, ch 16.

[45] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255180/Consultation-Principles-Oct-2013.pdf.

Commissioners.[46] In considering the principles and values that illuminate the common law, Lord Reed stated that "[T]here is no doubt that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information that is properly tested".[47] His Lordship also noted the imperative of avoiding "the sense of injustice which the person who is the subject of the decision will otherwise feel", where he added that "justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken".[48] His Lordship concluded his comments by linking procedural fairness to the rule of law: "Procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions".[49]

The second case was *R (Moseley) v Haringey London Borough Council*, where the issue was whether the respondent authority had been in breach of a statutory duty to consult in relation to council tax schemes.[50] In finding that the respondent authority had been in breach of that duty, Lord Wilson noted that the duty to consult can be sourced in either statute law or the common law and that, in the latter instance, "the search for the demands of fairness … is often illuminated by the doctrine of legitimate expectation".[51] Drawing upon Lord Reed's earlier comments in *Reilly*, his Lordship reiterated that consultation can enhance the quality of decision-making and engender a deeper sense of justice, where he noted a further purpose of consultation as that which is "reflective of the democratic principle at the heart of our

[46] [2013] UKSC, [2014] AC 1115.
[47] [2013] UKSC, [2014] AC 1115, 1149, para 67.
[48] [2013] UKSC, [2014] AC 1115, 1149, para 68.
[49] [2013] UKSC, [2014] AC 1115, 1150, para 71.
[50] [2014] UKSC 56, [2014] 1 WLR 3947.
[51] [2014] UKSC 56, [2014] 1 WLR 3947, 3956, para 23.

society".[52] Lord Reed, in *Moseley*, likewise spoke of the need for "meaningful public participation" through the medium of consultation, where his Lordship focused on the importance of the statutory context to the case before him.[53]

Such *dicta* suggest that the language of participation is now infusing the courts' approach to consultation, where a crucial link is made to a wider democratic ideal within public law more generally. But does this necessarily mean that the common law rules and so on will always allow individuals to participate in decision-making processes in the manner that is envisaged by the literature on administrative justice? At one level, the answer to this question can only be in the positive, as there will be many cases in which citizen involvement in decision-making is demanded and in which judicial protection of that involvement will be guaranteed. However, there are, at the same time, some limitations to the common law approach, and it is these that reveal some of the differences between administrative law and administrative justice such as were commented upon above. The point here is that the common law approach has its origins in an unavoidably adjudicative model whereby the focus will typically be placed upon the presentation of evidence and reasoned argument on behalf of the individual.[54] While that model will, again, be suitable for many decision-making processes, it may not be one that is suited to all, for instance those that are concerned with the initial allocation of benefits to vulnerable persons who come from a position of social need and who may not be able fully to project their own interests. It thus here that is sometimes said that a shift in institutional culture may be required so that consultation can become associated more with managerial and customer interests and less with a decision-making model that places parties in inevitable opposition to one another.[55]

### 3.2 The Parliamentary Ombudsman

The office of the Parliamentary Ombudsman in turn

[52] [2014] UKSC 56, [2014] 1 WLR 3947, 3957, para 24.
[53] [2014] UKSC 56, [2014] 1 WLR 3947, 3962, para 39.
[54] See further Craig, cit. at 19, 380-383.
[55] *Ibid*, citing, among others, Jerry Mashaw's seminal work, *Bureaucratic Justice* (1983).

provides one of the best-known examples of how individuals can raise grievances outside the judicial process, where the primary value that is at work is accountability in respect of exercises and non-exercises of public power.[56] Historically, the term "the Ombudsman" has very much been synonymous with the work of that office, although there are now many other ombudsmen that work within the public and private sectors.[57] The office of the Parliamentary Ombudsman itself was created under the Parliamentary Commissioner Act 1967 and it is empowered to investigate complaints of "maladministration" that are made in relation to a wide range of central government departments and associated bodies[58] (complaints are made through Members of the Westminster Parliament and may be made by any member of the public, including a corporation[59]). The threshold concept of "maladministration" is not defined in the legislation, although it is generally taken to embrace "bias, neglect, inattention, delay, incompetence, ineptitude, arbitrariness and so on".[60] When investigating complaints, the Ombudsman enjoys significant powers of enquiry – for instance, in accessing information[61] – albeit there are also some important limits to the office's powers. These include a statutory requirement that maladministration should result in "injustice" before the Ombudsman can make adverse findings,[62] as well as a rule whereby investigations cannot be carried out when a complainant has, or had, a means of legal redress in the courts or tribunals.[63] This latter rule has inevitably

[56] See further M. Elliott, *Ombudsmen, Tribunals, Inquiries: Re-fashioning Accountability Beyond the Courts,* in N. Bamforth and P. Leyland (eds), *Accountability in the Contemporary Constitution* (2013) 233.

[57] See further Harlow and Rawlings, cit. at 6, 480-483, writing about "ombudsmania".

[58] Parliamentary Commissioner Act 1967, s 4 and Sch 2.

[59] Parliamentary Commissioner Act 1967, ss 5-6.

[60] The so-called "Crossman catalogue". On the open-ended nature of the catalogue see *R v Local Commissioner for Administration, ex p Bradford MCC* [1979] QB 287.

[61] Parliamentary Commissioner Act 1967, ss 8-9.

[62] Parliamentary Commissioner Act 1967, s 5(1)(a). And see, by analogy, *R v Local Commissioner for Administration, ex p Eastleigh Borough Council* [1988] QB 855; *Re Sherrie's Application* [2013] NICA 18; and *Re JR 55's Application* [2014] NICA 11.

[63] Parliamentary Commissioner Act 1967, s 5(2).

given rise to litigation, and there have been cases in which the Ombudsman has been held to have acted *ultra vires* by proceeding with an investigation when the affected individual had an alternative means of legal redress.[64] However, the limiting effect of this rule must also be seen in the light of the Ombudsman's discretion to investigate a complaint where he/she is satisfied that, in the particular circumstances, it is not reasonable to expect the remedy to be, or to have been, invoked.[65] It is further significant that, whatever the formal legal position, there have been several – and in some cases celebrated – instances of overlap between the Ombudsman and the courts.[66]

The principal remedy that is open to the Ombudsman is the publication of a report that recommends that the investigated department take one or several courses of action.[67] The Ombudsman does not, as such, have power to force a body to quash a decision, or change its practices and/or pay compensation, although the government department will often act on the recommendation. Moreover, where a public body is minded to reject a finding of fact on the part of the Ombudsman, case law has established that it may only do so for "cogent reasons". Where no such reasons exist, it may be that the public body will have acted in a manner that is irrational in public law terms and that its decision may be quashed by way of an application for judicial review.[68]

The above model is generally regarded as having been successful in ensuring a heightened degree of accountability, and some of the other areas in which the model has been adopted include local government, policing, prisons, and pensions.[69] While the detail of each specific complaints system will depend upon the terms of its underlying statute (or agreement, for those other

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**64** See, by analogy, *R v Commissioner for Local Administration, ex p Croydon London Borough Council* [1989] 1 All ER 1033.

**65** Parliamentary Commissioner Act 1967, s 5(2).

**66** See, perhaps most famously, *Congreve v Home Office* [1976] 1 All ER 697, commented upon in Wade and Forsyth, n 9 above, 76-77.

**67** Reports are published on-line and can be accessed at http://www.ombudsman.org.uk/.

**68** *R (Bradley) v Secretary of State for Work and Pensions* [2009] EWCA Civ 36, [2009] QB 14. See also *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC 2495 (Admin).

**69** See Leyland and Anthony, cit at 42, 147-8.

ombudsmen that operate in the private sector[70]), it is axiomatic that the ombudsman system offers a means of redress to individuals that is both low cost and potentially very effective in outcome. As against that, it is also the case that all public sector ombudsmen depend upon public funding to carry out their work, and austerity measures and limited resources are inevitably having some impact on the functioning of offices. The significance of this point will be returned to below, where the example of the Police Ombudsman for Northern Ireland will be used to illustrate the tensions that now exist within the wider system of administrative justice.

### 3.3 Tribunals

It has already been noted above that tribunals perform an adjudicatory role in a wide range of areas and that they have historically been intended to provide individuals with effective and efficient means of redress before specialist decision-makers. The greater part of the modern tribunal system is now governed by the Tribunals, Courts and Enforcement Act 2007, which established a two-tier structure within which First-tier tribunals in specific areas make decisions that may, with permission, be the subject of an appeal on a point of law to an Upper Tribunal and thereafter, and again only with permission, to the Court of Appeal (although appeals are not possible in cases in which the Upper Tribunal refuses permission to bring an appeal to the Court of Appeal, a point which is returned to below).[71] The reforms that were made by the Act of 2007 were fundamental in their nature and changed the tribunal system in ways that have been said to amount to "a complete reordering of administrative justice".[72] For

[70] Harlow and Rawlings, cit. at 6, 481.

[71] 2007 Act, ss 9-14. But note that the tribunal and appeals system as applies throughout the UK as a whole is more complex than this brief statement suggests: see the graph that is available at https://www.judiciary.gov.uk/wp-content/uploads/2012/05/tribunals_chart-01072015.pdf. Note also that there are tribunals that adjudicate within the specific contexts of the Northern Ireland and Scottish legal systems: see, respectively, https://www.courtsni.gov.uk/en-gb/tribunals/Pages/Tribunals.aspx and https://scotcourts.gov.uk/the-courts/the-tribunals/about-scottish-tribunals.

[72] *R (Cart) v Upper Tribunal* [2010] EWCA Civ 859, [2011] QB 120, 169, para 29, Sedley LJ.

instance, the two-tier structure served to streamline appeals and give greater coherence to a system that had previously been piecemeal in nature and in which rights of appeal were variously available on a point of law and/or a point of fact, on a point of law only, or not at all (in which circumstance judicial review was available as a remedy). Another change was to mark out the tribunal system as independent from the government departments who make decisions that might be subject to adjudication: while tribunals had previously been closely aligned to government departments – they were therefore sometimes called "administrative tribunals" – the 2007 Act noted the independence of tribunal members as a constitutional imperative.[73]

The streamlining of appeal structures is the development that is of most immediate interest in the present context, as it includes linkages to anterior internal review mechanisms, as well as an overlap with the workings of judicial review. The linkages to internal review mechanisms are found in sections 9 and 10 of the Act of 2007, which enable either the First-tier Tribunal or the Upper Tribunal, respectively, to review one of its own decisions with a view to changing it. This review mechanism may be triggered either by the Tribunal acting on its own initiative or by a person who has a right of appeal against the decision, and it can lead the Tribunal to correct accidental errors, to amend the reasons that have been given in support of a decision, or to set a decision aside. Plainly, the last option is that which would ordinarily be preferred by the person with the right of appeal, although an amended statement of reasons may also give greater clarity and legitimacy to a decision. In either instance, the Act of 2007 provides that a decision can be subject to internal review only once and that it will thereafter become a matter for an appeal on a point of law to the Upper Tribunal or Court of Appeal, as appropriate, and with permission.[74]

The overlap with judicial review can occur in two ways. The first is where the Upper Tribunal, a so-called "superior court

[73] Courts, Tribunals and Enforcement Act 2007, s 1, as read with the Constitutional Reform Act 2005, s 3.

[74] Courts, Tribunals and Enforcement Act 2007, ss 11 & 13. Although on the relationship between appeals on a point of law and errors of fact see *E v Secretary of State for the Home Department* [2004] 2 WLR 1351 and *Jones v First Tier Tribuunal (Social Entitlement Chamber)* [2013] UKSC 19, [2013] 2 AC 48.

of record", can itself exercise a judicial review jurisdiction under the Act of 2007 and grant any of the remedies that would be available were proceedings to be brought by way of application for judicial review in the High Court.[75] Although the Upper Tribunal's jurisdiction in this regard is narrowly drawn under the Act[76] – the vast majority of its work will still come before it by way of appeal – the creation of a judicial review jurisdiction has further sought to consolidate the tribunal system by keeping disputes within its structures where that it is at all possible.[77]

The second way in which there can be an overlap with judicial review is where a decision of the Upper Tribunal itself is subject to judicial review in the High Court. This is an esoteric, yet important, point of law that has its context in cases, mentioned above, where the Upper Tribunal refuses an application for permission to bring an appeal to the Court of Appeal (such decisions are said to be "excluded" from any right of appeal to the Court of Appeal and the matter will thereby come to an end under the Act of 2007).[78] In *R (Cart) v Upper Tribunal*[79], the Supreme Court held that judicial review was available in respect of such refusals but that the High Court should intervene in Upper Tribunal decisions to refuse permission to appeal only in limited circumstances. In making this point, the Supreme Court held that the High Court should intervene solely where the case in which permission to appeal has been refused is one that raises some important question of principle or in which there is some other compelling reason why the matter should be heard. By approaching applications for judicial review in this way, it is understood that the High Court will be able to ensure that the rule of law is maintained without overburdening itself with cases that

[75] Ss 15-21. On its status as a superior court of record see s 3(5).

[76] Courts, Tribunals and Enforcement Act 2007, s 18(6), as read with Practice Direction (Upper Tribunal: Judicial Review Jurisdiction) [2009] 1 WLR 327 and Practice Direction (Upper Tribunal: Judicial Review Jurisdiction) (No 2) [2012] 1 WLR 16.

[77] See also, in England and Wales, s 31A of the Senior Courts Act 1981, as inserted by s 19 of the Courts, Tribunals and Enforcement Act 2007.

[78] Ss 13(1) & 8(c).

[79] [2011] UKSC 28, [2012] 1 AC 663. See, too the parallel judgment in respect of Scottish law in *Eba v Advocate General for Scotland* [2011] UKSC 29, [2012] 1 AC 710.

should, for the most part, be decided within the appellate structures in the Act of 2007.

### 3.4 Judicial review

And what, then, of judicial review and its place in the wider system of administrative justice? Certainly, the above analysis of consultation, Parliamentary Ombudsmen, and tribunals has revealed that it can play a role in each of those areas, whether by developing legal principles (as in *Reilly* and *Moseley*) and/or by providing remedies in the context of decision-making by the Upper Tribunal and the Parliamentary Ombudsman. However, to the extent that this suggests that judicial review is something of a constant within the workings of administrative justice, it says little about the precise nature of the judicial review procedure and the question of when individuals can have recourse to it. Moreover, even where an individual is able to have recourse to the judicial review procedure, there remains the point, made in the studies that were discussed in the first setion of this article, that it may have only a limited impact in practice. So, does this mean that judicial review is best understood as one of the lesser parts of the administrative justice machinery, its "high profile" cases notwithstanding?[80] Or does its real significance lie in those high-profile cases and the values and principles that are developed within them?

Taking first the matter of the judicial review procedure, there is a long-established rule that recourse to it cannot be had where an individual has an effective alternative remedy, for instance a claim before a tribunal.[81] This rudimentary requirement reflects the understanding that judicial review is a remedy of last resort and that individuals should instead avail themselves of remedies that have been put in place by, to continue with the example of tribunals, statute (such remedies may also be procedurally advantageous to the individual).[82] Of course, where no such remedy exists, it will be appropriate for an individual to

[80] Cane, cit. at 20.

[81] On the guiding principles see M. Belhoff and H. Mountfield, *There is no Alternative*, in 4 Judicial Review 143 (1999).

[82] See *Re Kirkpatrick's Application for Judicial Review* [2003] NIQB 49, especially at paras 40-41.

bring an application for judicial review, albeit as subject to practical considerations of costs and the dispute being one that falls within the realm of public law.[83] This latter requirement is one that has given rise to some complexity in the case law not only because of the early procedural rigidity of the public/private divide but also because of uncertainty about the nature of decisions that are taken by, most prominently, private companies performing contracted-out government functions.[84] While the procedural rigidity of the public/private divide has since been relaxed,[85] the question whether a particular decision falls within the realm of public law continues to give rise to occasional difficulties in the case law. Indeed, in some instances, the difficulties have been such that the legislature has had to intervene and override the effects of judgments that have been said to have drawn too narrowly the parameters of public law protections.[86]

Where the facts of a case fall within the realm of public law and an individual wishes to initiate proceedings, he or she must first observe a pre-action protocol that is meant to facilitate the resolution of disputes at source, save in those cases where an authority does not have the power to change its decision or where the dispute has arisen as an emergency (for instance, in a case concerning health).[87] At the heart of the protocol are requirements about an exchange of letters whereby an individual will identify the decision that he or she wishes to challenge and the public authority will explain whether or not it is willing to change the decision. Should that exchange of letters not result with a resolution of the dispute, proceedings may then be commenced by any person who has a "sufficient interest in the matter to which the application relates" and who has initiated proceedings within (what will usually be) a three-month time-limit (time runs from

**83** On costs see, eg, *R (Edwards) v Environment Agency (No 2)* [2013] UKSC 78, [2014] 1 WLR 55.

**84** See Leyland and Anthony, cit. at 42, ch 9.

**85** *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* and more recently, *Ruddy v Chief Constable of Strathclyde,* both cit. at 17.

**86** See, as regards, the reach of the Human Rights Act 1998, *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95, as read with s 145 of the Health and Social Care Act 2008.

**87** See further M. Fordham, *Judicial Review Handbook*, 6th ed (2012) Part 19.1.

the date of the decision, not the end of the protocol process).[88] In the event that the High Court considers that there is an arguable case, it will grant leave, or permission, to proceed to a full hearing, at which stage the individual must demonstrate that the public authority has acted unlawfully. Should he or she is be able to do so, the High Court may, in its discretion, variously grant a number of quashing, mandatory, and/or declaratory orders, as well as (more exceptionally) damages.[89]

The further question of whether judicial review's real significance lies in its high-profile cases can perhaps best be answered with reference to the grounds upon which an individual will challenge the lawfulness of a public authority's actions. Although there have also been some important doctrinal developments in relation to points of procedure – the "sufficient interest" threshold has been interpreted liberally by way of facilitating public interest litigation[90] – the grounds for review have been developed in evermore innovative ways over the past 30 years or so. Central to those grounds has been an increasingly robust rule of law doctrine that, while fully cognisant of the importance of the context to any decision and the need for judicial restraint in appropriate cases, emphasises that all forms of public power are ultimately subject to judicial control.[91] This has led the courts to develop a range of procedural and substantive dimensions to the grounds for review and, as noted above, to move towards values that may more readily be associated with the language of governance studies than public law orthodoxy.[92] While it may well be that decision-makers will not be familiar with such doctrines and values as they take decisions on a daily

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**88** Senior Courts Act 1981, s 31(3); and Part 54.5 of the Civil Procedure Rules. See further Leyland and Anthony cit. at 42, 201-210.

**89** Senior Courts Act 1981, s 31(1) & (4). On the discretionary nature of the remedies see C. Forsyth, *The rock and the sand: jurisdiction and remedial discretion,* in 18 Judicial Review 360 (2013).

**90** *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd* and *R (Child Poverty Action Group) v Secretary of State for Work and Pensions,* both cit. at 18.

**91** *R (Jackson) v Attorney-General* [2006] 1 AC 262, 304, para 107, Lord Hope.

**92** C. Howell, *Is There a General Principle Requiring Transparency about How Decisions Will be Taken?*, cit. at 41, and text. For some procedural and substantive dimensions see, on legitimate expectations, *R v North and East Devon Heath Authority, ex p Coughlan* [2000] 2 WLR 622.

basis – a point that has been made in some of the work on the impact of judicial review[93] – they still establish the outer-markers within which public power may lawfully be exercised. It may therefore be that this is where judicial review's true contribution to administrative justice is to be found and understood: it is able to provide normative reference points for the system as a whole and, in that way, ensure that the system remains grounded in the rule of law.

### 4. Administrative Justice – Some Challenges

The final matter to be addressed is that of austerity and its impact upon administrative justice.[94] Plainly, the practical success of the above mechanisms will depend, in large part, on the availability of public monies, whether to support the workings of the judicial and other institutions or to provide legal aid to individuals with limited economic means who may wish to, for instance, initiate judicial review proceedings. However, the reality in the UK, certainly since 2010, has been one in which much public funding for administrative justice has been frozen or reduced, in which some institutions have been abolished, and in which other institutions have had to reassess their spending priorities.[95] This has inevitably led to judicial review challenges to, among other things, institutional failures to discharge statutory duties and to government decisions to modify the funding arrangements that underlie legal proceedings.[96] For the High Court, such challenges have presented constitutionally difficult questions, as government decisions as to the level of public spending on services are typically regarded as political choices that demand judicial self-

**93** But compare the government's internal publication, *The Judge Over Your Shoulder*, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/256111/judge.pdf.

**94** On austerity see M. O'Hara, *Austerity Bites: A journey to the sharp end of cuts in the UK*, (2014).

**95** For abolition see, most prominently, the Public Bodies (Abolition of the Administrative Justice and Tribunals Council) Order 2013, SI 2042/2013. For some current issues see http://ukaji.org/2015/08/10/whats-new-in-administrative-justice-august-2015/.

**96** T. Dyke, *Judicial Review in an Age of Austerity,* in 16 Judicial Review 202 (2011).

restraint.[97] Austerity cases have, in that way, engaged the rule of law doctrine in settings that have sometimes been defined not just by the interests of individuals but also by much wider questions of policy.

Two cases can be used to illustrate the nature of the challenge for the High Court and, in turn, for the wider system of administrative justice. The first is *Re Martin's Application*[98], which was alluded to above and which concerned a delay in the investigative processes of the office of the Police Ombudsman for Northern Ireland. That office was established by section 51 of the Police (Northern Ireland) Act 1998 and is under a range of statutory duties related to the processing of complaints about the actions of officers in the Police Service of Northern Ireland. On the facts of *Martin*, the Chief Constable of the Police Service of Northern Ireland had referred to the Police Ombudsman his concerns about the conduct of police officers who had been involved in a criminal prosecution in 1991 that had led to the wrongful conviction of the applicant, Mr James Martin. The Police Ombudsman sought to explain that the subsequent delay in investigating the complaint had been caused by the fact that it was one of a growing number of historical cases that had created very real funding pressures within his office as it also tried to investigate contemporary complaints against police officers. This essentially meant that the case reduced to the question whether the Police Ombudsman's delay in performing his statutory duty could be justified for reasons of limited funding, or whether the delay in the case was such as to breach the implicit public law requirement to conduct an investigation within a reasonable time. While the judge who heard the case, Treacy J, acknowledged that the Police Ombudsman would normally enjoy very considerable latitude when making choices about the allocation of resources within his office, he considered that the delay in this case went beyond that which could be deemed acceptable. As the judge expressed the point: "The decided cases make clear that … (i)t is only if the delay is so excessive as to be regarded as manifestly unreasonable that a claim might be entertained by the court ... I

[97] *R v Secretary of State for the Environment, ex p Nottinghamshire CC* [1986] AC 240.
[98] [2012] NIQB 89.

have concluded, against the exceptional background of the present case, that by reason of chronic underfunding at the material time the respondent was disabled from discharging its statutory duty to investigate within a reasonable time".[99]

The second case is *R (Unison) v Lord Chancellor*[100], which concerned the lawfulness of changes to the fees regime that governs claims in employment tribunals.[101] The new regime required the payment of fees before claims and appeals could be brought in the tribunals, and the applicant, a public sector union, argued that the regime: (a) breached the EU law principle of effectiveness because many individuals would be unable to afford to bring proceedings to vindicate their rights; and (b) discriminated indirectly against women because a majority of claimants in employment cases are women. In dismissing the application for judicial review, the High Court noted that the EU law principle of effectiveness overlaps with the right of access to a court and that that right can be subject to limitation by way of fees so long as the fees do not make it virtually impossible or excessively difficult for individuals to bring proceedings. While the Court accepted, on the evidence before it, that there had been a drop in the number of tribunal claims since the introduction of the new regime, it was of the view that the applicant had not shown that this was because individuals were unable to bring proceedings as opposed to simply electing not to make claims. Moreover, on the matter of discrimination, the Court found that the fuller evidence did not support the applicant's submissions and that, in fact, the fees structures were largely balanced as between the genders. The regime that had been put in place was therefore lawful: it pursued the legitimate objectives of seeking to transfer the costs of tribunals to those who used them whilst making the tribunals more efficient, and it did so though means that were proportionate to those objectives.

*Unison* is on appeal to the Court of Appeal in England and Wales at the time of writing this article, and it may be that that Court will reach different conclusions on the law and evidence

[99] [2012] NIQB 89, paras 42-43.
[100] [2014] EWHC 4198 (Admin), [2015] 2 CMLR 4 at 111.
[101] The regime was contained in the Courts and Tribunals Fees Remission Order, SI 2013/2302.

before it. However, in the absence of that ruling, the judgment of the High Court remains authoritative and, indeed, indicative of the challenge that the wider administrative justice system faces. As was stated above, the funding of tribunals and so on is largely a political choice that must command the respect of the courts in a legal system that is centred upon not only the rule of law but also its correlate in the separation of powers doctrine. While this does not mean that the courts will never intervene in government choices – *Martin* points to disapproval of at least the consequences of limited funding, and *Unison* of the need to ensure that access to justice does not become impossible[102] – it does mean that the courts will not generally seek to adjudicate on broader questions of policy. The shape of the administrative justice system may, in that sense, rightly be said to be determined as much by politics as it is by law.

## 5. Conclusion

This article began by noting that it had three modest objectives: to explain how and why the language of administrative justice has become more prominent in the UK in recent years; to identify some of the primary mechanisms within the system of administrative justice; and to outline some of the challenges that the system faces in an era of austerity. Its resulting analysis of the principles and values that infuse the system, and which exist along its administration-adjudication continuum, has perhaps revealed two key points that should be emphasised by way of conclusion. The first is that, for public lawyers in the UK, administrative justice remains fundamentally concerned with maximising the scope for efficient, informed, and fair public decision-making as affects individuals. While an individual's interests will not, of course, thereby always be paramount – adjudication will typically balance an individual's interests with those of other parties and/or the wider public interest – the clear aspiration is for a system that will facilitate fuller engagement with the individual from the very outset of the decision-making process. If that occurs, it is expected that initial decisions will be

[102] And see, eg, *IS v The Director of Legal Aid Casework* [2015] EWHC 1965 (Admin).

taken in a manner that is more efficient, informed, and fair, and that those qualities will aid and define any subsequent complaints and/or adjudicatory processes.

The second point concerns the need for caution when assessing the relative significance of the various mechanisms of administrative justice. As was noted at the beginning of this article, administrative justice emerged as a field of study after a shift towards socio-legal analysis in the 1990s and a growing awareness of the limitations of judicial review both as a remedy and as a tool that influences bureaucratic behaviour. However, this article has also sought to outline the role that judicial review continues to play in administrative justice by establishing the paramaters of legality in the modern administrative state and by, for instance, safeguarding fair hearing and participation rights (albeit as determined by an adjudicative model). While that description of judicial review should not be taken to challenge the strength of compelling empirical data about its limitations, it should be taken to embed the point that the remedies that are available to individuals are best viewed holistically and as rooted in the rule of law. In the final analysis, it is that fact which gives administrative justice its relevance in the modern administrative state, even at a time of diminishing public expenditure on its institutions and values.[103]

[103] For some possible future directions see C. Skelcher, *Reforming the oversight of administrative justice 2010-2014: does the UK need a new Leggatt Report?*, in Public Law 215 (2015).

# ADMINISTRATIVE JUSTICE IN ITALY: MYTHS AND REALITY

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*Abstract*

The question of whether it is still possible to justify the existence of the "special jurisdiction" of the administrative court recurrently arises in Italian studies on administrative justice. In this perspective, this study examines three related questions: first, the presumed need to fully implement the Constitutional principle of jurisdiction's unity; second, whether the Constitutional historical reasons that have so far justified the existence of a special jurisdiction have been superseded; third, whether the system of protection against the public administration that has to be enforced by administrative courts according to the law is still suitable, that is, of potential incompatibility of current enforcement system with the changes in the modern civic society and the features of the post-industrial economy in a global context.

TABLE OF CONTENT



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**1. A necessary premise**

In Italian studies on administrative justice, the question regularly arises of whether it is still possible to justify the existence of the "special jurisdiction" of the administrative court[1]; in other words, but question in reality is the same, it is not time to move towards the unification of jurisdiction for all disputes involving the public administrations[2].

Recently too, inspired by conferences and study meetings, many thoughtful reflections have been provided by scholars of administrative[3] and Constitutional law[4] who are once again focusing on the "reasons for the existence of such a court"[5].

Significantly these renewed reflections run alongside, and we ought to be fully aware of this, a series of interventions by authoritative political figures who, for reasons that are very different to those that inspire legal scholars, have recently repeatedly questioned the utility of administrative justice and, indeed, have challenged its very existence, considering the legitimacy this court has been granted for over a century to be an unacceptable obstacle to Italy's economic development and a brake on its growth[6].

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[1] Our thoughts turn immediately to M. Nigro, *E' ancora attuale una giustizia amministrativa?*, Foro It. 249 (1983).

[2] Cf. the beautiful writings of G. Pastori, *Per l'unità e l'effettività della giustizia amministrativa*, Riv. dir. proc. 921 (1996) and A. Travi, *Per l'unità della giurisdizione*, Dir. pubbl. 380 (1998).

[3] Above all the writings of R. Villata, *Giustizia amministrativa e giurisdizione unica*, Riv. dir. proc. 287 (2014), speech to a conference at the Avvocatura Generale dello Stato (Rome, December 2013), and L. Ferrara, *Attualità del giudice amministrativo e unificazione delle giurisdizioni: annotazioni brevi*, Dir. pubbl. 561 (2014). Speech on the occasion of the presentation of the *Terzo rapporto sulla giustizia civile in Italia* "*Semplificazione ed unificazione dei riti nella prospettiva dell'unificazione della giurisdizione*", Unione Nazionale Camere Civili, Rome (Aula magna of the Court of Cassation), March 2014.

[4] F.S. Marini, *Unità e pluralità della giurisdizione nella Costituzione italiana*, Giustamm.it (2014). Speech on the occasion of Conference organised by the Supreme Court of Cassation, *Unità e pluralità della giurisdizione. Presupposti costituzionali e prospettive di riforma*, Rome (Aula magna of the Court of Cassation), October 2014.

[5] To quote L. Ferrara, *Attualità del giudice amministrativo*, cit. at 3, 561.

[6] Consider the intervention of Romano Prodi, *Abolire Tar e Consiglio di Stato per non legare le gambe all'Italia*, an article that appeared in *Il Messaggero*, *Il Mattino* and *Il Gazzettino* on 11 August 2013. But the issue has since been taken up by the Prime Minister Matteo Renzi on various occasions, from an interview in

Thus there is more than one reason for addressing this issue, and in the same way there is more than one point of view to consider in studying the issue.

However, three points appear to be the most significant:

the first relates to the need, mentioned by various parties, to fully implement the Constitutional principle of unity of jurisdiction, on the assumption that the specialty of the administrative court is unjustified (an assumption always accompanied by a more or less explicit suspicion regarding the lack of guarantee of independence ensured by this court and thus offered in turn to the users of the justice system);

a second regards establishing whether or not the historical reasons that for a certain period of time – in our Constitutional legal system – justified the existence of a special jurisdiction have been superseded, and which, in the same way as the transitory provisions of the Constitution, are the only reasons that justify this temporary derogation for this special jurisdiction;

a third, finally, concerns a verification of the suitability today of the system of protection against the public administrations that the law assigns (only) to the administrative court, that is, of its incompatibility with the needs of a modern civic society and a post-industrial economy in a global context[7].

What follows here will focus carefully on these points and seek to show in a reasoned way the (always provisional) conclusions that will be reached. It is necessary, however, to warn the reader from the outset that the subject under investigation in this study is populated, and certainly not just recently but at least since it was passionately debated within the Constituent Assembly (but even earlier in the late nineteenth-century debates between the historical Left and Right), by a host of mythological

November 2013, in which he declared "abolishing the TAR and administrative justice, unifying the jurisdictions, would mean an additional two points of GDP" (*Servizio pubblico*, La7, November 8, 2013); on this point cfr. *Matteo Renzi alla guerra dei Tar*, in formiche.net, 22 April 2014.

[7] This being a perspective that is taken in these pages within the logic of administrative law (to use the words of G. Napolitano, *La logica del diritto amministrativo* (2014), aware of the existence of a wider, supranational perspective, and its extraneousness to the topic under consideration. Cfr., above all, S. Cassese, *I tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale* (2009).

figures[8] which ensure a very bumpy ride for the jurist who – by definition – has to distinguish the real from the myth.

## 2. Unity of jurisdiction and Article 103 of the Constitution

Going in order through the various myths it is opportune to start with the myth of the uniqueness of jurisdiction which is often made to coincide with the Constitutional principle of the unity of jurisdiction.

Unity and uniqueness of jurisdiction are not the same thing and only the former is a Constitutional principle; the aspiration for uniqueness, instead, is merely a legitimate political goal, albeit one with noble cultural and ideological roots. A study of Article 103 of the Constitution, also in the light of Constitutional case law on the issue, is very helpful in seeing this.

The provisions of Article 103 of the Constitution is related to the provisions that precede or follow it in the Constitutional text. This reference is in particular to Article 24 of the Constitution which ensures the entitlement to take legal action to protect individual rights and legitimate interests; Article 100, which grants Constitutional weight to the Council of State and the Court of Auditors; Articles 101 and 102, which establish the principle of the unity of jurisdiction; Article 108, according to which "the law ensures the independence of judges of special courts" (in the second paragraph); Article 111 which, again in the second paragraph, ensures the principle of a fair trial in "equal conditions before an impartial judge in third party position"; and Article 113, which ensures judicial protection (ordinary or administrative) against the acts of the public administration. In terms of these provisions, however, the first two paragraphs of Article 103 are placed in a position of absolute pre-eminence. It is, in fact, Article 103 of the Constitution that has provided sufficient Constitutional

[8] No disrespect is intended with the reference to mythology, when comparing real problems and issues that while fascinating are not reflected in legal reality. We also refer here to the words of Santi Romano (*Mitologia giuridica*, in *Frammenti di un dizionario giuridico* (1947), 126. And indeed, while the ability to hover in legal mythology, in Romano's sense, is not common, it cannot predicate for all the poverties, but only for those that assume the appearance of "wonderful imagination" or a "belief that has the character of faith" (the quotes are at 127 and 128).

"cover" to the "Council of State and the other organs of judicial administration"[9], as well as to the criteria for the allocation of judicial functions between the different orders of courts called on to exercise it historically, albeit in the uniqueness of the same function sanctioned – as we are well aware – by Article 101 of the Constitution.

The Constituent Assembly, in reality, crystallised in Article 103 of the Constitution the difficult balance that in the early part of the last century had been achieved in dividing the exercise of judicial function between the ordinary court, the court of civil and political rights since the law abolishing administrative litigation, and the administrative court, the court of legitimate interests since it was founded with the law establishing the IV Section of the Council of State. This balance was achieved after a sharp oscillation between the one-tier system of judicial function entrusted solely to the ordinary court (a system supported by the majority of the historical Right of Mancini, Minghetti, Boncompagni and Borgatti that came to fruition in the law abolishing administrative litigation) and the two-tier system characterised precisely by the division of jurisdiction between different orders of courts (following the change in opinion brought about by Silvio Spaventa in his famous speech in Bergamo and adopted by the Crispi Ministry with the law establishing the IV Section of the Council of State[10]).

This is not the place to dwell on the evolution of doctrine and case law which has characterised the theme of administrative jurisdiction and its court and, connected to this, the division of jurisdiction[11]. The debate in question is the fruit of and is nourished not by the Constitutional provision, or the preparatory

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[9] For an updated commentary on Articles 100, 103, 111 and 113 of the Constitution, cfr. above all G. Cerrina Feroni, *La giustizia amministrativa nella Costituzione*, in G. Morbidelli (ed.), *Codice della Giustizia amministrativa* (2015), 3.

[10] The speech has been published on various occasions, most recently in S. Spaventa, *La giustizia amministrativa* (1993), 41 (edited by S. Ricci). On this point, also for a complete picture of the different situations compared, cfr. M. Nigro, *Le varie esperienze di giustizia*, in Id. (ed.), *Giustizia amministrativa* (2002), 33. The debate on the establishment of Section IV is described in more detail by N. Paolantonio, *L'istituzione della IV Sezione del Consiglio di Stato attraverso la lettura dei lavori parlamentari* (1991).

[11] The centuries-old debate on the subject has been reconstructed by F.G. Scoca, *Riflessioni sui criteri di riparto delle giurisdizioni*, Dir. proc. amm. (1989).

work behind the same, but by the rules that were intended to regulate the matter[12] prior to the unification of the Kingdom of Italy. Article 103 of the Constitution limits itself to incorporating and consolidating the fruits of that debate and to re-proposing and "constitutionalising" the jurisdictional function of the Council of State and the other organs of administrative justice, as well as a division of jurisdiction which, overcoming the one-tier setting affirmed with the abolition of administrative litigation, adopts the dualistic solution of the distinction of jurisdictions based on the different nature and consistency of subjective legal situations of legitimate interest and individual right.

And it is very much the clear intent of Article 103 of the Constitution to greatly limit the scope and consistency of the doubts on and disputes over the constitutionality of the entire system of administrative justice and the jurisdictional reserve assured to it[13]. While, in fact, it is more than possible, from a perspective of legal policy, to wonder about the appropriateness and benefits of a change in the Constitutional framework on the point and the adoption of a different one-tier model[14], it is important to always avoid that such assessments of political expediency should obtain nourishment from a mistaken reading of the current Constitutional framework.

And this is so true that even the case law of the Constitutional Court has rarely dealt with the issue of administrative jurisdiction and its division (while it has investigated much more often the theme of the efficacy of the legal protection offered by the administrative court).

And indeed, if such a crystallised criterion of division, that between rights and interests, were the only criterion of division foreseen by Article 103, the theme of administrative jurisdiction

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[12] It is still worth returning to the pages of M. Nigro, *La formazione del sistema italiano di giustizia amministrativa*, in Id. (ed.), *Giustizia amministrativa*, cit. at 10, 55 and of F.G. Scoca, *La genesi del sistema delle tutele nei confronti della pubblica Amministrazione*, in Id. (ed.), *Giustizia amministrativa* (2014), 3. This is a work which harks back to an earlier work by the same author, *Linee evolutive della giustizia amministrativa*, in *Annali della Facoltà di Giurisprudenza* (1977), 373.

[13] On which we cannot but agree with R. Villata, *Giustizia amministrativa e giurisdizione unica*, cit. at. 3, 287.

[14] This, for example, is what can be seen in L. Ferrara, *Attualità del giudice amministrativo e unificazione delle giurisdizioni: annotazioni brevi*, cit. at 3, 561.

would never have been a subject of interest for the Constitutional Court. If the division of jurisdiction – and hence the delimitation of the borders of administrative jurisdiction – had found its exclusive basis in the Constitutional provisions that refer to the distinction of subjective legal situations, the issue of administrative jurisdiction and its related disputes would have had to be limited to the cognition of the court of the jurisdiction, namely the Court of Cassation in Joint Session.

As is well known, however, Article 103 of the Constitution, again to leave unaltered the delicate balance achieved in the field before the advent of the Republican Constitution, alongside the general principle of apportionment based on the nature of the subjective legal situations in dispute, also provided an alternative criterion of special character. A special criterion that allowed the ordinary legislator, notwithstanding the general rule, to establish the exclusive jurisdiction of the administrative court (but implicitly also that of ordinary court) in "particular matters", regardless of whether what is in dispute are situations of individual rights or legitimate interests. It is precisely this discretionary margin left to the legislator by the Constituent Assembly in the demarcation of "particular matters" of exclusive jurisdiction which led to the Constitutional Court dealing with the scope and extent of administrative jurisdiction on various occasions.

And this is both to verify compliance with the Constitutional limit of "particular matters" which alone justifies the derogation from the general rule of apportionment based on subjective situations; as well as and above all to ensure that the discretionary choice of the legislator did not enter into conflict with the principles of equality, independence of judicial power and fullness of the relative protection ensured by Articles 3, 24, 108 and 111 of the Constitution. In fact, the very Constitutional provision that enables the ordinary legislature to reserve the protection of equal subjective legal situations (individual rights or legitimate interests) to the exclusive cognisance of different jurisdictions (the traditional exclusive jurisdiction of the administrative court or new hypothesis of an "exclusive" jurisdiction of the ordinary court), has allowed the legislature to choose to assign to one jurisdiction rather than the other individual legal situations of the same consistency.

And this is precisely the dual track along which runs all Constitutional case law in terms of administrative jurisdiction: on one side, the track constituted by the parameter of judgment provided by Article 103 of the Constitution as regards the limits to legislative discretion in identifying particular matters of exclusive jurisdiction; on the other, the track built on the parameter of the equality, independence and effectiveness of the legal safeguards guaranteed to individual legal situations of equal consistency.

Thus is becomes evident that precisely because of these Constitutional provisions, it was never assumed that the two-tier system on which jurisdiction in relation to the public authorities is built might be contrary to the principle of jurisdictional unity: a unity which essentially was never declined, in the Constitution, in terms of uniqueness[15]. In bringing up, then, the subject of a possible reform of the Constitutional system of jurisdiction from the point of view of its unification it is necessary to decline the real needs which justify or require such significant reform.

Well, in older and more recent writings on the subject, the only significant requirement that is made explicit in a different way is based on a supposed "original sin" of the administrative court. This court, as noted, was born in the sphere of the administration and not in that of the jurisdiction; when in 1889 the functions of justice "in the administration" were attributed to a Section of the Council of State it was decided to introduce a guarantee that was not judicial even though its nature related to justice[16].

From that source what continues to come down to this day are:

a) the closeness of this court to, or rather its "contiguity with" executive power;

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[15] This position is as obvious as it is often obliterated or unspoken. On this point R. Villata is very clear in *Giustizia amministrativa e giurisdizione unica*, cit. at 3, 287, which also criticises the ambiguity of certain case-law tendencies of the Cassation as the court of jurisdiction (293 ff.), or, if we prefer, but these are my words, as the propulsion (or promoter) of (or towards) a single jurisdiction.
On this point, for further discussion, cf. once again R. Villata, "*Lunga marcia" della Cassazione verso la giurisdizione unica ("dimenticando" l'art. 103 della Costituzione)?*, in Dir. proc. amm. 324 (2012).

[16] This is the position of the whole of the Orlando school, above all cfr. its founder, V.E. Orlando, *La giustizia amministrativa*, in Id. (ed.), *Primo Trattato completo di diritto amministrativo italiano* (1907), 818.

b) its structural "amenability" with respect to reasons of public interest at the expense of the protection of individual legal rights;

c) the commingling of roles and judicial and advisory (or even administrative) functions[17].

All this would help to fuel an incurable weakness in the Constitutional guarantee of the independence and impartiality of the administrative court, or at least a weakness in the image of said court as independent and impartial[18].

Only a verification of the real consistency of these fears, of the actual correspondence to reality of these "deadly sins", of the possible disastrous impact of this conditioning on the exercise of the judicial function will allow (or not) support for the proposed amendments to the current system of safeguards against the public administrations. It also has to be asked whether these problems, always assuming they are significantly consistent, are the most real and pressing problems of administrative justice, those that most urgently require the intervention of the legislature and even of the legislature at Constitutional level.

In answering these recurring questions, doctrine has inevitably been inspired and influenced by cultural options and ideals, by value judgments, by current events (rather than history), and consequently it is only natural that conclusions have been suggested that are questionable by their very nature. What comes to mind is the warning that one of Italy's leading humanists placed on the lips of St. Bernardine of Siena: "Not everything that has been written is worthy of faith. Certainly the canonical scriptures (the Constitution, for us) have undoubted authority. But in other cases it is always necessary to inquire about who the writer was, their life, their beliefs, the importance of what they said; with what you agree and with what you disagree, if they say things that are plausible, if the things you read coincide with the

[17] Cfr. the work of A. Travi, *Il consiglio di stato tra giurisdizione ed amministrazione*, Dir. pubbl. 505 (2011).

[18] For an articulation of these issues, cfr. L. Ferrara, *Attualità del giudice amministrativo e unificazione delle giurisdizioni: annotazioni brevi*, cit. at. 3, 561, spec. 581.

places and times. We should not simply believe a speaker or writer"[19].

Applying this wise maxim to the issue before us we can see, for example, how as regards the criticism about the closeness, or rather the "contiguity" of the administrative court to executive power, it can easily be replied that this situation, if it was true in a certain period of the history of the Republic, was much less so in the sad season of the corporative order[20], or in the recent past characterised by a completely opposite trend, both for a substantial preclusion and rigid barrier to the collaboration of administrative judges on the political staff, as a result of a declared intolerance of executive power for the administrative court (and even more for the weight of their destructive controls)[21]. And indeed this significant intolerance of the executive at both state and regional level, as well as in terms of local authorities, would seem to clearly contradict the supposed structural "amenability" of the administrative court with respect to the reasons of public interest. Even the complaints about the mixing of roles in the ownership of the judicial and advisory functions could be considered the result of a doctrinaire overestimation only if examined from a comparative perspective in the light of the case law of the European High Courts compared to the analogous institutions in the countries of the European Union[22].

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[19] The passage comes from Enea Silvio Piccolomini (later Pope Pius II), *Dialogus de somnio quodam* (datable to around 1453-1454), finally published in an admirable critical translation in Italian, in A. Scafi (ed.), *Dialogo su un sogno* (2004). The quote is from page 186.

[20] Crf. among others, G. Melis, *Il Consiglio di Stato ai tempi di Santi Romano*, Speech at the conference "*Il Consiglio di Stato durante la presidenza di Santi Romano*" (Rome, February 2003), in *giustizia-amministrativa.it* and then more widely Id., *Fare lo Stato per fare gli italiani* (2015), especially in the second part of the work *Quanto è stato fascista lo Stato fascista*, ch. VIII, *Il Consiglio di Stato: note sulla giurisprudenza* and ch. IX *La giurisdizione sul rapporto di impiego negli enti pubblici e il ruolo di Santi Romano.*

[21] We have already mentioned the interventions of Romano Prodi, *Abolire Tar e Consiglio di Stato*, cit. at 6, and Prime Minister Matteo Renzi on several occasions in this legislature (cit. at 6).

[22] On this point an efficacious synthesis can be found in the study by S. Mirate, *L'indipendenza e la imparzialità del giudice amministrativo. Un'analisi problematica tra diritto interno e giurisprudenza CEDU*, in A. Sandulli & G. Piperata (ed.), *Le garanzie delle giurisdizioni. Indipendenza ed imparzialità dei giudici* (2012), 78 and in

It is precisely the debatable nature of the opposing doctrinal visions which suggests to us that we should not set out on the same path in formulating an additional position in this debate populated by highly respectable and often compelling value judgments. As mere jurists it was thought more useful to put forward a number of conclusions on the issue while remaining anchored to the decisions of the Constitutional Court which has been asked, mostly at the request of the ordinary court, to address the issue of the inadequacy of the guarantees of independence and impartiality of the administrative court.

### 3. Is the Constitutional guarantee of the jurisdiction of the administrative courts still justified?

We need to point out how the examination of the Constitutional Court regarding administrative jurisdiction is often (though not always) preceded by a reasoned and argued premise, almost a warning with respect to the doubts which the ordinary courts sow cyclically in their orders for referral.

The Constitutional Court, in fact, repeatedly recalls that Article 103 is not only the main Constitutional guarantee of the jurisdiction of the administrative court but, at the same time, represents a solid bulwark against all the attempts advanced in doctrine in favour of a "non-administrative justice"[23] and which fight for a return to the one-tier system and the uniqueness of the order exercising the judicial function[24].

Moreover, the entirely political goal of rebuilding jurisdiction in monistic terms, and thus ensuring the unity of the judicial role also at the level of the judicial orders called on to exercise it, was a goal – openly pursued by some members of the

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the reflections of M.P. Chiti, *La giustizia amministrativa serve ancora?*, 35 Astrid Rassegna (2006).

[23] The noblest of which is to be found in the beautiful pages of A. Orsi Battaglini, *Alla ricerca dello Stato di diritto. Per una giustizia "non amministrativa"* (2005). For a comment cfr. 1 Dir. pubbl. (2006), with writings by G. Silvestri, *Un libro che fa 'respirare'*, 61; F.G. Scoca, *Un pensatore generoso*, 69; A. Travi, *Rileggendo Orsi Battaglini*, 91; G.U. Rescigno, *La tutela dei diritti soggettivi e degli interessi legittimi secondo la Costituzione italiana (dialogando con Andrea Orsi Battaglini a proposito del suo libro Alla ricerca dello Stato di diritto*, 111.

[24] Cfr. A. Orsi Battaglini, *Alla ricerca dello Stato di diritto. Per una giustizia "non amministrativa"*, cit. at 23, 33.

Constituent Assembly – that never met with a widespread consensus. As the work of the Constituent Assembly reveals, in fact, beyond even the authoritative voice of Piero Calamandrei, these positions remained very much in an isolated minority, and specifically led to ensuring the administrative court full membership of the constitutional Republican system.

Ample evidence of this is also provided by sentence no. 204/2004. In the first part of the reasoning behind this ruling, in fact, the Court recalls how the Constitution "recognised to the administrative court the full dignity of the ordinary court for the protection of individuals" with a legitimate interest "against the public administration". By now this should be fully accepted, but questions of constitutionality that have also been raised again recently have made this clarification necessary, just as they have made it necessary to recall the scope of the Constitutional principle of the unity of jurisdiction which, in the words of Mortati, the Court recalls consists of a "a unity that is non-organic, but functional in its jurisdiction, which does not exclude, but rather implies, a division of the various orders of judges in different systems, in autonomous systems". In essence, the Constitutional Court, even as it recalls the interventions of Calamandrei, seems to decisively and firmly debunk the myth of the unity of jurisdiction and does so from a perspective of enriching legal safeguards for individuals and the effectiveness of protection that evidently prizes the teaching of Vittorio Bachelet and his unforgotten work[25].

Again from this perspective we should read that part of the sentence no. 204/2004[26] which examines the power given to the administrative court to grant claims for damages by means as well of reinstatement in a specific form. In making an exception to the declaration of unconstitutionality of Article 35 of Law by Decree no. 80 of 1998 (replaced by Law no. 205 of 2000), the Court underlines how the attribution to the administrative court of compensatory protection constitutes "a tool of further protection, compared to the traditional destructive and/or conformative model, to be used to provide justice to the citizen against the public administration". And the assignment of this judicial power

[25] V. Bachelet, *La giustizia amministrativa nella Costituzione italiana* (1969).
[26] Reference is made to par. 3.4.1.

is justified by the Constitutional Court, not only in the fullness of the "dignity of the court" that is recognised to the administrative court, but also in the need for fullness in the judicial protection of individuals. In fact, the Court acknowledges that it "is rooted in the provision of Article 24 of the Constitution, which guaranteeing full and effective protection to individuals in the administrative jurisdiction, implies that the court is able to provide adequate protection".

These are, moreover, conclusions that the Constitutional Court itself had already provided in the past[27] and which are reaffirmed very clearly where it is recalled that "Article 24 of the Constitution ensures to legitimate interests the same guarantees ensured to individual rights and the possibility of exercising them before the court and the effectiveness of the protection the court must assure them of". But we will return to this subject (cf. below)

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[27] Think of the judgment of Vincenzo Caianello, Constitutional Court no. 177/1995, regarding third-party proceedings in the administrative process. For further reading, cfr. A. Police, *L'opposizione di terzo nel processo amministrativo: la Corte costituzionale anticipa il legislatore*, I-1 Giur. it. 512 (1995). But, in fact, these are recurring affirmations, particularly in relation to all the doubts about constitutionality raised with reference to the lack of fullness and effectiveness of the protection of the administrative court as the exclusive court for individual rights in public employment before privatisation. Cfr. in particular the judgments of the Constitutional Court no. 47/1976, n. 43/1977 and n. 100/1979 (followed by the ordinances of manifest lack of foundation no. 23 and n. 90/1980), on the allocation and revocation of public housing allocation. Cf. also the judgments of rejection no. 140/1980, regarding compulsory recruitment in the public administrations, no. 185/1981, regarding the liquidation of severance pay for state employees, and no. 208/1984, regarding disciplinary actions against personnel of the railways, tramways and inland waterways under concession, which referred substantially to what had been decided as regards public employment with judgments no. 47/1976 and no. 43/1977. More recently, the question has again been repeatedly raised of the constitutionality of the attribution to the administrative court of disputes about disciplinary action against the so-called *autoferrotranvieri* (rail transport workers), a group who now work increasingly in the private (or at least formally private) sector rather than for public bodies, but the Court has continued to declare it unfounded, even after the assignment to the ordinary courts of the majority of disputes on privatised relationships in the public sector (including those relating to disciplinary sanctions), continuing to point out, so far as it is relevant here, that the protection offered before the administrative court is not, in principle, "less valid" or "less advantageous or rewarding" than that available in the ordinary court (cf. adverse judgment no. 62/1996 and the ordinances of manifest lack of foundation no. 161/2002, 439/2002 and 301/2004).

in terms of the jurisdiction of the administrative court in terms of action for compensation for damage to legitimate interests.

That the system of administrative justice was pointing towards full jurisdiction was an acquisition that doctrine had reported at the first appearance of the legislative novelties and case law of the turn of the century[28]. Today the Constitutional Court has recognised that path as being fully complete and puts a substantial brake on any hypothesis of a return to the past. Independently of the reference to Article 35 of Law by Decree no. 80/1998 and therefore to the hypothesis of exclusive jurisdiction, the Court in fact indicates how the overcoming of the system which saw the administrative court as the setting for the annulment of an administrative act and the ordinary court for the recompense of consequential economic rights, "with its relative degrees of trial", "constitutes nothing more than the implementation of the precept of Article 24 of the Constitution", as well as Article 111 of the Constitution[29], as explicitly mentioned in the subsequent Constitutional Court judgment no. 191/2006.

The Constitutional case law just referred to is much more useful than any doctrinaire effort to dispel the myth of the specialty of the administrative court, a specialty declined in terms of a reduced or insufficient guarantee of independence and impartiality. In reality, as mentioned earlier, that contiguity with public power (and more particularly with the Government) about which so much has been written[30], if, on the one hand, appears to be greatly diminished if not dissolved now by the choice of the Ministers of the Government in power not to make use in their political staff of administrative judges (except to a very limited extent), on the other, for many years, precise rules of professional conduct have been followed for the exercise of the judicial

[28] The reference is to S. Cassese, *Verso la piena giurisdizione del giudice amministrativo. Il nuovo corso della giustizia amministrativa italiana*, 12 Gior. dir. amm. 1221 (1999). Cfr., in greater detail, A. Police, *Il ricorso di piena giurisdizione davanti al giudice amministrativo* (2000).

[29] On which we recall the writings of E. Picozza, *Il giusto processo amministrativo*, II Cons. St. 1601 (2000). Cfr., in greater detail, S. Tarullo, *Il giusto processo amministrativo* (2004); and more recently F.F. Guzzi, *Effettività della tutela e processo amministrativo* (2013).

[30] For a recent discussion cfr. L. Ferrara, *Attualità del giudice amministrativo*, cit. at 3, 565.

function[31] under the supervision of institutions of guarantee[32], as is also the case with the ordinary court[33].

**4. The independent and impartial administrative court in Constitutional case law**

Leaving aside the myths, then, it can be seen that the real issue is not so much to ensure the uniqueness or rather the reduction to unity of the jurisdictions, but rather to ensure the unity and effectiveness of the jurisdictional function.

And re-reading Constitutional case law will also provide confirmation of how well-founded the positions are of that part of doctrine[34] which emphasises the centrality of the need to ensure the equality and effectiveness of legal safeguards for the protection of subjective legal situations of legitimate interest on the part of the administrative court. And this is with reference both to the dynamic profiles, related to the system of actions available before the administrative court, to the means of inquiry and decision-making powers of said court and to the system of ordinary and extraordinary appeals; as well as with reference to the static profiles related to the structure and organisation of the administrative court system.

This is not the place to dwell on the dynamic profiles, but rather here it is necessary to study the static profiles of the Constitutional guarantee of the administrative jurisdiction for the protection of subjective legal situations of legitimate interest.

In the same way as for individual rights, so for legitimate interests the courts have the task of ensuring an effective compliance with the norms established by the Constitution. Hence

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[31] For further discussion allow us to return to A. Police, *Riflessioni in tema di deontologia e giustizia amministrativa*, Dir. proc. amm. 23 (2010).

[32] For further discussion allow us to return to A. Police, *Le garanzie istituzionali dell'indipendenza dei giudici amministrativi in un confronto tra diversi modelli di autogoverno*, in *Scritti in onore di Paolo Stella Richter* (2013), I, 361.

[33] This is not to say that similar doubts could not well be raised with respect to certain ordinary courts. Cfr. R. Garofoli, *Unicità della giurisdizione ed indipendenza del giudice: principi costituzionali ed effettivo sviluppo del sistema giurisdizionale*, Dir. proc. amm. 165 (1998).

[34] The reference is to the article by M. Clarich, *Quello sterile pressing sulla giustizia amministrativa che elude la sfida di far funzionare meglio i processi*, 21 Guid. Dir. (2014).

the importance of the judicial function in the civil orders intended to ensure effective, independent and impartial dispute resolution and compliance with the rules violated, in order to ensure peaceful coexistence and order in civil life[35]. The guarantee contained in Article 24 of the Constitution states firstly that only the court may grant or deny the protection, by examining the presuppositions in court. Therefore norms that directly or indirectly withdraw the "judgment" from the judicial authority, in whole or in part, violate the Constitutional precept. And it is on this point that we have to signal the first significant contribution of Constitutional case law.

With a series of decisions over a decade (from the second half of the 1960s to the second half of the 1970s), the Court declared constitutionally illegitimate a number of non-judicial organs to which the legislation prior to the Constitution had entrusted the protection of subjective legal situations of legitimate interest. As is well known, at the time the Constitution came into force there were a number of administrative bodies (provincial administrative councils and prefectural councils "in their judicial capacity", municipal and provincial councils for electoral disputes) whose survival was permitted by transitory disposition IV of the Constitution. More than 15 years after the Constitution came into force and in the absence of intervention by the legislator that would put an end to the transitional period, the Constitutional Court felt obliged to ensure that the protection of

[35] European Community case law also holds that what should be understood by jurisdictional organ is one of legal origin, with the characteristics of permanence and independence, whose jurisdiction is mandatory and whose procedure is inspired by the rule of the adversarial system and the application of legal rules: cf. EC Court of Justice of 30 June 1966, case 61/65, *Goebbles,* in Racc., 1966, 407; European Court of Human Rights, 25 September 1997, *Aydin*, in Racc., 1977, 1866. On several occasions the Strasbourg Court has ascertained violations of the "right to justice" by European states. In an interesting ruling that has affected Italy the Court considered detrimental to the "right to justice" a number of provisions regarding evictions which granted prefectures the right to carry out the same in the absence of judicial control (EC Court of Justice, 18 July 1999, *Società Immobiliare Saffi,* 25 Guid. Dir. 132 (1999). As has been pointed out by authoritative doctrine (L.P. Comoglio, *Valori etici e ideologie del "giusto processo" (modelli a confronto),* Riv. trim. dir. e proc. civ. 896 (1998) the "right to justice", sought by the Court of Justice, is part of the core of the judicial model that is part of modern constitutionalism.

legitimate interests was not further removed from the administrative jurisdiction[36].

In the same vein, although in a different period, are other decisions that, in considering the eligibility of optional arbitration, that instrument individuals are free to turn to in order to resolve disputes relating to rights available through arbiters of their own choosing, instead considered unconstitutional those provisions that imposed arbitration as a form of compulsory private jurisdiction, an alternative to the public[37]. These decisions would suggest cases relating to situations of legitimate interest are not likely to be dealt with in arbitration[38], as would seem to be confirmed today also by the provisions of Article 6 of Law no. 205 of 21 July 2000[39].

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[36] Reference is made to Constitutional Court decision no. 133/1963, on the institution of the "Minister judge" (the power of the Minister for the Merchant Navy to decide on appeals against decisions that determine the compensation for the requisition of ships); Constitutional Court decision no. 93 of 1965, on municipal councils as organs for electoral disputes; Constitutional Court decision no. 55/1966, on prefectural boards in their judicial capacity, on which cf. the note by F.G. Scoca, *Il contenzioso contabile dopo la dichiarazione di incostituzionalità dei Consigli di prefettura*, Giur. cost. 1485 (1966); Constitutional Court decision no. 30/1967, on provincial administrative councils; Constitutional Court decision no. 33/1968, on the judicial administrative council of Valle d'Aosta. Cfr. again Constitutional Court decision no. 49/1968, with a note by M.S. Giannini, *Una sentenza ponte verso i Tribunali amministrativi*, Giur. cost. (1968), and now in *Scritti* (2004), V, 925; and again Constitutional Court decision no. 128/1974, on the President of the Autonomous Consortium of the Port of Genoa deciding on the administrative measures of the organisation. Not to mention the rulings relating to jurisdictions other than administrative: Constitutional Court decision no. 60/1969, on the authority of Superintendent of Finance (but with reference to criminal jurisdiction); Constitutional Court decision no. 121/1970, on the powers of port commanders (again with reference to criminal jurisdiction); Constitutional Court decision no. 164/1976, again on the powers of port commanders, in relation to marine accidents.

[37] The reference is to Constitutional Court decision no. 127/1977 and no. 488/1991.

[38] On this point, however, cfr. M. Vaccarella, *Arbitrato e giurisdizione amministrativa* (2004), 18, which highlights a different attitude of the Court that can be inferred, for example from Constitutional Court decision no. 376/2001.

[39] Which in the second paragraph specifies: "disputes concerning individual rights devolved to the jurisdiction of the administrative court can be resolved through legal arbitration". But it does not mention – and therefore excludes – disputes relating to legitimate interests.

The legal protection is manifested in the judgment and personified in the third-party and impartial judge in relation to the parties. The impartiality and fairness of the judge lie in the absolutely equal distance of the judges from the interests that concretely pursue the individuals working within the process[40]. This guarantee must be ensured and today is also ensured to protect situations of legitimate interest on the part of the administrative court (as seen also in par. 2 above), and this is both in the configuration and the structure of the organisation and order deriving from the law establishing the Regional Administrative Courts and the Consolidated Law on the Council of State, as well as in relation to cases characterised by organisational solutions that can be considered "special", such as, for example, those organisational models specific to certain autonomous regions or provinces with special statutes[41].

Above all as regards the doubts raised concerning the guarantees of independence and the real nature of the court of the

[40] To ensure the impartiality of the judge, the system provides various instruments, such as the rules of jurisdiction, legal remedies, the rules on the judiciary etc. In this regard, for case law cfr. Constitutional Court decision no. 123/1999, in Giur. cost. 1031 (1999); and Constitutional Court decision no. 335/2002, in II Cons. St. 1090 (2002).

[41] The reference is to the Council of Administrative Justice for the Region of Sicily and the Regional Court of Administrative Justice for Trento. On this point, most recently, Constitutional Court decision no. 316/2004, according to which "the peculiar structure and composition of the Council of Administrative Justice outlined by Decree no. 373/2003 appear, therefore, fully justified, given the clarity of the principle expressed in Article 23, but also by the absence of organisational solutions established beforehand, by the intention to concretely put into practice that principle through the foreshadowing of a particular model whose specialty, following the established case law of this Court, does certainly not appear *praeter statutum*. In this regard it is important to remember that the special status of Trentino-Alto Adige (and its related implementing decree of 6 April 1984, no. 426) was inspired by the same principles of autonomy, substantially reproducing, many years later, the Sicilian organisational model based on the presence, in the organ of administrative justice, of "non-robed" members designated locally. Clearly this is a very peculiar model based on the "specialty" of a number of regional statutes which can also, in the field of judicial organisation, contain provisions in turn that are expressive of autonomy". This favourable judgment was made possible thanks to the legislative and statutory changes introduced recently, in the face instead of substantial doubts concerning constitutionality already made manifest longer ago by Constitutional Court decision no. 25/1976.

Council of State, the Constitutional Court has intervened decisively since the 1970s. In its judgment no. 177/1973[42], it pointed out that "it is undeniable that the Constituent Assembly took into account two specific needs, of wide scope: that the persons, to whom are entrusted judicial roles, are able to perform them, and that this ability is concretely established. And they, in fact, find complete or sufficient protection where various provisions affirm and recognise them as timely and essential because they will ensure to the judiciary the features that set it apart, of independence and (where applicable, and connected) impartiality. Undoubtedly in this sense, with Article 100, par. 3, according to which, specifically and in any case absorbing Article 108, par. 2, the law ensures the independence of the Council of State and its members in relation to the Government; Article 102, par. 2, final sentence, which provides for the participation in the specialised sections of the judiciary of qualified citizens who are not members of the judiciary; Article 106, par. 3, which defines the requirements and categories of people to whom can be entrusted the office of counsellor to the Court of Cassation; and, as regards their autonomy, again Article 108, par. 2, by which the law ensures the independence of the judges of the special courts and of the other persons involved in the administration of justice"[43].

Therefore, with reference to the rules governing the (partial) provision of Counsellors of State appointed by the Government, the Court stated that these rules, and in particular those of them that relate to the qualitative aspects of the choice and the guarantees and verification of the process, "should be interpreted on the basis of references and considerations of the foregoing, in the sense that they impose: a) that the choice should fall on people specifically suited to the functions and that is – borrowing the words of the opinion of the Plenary Meeting of the Council of State of 24 September 1973 and *in toto* by the text of Article 1 of Presidential Decree no. 579 of 1973 - on persons who through their occupation or legal-administrative studies carried out and their qualities of character and aptitude, fully possess the ability to perform the duties of a counsellor of state; b) that this ability is concretely established, and c) as a corollary, that, insofar

[42] Published in Giur. cost. 2348 (1973), with a historical note by C. Mortati.
[43] The reference is to Constitutional Court decision no. 177/1973.

as this is all compatible with the nature and function of the procedure and the order of appointment, the assessment of that eligibility is documented in some way or can be deduced from the context". Having thus correctly interpreted those provisions, the Constitutional Court held that they do not go against the Constitutional rules and principles mentioned above. "They give life to a legislative framework which, while giving the Government broad discretion, guarantees, with regard to the subject, compliance with the requirement of the suitability of the judge, as well as of the independence of the Council of State and its components from the Government (and at least insofar as it may arise from the exercise of the power of appointment). Acts of appointment, which in applying those rules that are in place, are subject to a control of legality by the Court of Auditors and can be brought to the judgment of the Council of State"[44].

The width of the quotation is justified because it synthesises a no-longer denied line taken by the Court in judging this issue, a line that follows an approach that is non-formalistic but attentive to the substance of things, according to an interpretation of the rules that is constitutionally directed.

And also in more recent years the Court has been shown to follow an approach linked to the substance of the issues, rather than to the enunciation of abstract questions of principle. Both with reference to possible extrajudicial assignments of the judges of the Court of Auditors[45], or more generally with respect to

[44] The reference is again to Constitutional Court decision no. 177/1973.

[45] The reference is to Constitutional Court decision no. 224/999, according to which "the Sicilian Regional Branches of the Court of Auditors, in a position of independence in terms of the regional administration, including public bodies belonging to the Region, and the administrators and officers who work in it, perform all the control and judicial functions of the Court itself: including the functions of *a posteriori* inspection of the management of the public administrations, governed by Article 3, par. 4, 5, 6 and 7 of Law no. 20 of 14 January 1994, under which, among other things, the Court verifies the pursuit of the objectives set by regional laws (par. 5), reports to the Regional Assembly on the outcome of the checks carried out, also with evaluations on the operation of the internal controls, and provides its observations to the administrations concerned (par. 6 and 7). The colleges of accountants of the regional bodies in question perform the typical functions of internal control, thus being themselves subject to "outside" evaluations by the Court of Auditors. The risk of entanglement of functions between the two orders is clear, which may result in an impairment to the independence and impartiality of the judges of the

opportunities for the scrutiny of the legality of other "special" jurisdictions[46].

It is therefore not the uniqueness of the jurisdiction that constitutes the unfailing Constitutional principle, but rather unity as a rule for the exercise of the judicial function. And the

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regional sections of the Court, because of the necessary institutional presence of judges, belonging to the same sections, in the area, and even on the boards and organs of the regional bodies. On closer inspection, the provision for entrusting such assignments only to magistrates of the Sicilian sections of the Court, contained in the contested dispositions, does not have the meaning and scope of a simple choice of suitability for organisational reasons, but expresses a line of institutional involvement by those sections, through the magistrates involved in them, in an activity of internal control within the framework of the regional administrations, in turn then subject to the institutional powers of control exercised by the same sections. It is no coincidence, in fact, that this is not an isolated and occasional choice, but corresponds to a line of institutional policy applied systematically in the discipline of the organisation of regional bodies in Sicily: the contested provision in Article 5 of Law no. 25 of 1976 refers to a category of bodies (inter-company centres for professional training in industry); the likewise contested provision, of Article 15, par. 1, of Regional Law no. 212 of 1979 refers to four regional bodies; the same provision is provided for two other regional bodies in par. 3 of Article 15; an identical provision is found, referring to other bodies, in other regional laws (cf. e.g. Article 6, par. 1, of Regional Law no. 50 of 21 December 1973, regarding the colleges of auditors of three bodies). Though such a line can correspond to the intention of the regional legislature, in itself commendable, to impart a character of seriousness and "neutrality" to the internal control of the bodies, through the presence of the professionalism that is typical of accounting magistrates, this does not eliminate the "contamination" between internal and external controls, which can be achieved through the systematic allocation of tasks of internal control, conferred and paid for by the Region or by regional bodies, to many of the same judges who operate institutionally in the same geographical area, in the organ of external control. The territorial limitation, in this case, translates into an obstacle to the exercise of the tasks of safeguarding the independence and impartiality of the magistrates, entrusted to the Presidential Council, which is responsible, for these very purposes, for deliberating on the assignments, and that could not prevent, not so much on single occasions (for which it could always exercise its power to concretely refuse a designation), but systematically, which creates the risk of entanglement mentioned above, which is dangerous for the independence of the Court and its magistrates. It must therefore be concluded that the provisions are unconstitutional, being contrary to Articles 100, par. 3, and 108, par. 2, of the Constitution, insofar as they limit to magistrates serving in the Sicilian regional sections the choice of accounting magistrates on whom may be conferred the positions in question".

[46] The reference is to Constitutional Court decision no. 284/1986.

Constitutional Court is well aware of this and has given a significant reading to it in questioning the scope and limits of exclusive jurisdiction.

The Constitutional Court, in fact, found that the "particularity" of the matters of exclusive jurisdiction referred to in the Constituent Assembly is nothing more than the reference to that particular type of dispute in which the "safe and necessary coexistence or cohabitation … of positions of legitimate interest or individual right linked by an inextricable Gordian knot" made it so difficult to make a distinction to justify the derogation from the traditional criteria of allotment. A thesis which was also espoused during the work of the Constituent Assembly by Ruini, according to whom – as also remembered in the judgment – because of "the inseparability of the issues of legitimate interest and individual right, and the prevalence of the former" the need has emerged to "add the competence of the Council of State for the rights of individuals, in the particular matters specifically provided for by law"[47].

The Constitutional Court stated therefore that the particularity of the matters assigned to exclusive jurisdiction implies that such matters "must share in the same nature" as those devolved to the general jurisdiction of legitimacy "which is marked by the fact that the public administration acts as the authority against which protection is granted to citizens in the administrative court".

This solution has been heavily criticised in doctrine, to the extent of casting doubt on the very existence of exclusive jurisdiction[48]. This is not the place to dwell on this point. For the

[47] The reference is to Constitutional Court decision no. 204/2004.

[48] Among the many comments cfr. those of F.G. Scoca, *Sopravvivrà la giurisdizione esclusiva?*, Giur. cost. (2004); V. Cerulli Irelli, *Giurisdizione esclusiva e azione risarcitoria nella sentenza della Corte costituzionale n. 204 del 6 luglio 2004*, Dir. proc. amm. (2004); R. Villata, *Leggendo la sentenza n. 204 della Corte Costituzionale*, Dir. proc. amm. (2004); L. Mazzarolli, *Sui caratteri e i limiti della giurisdizione esclusiva: la Corte costituzionale ne ridisegna l'ambito*, Dir. proc. amm. (2005); M. Clarich, *La "tribunalizzazione" del giudice amministrativo evitata*, Gior. dir. amm. (2004); A. Pajno, *Giurisdizione esclusiva ed "arbitrato" costituzionale*, Gior. dir. amm. (2004); A. Travi, *La giurisdizione esclusiva prevista dagli artt. 33 e 34 del d. leg. 31 marzo 1998, n. 80 dopo la sentenza della Corte costituzionale 6 luglio 2004, n. 204,* I Foro it. (2004); F. Fracchia, *La parabola del potere di disporre il*

purposes of this short essay it is sufficient to recall how the reading that the Court provides overall of administrative jurisdiction, and that still today justifies its specialty, lies in the Constitutional configuration of the administrative court as a judge of public power. This reading was then taken up by the legislator in Article 7 of the Code of Administrative Procedure[49]. And indeed the administrative judge within their jurisdiction is not in any way, if they ever were, a special judge; we should more properly highlight with the law that in matters where what is disputed is the exercise or non-exercise of public power, the administrative court is the only ordinary court, the natural court also referred to with fiery passion in doctrine[50].

### 5. Beyond the myth, a conclusion regarding the real problems of justice in relation to the public administrations

If Constitutional case law has helped us reshape the mythological import of certain themes, those of the uniqueness of the jurisdiction and the specialty of the administrative court (or its structural bias), this does not mean that there is not a significant third theme for investigation, among those which were enumerated at the start of this paper; the reference is to that which urges the verification of the current system of safeguards against the public administration that the law assigns to the administrative court, or rather its incompatibility with the needs of a modern society and a global economy.

The theme, as noted, has been repeatedly brought up in the context of political debate and deserves thoughtful reflection. If, in fact, a not insignificant part of this debate is fuelled by the natural irritation and inevitable impatience with the counter-limits on the part of the public authorities and the executive power in particular, it would be very short-sighted on the part of the institutions of guarantee not to notice the existence of some real

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*risarcimento: dalla giurisdizione esclusiva alla giurisdizione del giudice amministrativo*, I Foro it. (2004).

[49] On this point, cf. N. Paolantonio, *Commento all'art. 7,* in R. Garofoli & G. Ferrari (eds.), *Codice del processo amministrativo* (2010), 81.

[50] Cfr. M. Mazzamuto, *Per una doverosità costituzionale del diritto amministrativo e del suo giudice naturale*, Dir. proc. amm. 156 (2010).

problems and not to recognise the justified reasons that sometimes nurture controversies of a simplistic or populist tone.

In fact it cannot be denied that the exercise of the judicial function against public administrations has contributed in a substantial way in recent years to generate an unwelcome instability in public decision-making; those decisions which insofar as a result of the exercise of public power are precisely the object of administrative proceedings.

The destructive result of a sentence of annulment, a typical remedy consequent to a review of legitimacy of the administrative court (but the discussion has recently also shifted to the judgment on the legitimacy of laws by the Constitutional Court), creates the feeling that the administrative court is an obstacle to the timely adoption of measures that are necessary to protect collective interests. The pages of the newspapers are full of arguments about the supposed responsibility of the administrative courts for the failure to complete works of environmental reclamation in polluted areas or those affected by hydrogeological problems, or for the flight of foreign investors from projects for the construction of plants for power processing or generation, or again for the failure to set up extensive networks of public services (from the distribution of electricity and gas to high-speed rail), or for the interruption in the delivery of public services.

It is quite clear that blaming the judicial function for the harmful effects of illegitimate (if not illegal) administrative activities is inappropriate, but, in certain circumstances, there is a striking disproportion between the usefulness of the remedy (the guarantee of legitimacy in the exercise of the public function) and the damage resulting from the effects produced by the exercise of this remedy is a finding that cannot be denied. There is (and there is no point hiding it) an issue of proportionality and adequacy regarding the effects of the destructive remedy compared to the public or collective interests related to the public decision that was taken.

To address this issue, in the past the administrative court has sometimes exposed itself to the criticism discussed in the preceding pages, according to which it would manifest a substantial bias towards the public body to the detriment of the

protection of individuals[51]. In reality, the court far from altering the position of parity of the parties in the judgment has imagined a number of possible solutions to ensure adequacy and proportionality between the general effects of its judgment and the request for compensation for the damages of the individuals covered by the judgment.

Examples of this are the insights for the delisting of the vices of formal legitimacy of administrative actions, which was later implemented by the legislature in general terms[52], both with regard to the vices of public tenders (and the consequent effects on public contracts)[53], or rulings to defer or modulate over time the effects of judgments of annulment[54], or, lastly, the attempt to remove Constitutional protection itself as speculated about in a recent referral order to the Plenary Meeting of the Council of State[55].

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[51] On this point cf. also the reflections of S. Battini, *La giustizia amministrativa in Italia: un dualismo a trazione monista*, Riv. trim. dir. pubb. 47 (2013).

[52] This is not the place to dwell on this point, but allowed us to refer once again to A. Police, *Annullabilità e annullamento*, I Enc. Dir. Ann. 49 (2007).

[53] We refer to Articles 119 ff. of the Code of Administrative Procedure. On which see N. Paolantonio, *Commento al Libro quarto Titolo quinto*, in G. Leone et al (eds.), *Codice del Processo Amministrativo* (2010), 876; R. Giovagnoli, *Commento* agli artt. 119 e 120, in A. Quaranta & V. Lopilato (eds.), *Il processo amministrativo* (2011), 980; R. De Nictolis, *Commento agli artt. 121-125*, in A. Quaranta & V. Lopilato (eds.), *Il processo amministrativo* (2011), 1013; S. Morelli, *Commento all'art 119*, in E. Picozza (ed.), *Codice del Processo Amministrativo* (2010), 228; C. Sgubin, *Commento agli artt. 120-125*, in E. Picozza (ed.), *Codice del Processo Amministrativo* (2010), 232; R. Chieppa, *Il Codice del processo amministrativo* (2010), 562; P. Lignani, *Commento all'art. 119*, in R. Garofoli & G. Ferrari (eds.), *Codice del processo amministrativo* (2010), III, 1635; G. Ferrari, *Commento agli artt. 120-125*, in R. Garofoli & G. Ferrari (eds.), *Codice del processo amministrativo* (2010), III, 1649; M. Lipari, *Commento all'art. 119*, in F. Caringella & M. Protto (eds.), *Codice del nuovo processo amministrativo* (2010), 1090; S. Cresta, *Commento agli artt. 120-125*, in F. Caringella & M. Protto (eds.), *Codice del nuovo processo amministrativo* (2010), 1118.

[54] Reference is among others to the Council of State, Sect. VI, May 10 2011, no. 2755, with comment by M. Clarich, *L'annullamento degli atti non è sempre retroattivo*, Il Sole 24Ore - Norme e Tributi (7 June 2011).

[55] The reference is to the Council of State, Sect. V, January 22, 2015, no. 284, with highly critical comments by M. Mazzamuto, *Dalla dequotazione dei vizi "formali" alla dequotazione dei vizi "sostanziali", ovvero della dequotazione* tout court *della tutela costitutiva*, Giustamm.it (2015).

Part of the doctrine and the Plenary Meeting itself[56] did not welcome this solution favourably but, leaving aside the reasons for a more traditional reading, there is no doubt that the real question remained unanswered, the real and main problem of judicial protection against the public administrations. And this is a problem, as can be seen, irrespective of what court is called upon to review the legality of administrative measures[57].

So if we really want address the real problems of justice in terms of the public administrations, or at least the most urgent, we believe it to be more constructive for scholars, as well as for judges, to dwell on the possible evolution of safeguards, without setting off in the vain search for "brief and vanishing dawns"[58], among which the legitimate aspiration to unity of jurisdiction is very much at home.

[56] The reference is to the Council of State, Plenary Meeting, April 13, 2015, no. 4.

[57] Always assuming we do not want to solve the problem with a ban, similar to the one that for 150 years still exists for the ordinary courts (the reference, of course, is to Article 4, par. 2, of Law no. 2248, Ex. E of 20 March 1865 ,) and which of course would be in stark contrast with Article 113, par. 2 of the Constitution.

[58] In the words of M.S. Giannini (*Administrative Law* (1988), Preface), there where he "sadly" confesses that "at the age where time has led me there open neither prospects of shipwrecks or expectations of regeneration, although the condemnation of jurists is to always think of new dawns. But they are brief and vanishing dawns".

# AT RISK: NATIONAL ADMINISTRATIVE PROCEDURE WITHIN THE EUROPEAN UNION*

Carol Harlow **

> La nostra idea di Europa è fondata sulla diversità …
> La nostra Unione si fonda su cultura e interessi comuni, ma custodisce anche la diversità e la varietà del nostro continente. La diversità non ci fa paura. Noi stessi siamo la diversità. La diversità è nel nostro DNA. È il nostro bene più prezioso.
>
> Federica Mogherini, 'Le sfide ai confini dell'Europa : Come rilanciare la politica estera e di sicurezza comune?' *Lectio magistralis per la consegna del Premio ISPI* (25.05. 2015).

*Abstract*

The paper analyses the risk of national administrative procedure within EU. In particular, it presents three different examples of an integrationist approach to administrative law and procedures. Focusing on the neglected principle of subsidiarity, the analysis proceeds in favour of democratic legitimacy and against the integrationism of the Court of Justice, with the aim of supporting a model based on procedural autonomy.

TABLE OF CONTENTS



* Paper presented at the celebration for Mario Chiti, Rome, September 2015.

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**Introduction**

In an article on the development of European public administration written in 2004, Professor Mario Chiti wrote of 'the rise of a *multilevel* public administration in which the original Community scheme of the indirect, autonomous execution of Community policies by national administrations is being replaced by an administrative model of integration.'[1] His was not a lone voice.[2] Only four years later, Herwig Hofmann introduced the terminology of a shared 'European administrative space' or 'area in which increasingly integrated administrations jointly exercise powers delegated to the EU in a system of shared sovereignty'.[3] An integrated administration was materializing, in which both national and supranational administrative actors participated; the outcome was an increasing convergence of administrations and administrative practices at every level of the EU; a 'common European model' was seen as emerging.

It is no secret that I am not an advocate of European integration or of a European *ius commune*. I have never considered that belief in a pluralist Europe is inconsistent with a commitment to internationalism. In common with the High Representative, I believe in diversity. I believe that cultural diversity is 'valuable in its own right' and is 'a basic strength of the European enterprise'.[4] This is indeed recognised in the Preamble to the TEU, which promises 'to deepen the solidarity between their peoples while respecting their history, their culture and their traditions' and is repeated in the Preamble to the European Charter (ECFR), which guarantees respect for 'the diversity of the cultures and traditions of the peoples of Europe'. More closely relevant to our present subject-matter, Point 7 of the Protocol on the Application of the Principle of Subsidiarity and Proportionality stipulates that 'care [should] be

[1] M Chiti, *Forms of European Administrative Action*, 68 Law & Contemp. Probs. 37 (2004).

[2] See specially F Bignami, *Introduction,* and S Cassese, *European Administrative Proceedings*, in the Special Issue F Bignami and S Cassese (eds), *The Administrative Law of the European Union* 68 Law & Contemp. Probs. (2004) 1-239.

[3] H Hofmann, *Mapping the European administrative space*, 31 West Eur. Pol. 662 (2008). And see J Olsen, *Towards a European administrative space*, 10 JEPP 506–31 (2003).

[4] C Harlow, *Voices of Difference in a Plural Community*, 50 AJCL 339, 340 (2002).

taken to respect well established national arrangements and the organisation and working of Member States' legal systems'. In line with this, I believe that law and administrative procedure should not be treated as a form of transferable technology; they represent important cultural preferences and careless change may trigger unwanted side effects.

In this paper, I want to advance a case against the wide-scale Europeanization of administrative procedures. In Part I, I shall present three different examples of an integrationist approach to administrative law and procedures, representing three different routes towards procedural integration. In Part II, focusing on the neglected principle of subsidiarity, I shall consider the feasibility of a radically different approach. In Part III, I shall argue in favour of democratic legitimacy and against the integrationism of the Court of Justice, which overlooks questions of impact and enforceability. I shall argue for a more relaxed and diverse model, in which greater attention is paid to procedural autonomy.

**I. Paths to convergence**

As the starting point for this section, I want to take a second paper written by Mario Chiti in 1995,[5] in which he asked whether it was possible to identify universal principles of good government. Chiti was talking primarily of the building of the European Community both as 'a Community of Law, with new sources of juridical inspiration, its own institutions and the possibility of enforcing the new rules through the Commission and its own judiciary' and as 'the major expression of judicial universalism' in our times. In this framework, it was natural for 'a series of general principles considered universal' to emerge; equally it was natural that the principles should derive mainly from the jurisprudence of the European Court of Justice. The principles were designed to regulate administrative action and procedures with a view to achieving a balance between authority and liberty; they had at one and the same time to 'support the

[5] M. Chiti, *Are there universal principles of good government?*, 1 EPL 241, 244-5 (1995).

pursuit of the public interest while seeking to guarantee security for the affected individual'.[6]

This may have been broadly true of the principles listed by Chiti - equality and the prohibition of discrimination; proportionality; the principle of legal certainty and the protection of legitimate expectations; the principles concerning the rights of the defence and other specific principles related to the concept of due process – although even then Chiti recognised that his chosen principles were not 'universal'. They were 'partly common to the Member States, partly typical of only some of them'; the proportionality principle was, for example, strongly represented in German administrative law but unrepresented in French and English administrative law. There may therefore be significant 'spill-over effects' from 'constitutionalizing' proportionality as a general principle of EU administrative law across the Member States.[7] Again, his chosen principles were expressed at a very general level and might be subject to very different interpretations. It is very possible to find agreement on symbolic values such as the rule of law or natural justice at an abstract level; it is in the implementation of these values inside specific legal orders that differences occur. A study made for the Swedish Presidency in the context of a possible Union-level codification of administrative procedure found , for example, that there was much general agreement on core principles in the 17 states studied but that the form in which they were incorporated into law differed greatly.[8]

It is important to take note of the context in which these words were written. It was a period when the Court of Justice was engaged in a clearly integrationist project; indeed, integrationism had recently been described by the Italian judge at the Court of Justice as 'a genetic code transmitted to the Court of Justice by the founding fathers'.[9] The Court was beginning to treat the Treaties as

[6] M. Chiti, *Are there universal principles of good government?*, cit. at 5, 247.

[7] See, eg, G Anthony, *Community Law and the Development of UK Administrative Law: Delimiting the UK 'Spill-Over' Effect*, 4 EPL 253 (1998); R. Rawlings, *Modelling Judicial Review*, 61 CLP 95 (2008).

[8] Statskontoret, *Principles of Good Administration in the Member States of the European Union* (2005).

[9] F. Mancini and D. Keeling, *Democracy and the European Court of Justice*, 57 MLR 175, 186 (1994).

constitutional in character; it was engaged too in establishing the primacy of the 'new legal order' that it had fathered[10] and in underwriting the doctrine of primacy by 'constitutionalizing' its general principles. The Court showed no concern over the legitimacy of outlawing well-established principles of member state administrative law as it did in *Johnston*[11] in respect of the right of access to the court and in *Heylens* in respect of the rights of the defence in administrative proceedings.[12] Underlying this approach was an implied assumption of 'levelling-up', which the French Conseiller d'Etat, Ronny Abraham, argued was a threat to minority cultures: 'It is not because an institution or rule is to be found only in one, or in a small number of countries, that it is to be adjudged bad; the majority is not always right.'[13]

At least at this early stage, the integrationist tendencies of the Court of Justice had generated little rebellion.[14] As Jospeh Weiler famously put it, the Court had been able 'to satisfy its main interlocutors'; it had achieved a 'quiet revolution' in which 'the growing involvement of the national judiciary in the administration of Community law, transforming doctrinal acceptance into *procedural* and social reality' had played a significant part.[15] By the early 1990s, however, American observers began to take note of the Court's integrationist tendencies. In a paper designed for an American audience, Martin Shapiro pointed to the integrationist effects of the Single European Act, which specifically authorised the Commission to challenge national regulations before the Court of Justice, to be decided by the Court's 'broad proportionality

[10] Case 26/62 *Van Gend en Loos v Nederlandse Administratie Belastingen* [1963] ECR 1.
[11] Case 222/84 *Johnston v Royal Ulster Constabulary* [1986] ECR 1651.
[12] Case 222/86 *UNECTEF v Heylens* [1987] ECR 4097.
[13] R. Abraham, *Les principes généraux de la protection juridictionnelle administrative en Europe: L'influence des jurisprudences européennes*, 9 EPLR 577, 582 (1997) (my translation).
[14] But see the notable critique by H. Rasmussen, *On Law and Policy in the Court of Justice* (1986) and the revolt of the *Bundesverfassungsgericht* in *Internationale Handelgesellschaft Gmbh*, BVerfGE 37, 271 (1974); '*Solange II*' (1986) 73 BverfGE 339; *Re the Application of Wünsche Handelgesellschaft* [1987] 3 CML Rev 225.
[15] J Weiler, *A Quiet Revolution - The European Court of Justice and its Interlocutors*, 26 CPS 510 (1994). And see his debate with Judge Mancini: F Mancini, *Europe: The Case for Statehood*, 4 ELJ 29 (1998); J. Weiler, *Europe: The Case Against the Case for Statehood*, 4 ELJ 43 (1998).

discretion'.[16] Shapiro highlighted the significance of *administrative* judicial review, which would subject Member States to the Court's supervision on administrative-law questions. By applying EU procedural standards, such as the duty to give reasons or proportionality-testing, the Court could use procedural law to achieve substantive outcomes; it could, in other words, shelter constitutional behind administrative review.[17] This point is particularly relevant to my first case study.

In administrative matters, however, the Court of Justice had brought into play the principle of national autonomy in matters of administrative and judicial procedure. In *van Schijndel*,[18] Advocate-General Jacobs insisted that the doctrines of primacy and effectiveness of EC law could not be absolute; the interest of litigants (in the enforcement of rights under Community law) must be balanced against other considerations such as legal certainty, sound administration and the orderly and proper conduct of proceedings by (national) courts. Legal systems, he argued, 'commonly impose various restrictions which, in the absence of a reasonable degree of diligence on the part of the plaintiff, will lead to full or partial denial of his claim'. But where was the line to be drawn? A complex and often contradictory case law evolved, evoking criticism from commentators. While some complained that 'the efficacy of Community law and, in particular, its capacity to be equally applied', was being undercut by the Court's 'sympathetic accommodation' to national procedures and by an inconsistent approach,[19] others argued that the trend towards integration and cultural uniformity was threatening national cultures unnecessarily.[20]

Writing more recently, Rolf Ortlep and Maartje Verhoeven have suggested an emerging distinction between 'direct' collisions of EU and national legal orders, where EU law and national law

[16] M. Shapiro, *European Court of Justice*', in A. Sbragia (ed.), *Euro-Politics: Institutions and Policymaking in the "New" European Community* (1991), 141-5.
[17] Ibid. And see M. Shapiro, *The Giving Reasons Requirement*, U. Chi. Legal F. 179 (1992).
[18] Opinion of A.G. Jacobs in Joined Cases C430, 431/93 *van Schijndel and van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705 at [31].
[19] C. Himsworth, *Things Fall Apart: The Harmonisation of Community Judicial Procedural Protection Revisited*, 22 EL Rev. 291 (1997).
[20] M. Hoskins, *Tilting the Balance: Supremacy and National Procedural Rules*, 21 EL Rev. 365 (1996).

provide different, incompatible legal regimes for the same factual situation; and 'indirect' collisions involving national procedural rules, such as time limits in which to initiate judicial proceedings, which can limit the effect of EU law in the national legal order. In the former case, the Court of Justice generally opts for primacy; in the latter case, there is more room for assessment and national rules that hinder the effectiveness of EU law may not have to be set aside.[21] In support of their thesis, the authors cite the well-known decision in *Kühne & Heitz*,[22] where the Court of Justice ruled that EU law did not oblige an administrative authority to re-open a final administrative decision when national law did not authorise this. The limitations placed by the Court on this application of procedural autonomy, however, were sufficient to render the principle itself exceptional and case law cited in later sections suggests that we are fast moving towards a counter-principle that would read (as drafted by John Delicostopolous):

> All procedural rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially; the effective enforcement of Community law are to be considered as measures contrary to Community law and must be declared inoperative.[23]

**1. Standardising health care procedures: a stroll through the Court of Justice**

EEC Regulation No 1408/71 was primarily intended to deal with social security benefits for migrant workers.[24] Under Article 22 of the Regulation, however, a worker satisfying the conditions of the competent state for entitlement for benefits can be 'authorised' by a 'competent institution' to travel outside his/her

[21] R. Ortlep and M. Verhoeven, *The Principle of Primacy versus the Principle of Procedural Autonomy found in 2012*, June 2012, Netherlands Administrative online Law Library.
[22] Case C-453/00 *Kühne & Heitz* [2004] ECR I-837.
[23] J. Delicostopolous, *Towards European Procedural Primacy in National Legal Systems*, 9 ELJ 599, 605 (2003).
[24] Regulation No 1408/71 (EEC) on the application of social security schemes to employed persons and their families moving within the Community, OJ L149 (05/07/1971), pp.2-5.

Member State of residence for 'treatment'. In *Kohll*, [25] this provision was read up by the Court of Justice as designed to allow an authorised person to go to another Member State to receive appropriate treatment '*without that person incurring additional expenditure*'.[26] The Court added that, although it had not been intended to regulate the question of reimbursement, the provision did not in any way prevent the reimbursement of costs incurred even where prior authorisation had *not* been granted.

Over time, a complex jurisprudence on the question of reimbursement settled that a prior administrative authorisation scheme must exist and be justified in terms of Articles 59 and 60 of the Treaty and that, to be justified, it must be based on objective, non-discriminatory criteria known in advance, 'in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily'. In *Smits and Peerbooms*, the Court added:

> Such a prior administrative authorisation scheme must likewise be based on a procedural system which is easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time and *refusals to grant authorisation must also be capable of being challenged in judicial or quasi-judicial proceedings*. [27]

This jurisprudence came to a head in *Watts*, which involved the British National Health Service (NHS). No formal procedures were in place under British law for claiming reimbursement in a case where the claimant (Mrs Watts) had been refused reimbursement of the costs of an operation in France by the NHS, for these purposes the 'competent institution'. She therefore relied solely on the provisions of Regulation No 1408/7. Once again requirements were deepened. Nine Member States made

[25] Case C-158/96 *Kohll* [1998] ECR I-1931.
[26] *Kohll* at [5] (emphasis mine).
[27] Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473 at [90] (emphasis mine). See also Joined Cases C-358/93, C-416/93 *Bordessa and Others* [1995] ECR I-361; Joined Cases C-163/94, C-165/94, C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821; Case C-205/99 *Analir and Others* [2001] ECR I-1271; Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509.

observations to the Grand Chamber in *Watts* and the English Court of Appeal took the unusual step of warning the Court of Justice in making its preliminary reference that its application of Article 49 EEC might 'involve the interference of Community law in the budgetary policy of the Member States in relation to public health, such as to raise questions with regard to Article 152(5) EC'.[28] This provides that Community action in the field of public health 'shall fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care'. Undeterred, the Court of Justice insisted that decisions must be individuated; that the *burden of proof lay on the competent institution* to establish that the waiting time did not exceed an acceptable period and that the claimant's medical condition, the history and probable course of his illness, the degree of pain s/he is in and/or the nature of the disability at the time when the authorisation is sought must be considered.[29]

The Commission now saw an opening to submit a proposal for a directive on patients' rights in cross-border healthcare, which included as Article 9 a resumé of the Court's jurisprudence[30] - 'a daring move' as an earlier attempt at codification of patient mobility rights had already failed.[31] The Dutch Government and European Parliament both raised concerns over subsidiarity, arguing that no harmonisation was necessary; it was culture rather than regulatory uncertainty that was the true regulator of cross-border health care travel and it was member state failure to implement existing case-law rather than the absence of a European framework that created problems.[32] Nonetheless, the Commission succeeded in pushing through a Directive that replicates the case law. It requires Member States to ensure that

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[28] Case C-372/04 *R(Yvonne Watts) v Bedford Primary Care Trust and Secretary of State for Health* [2006] ECR I-4325 at [41].

[29] Ibid at [68].

[30] Proposed Art. 9 of COM(2008) 414 final 2008/0142 (COD).

[31] W. Sauter, *The Proposed Patients' Rights Directive and the Reform of (Cross-Border) Healthcare in the European Union*, 36(2) Legal Issues of Economic Integration 109, 110 (2009). And see European Commission, Proposal for a Directive of the European Parliament and of the Council on services in the internal market 2004/0001 (COD) [SEC(2004) 21] COM (2004) 2 final/3.

[32] See P. Kiiver, *Legal Accountability to a Political Forum? The European Commission, the Dutch Parliament and the Early Warning System for the Principle of Subsidiarity*, 8 Maastricht Faculty of Law Working Paper 30-32 (2009).

administrative procedures regarding the use of cross-border healthcare and reimbursement of costs of healthcare incurred in another Member State are based on objective, non-discriminatory criteria that are necessary and proportionate to the objective to be achieved.[33]

Unusually, the European Parliament paid attention to the administrative procedures. It resolved that individual decisions regarding the use of cross-border healthcare and reimbursement of costs must be properly reasoned, subject on a case-by-case basis to review and capable of being challenged in judicial proceedings that include *provision for interim measures*.[34] These requirements too found their way into the Directive. This provided for an administrative procedure capable of ensuring that requests are dealt with objectively and impartially and easily accessible; that information relating to such a procedure shall be made publicly available at the appropriate level; and that time-limits must be publicised in advance. Decisions must be individuated and take into account the specific medical condition, urgency and individual circumstances. Finally, Article 9 provides that decisions regarding reimbursement must be 'properly reasoned'; subject to case-by-case review; and 'capable of being challenged in judicial proceedings, which include provision for interim measures'. As Wolf Sauter was quick to observe, these provisions extended and perhaps even misconstrued the procedural guarantees set out in the Court's case law, placing on the national institution a burden of proof so heavy that almost all reimbursement requests will now have to be met by national public services.[35] For Sauter, the process typified:

> the standard interaction between positive and negative integration: first national measures obstructing the freedom to provide services (in this case) are struck down by the

[33] Directive 2011/24/EU of 9 March 2011 on the application of patients' rights in cross-border healthcare, OJ L 88/45 (04.04.2011).

[34] European Parliament legislative resolution of 23 April 2009 on the proposal for a directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare (COM(2008)0414 – C6-0257/2008 – 2008/0142(COD).

[35] W. Sauter, *The Proposed Patients' Rights Directive and the Reform of (Cross-Border) Healthcare in the European Union*, cit. at 31, 122-3.

> Court, and then the need arises for reregulation to fill the gap left, providing sufficient consensus for a more liberal community regime to emerge.[36]

We should note the important part played by procedural integration at each stage in the process, as procedural rights for individuals are first introduced and then steadily ratcheted-up by the Court of Justice and spread through the Community in a case law covering the public health services of several Member States. At a later stage, they are adopted as part of an *acquis*, then transformed and extended in legislation that adds rights to reasoned decisions, transparency and accountability, reinforced by the right to judicial review. As the Directive is not a mere codification of the case law, there is room for further centralisation through the extension of cross-border rights to home treatment, creating the potential for further intrusive transformation of national healthcare systems.[37] To put this slightly differently, a sort of 'shared' welfare system has been introduced, permitting users to receive services in other parts of system subject to judicially-constructed conditions. Equally, the cursory dismissal of the argument from the English Court of Appeal concerning infringement of the restriction in Article 152(5) TEC without any serious consideration of subsidiarity is highly significant.

**2. Asylum procedure: unwilling approximation**

The integration of member state asylum procedures cannot be questioned on grounds of legitimacy. It was the European Council at Tampere that called on the Commission to prepare a communication on approximation of standards for asylum applications. This was to include a first phase establishing '*common standards* for a fair and efficient asylum procedure', which would lead in a second phase to 'a *common asylum procedure* valid throughout the Union'.[38] Article 63(d) TEC, agreed at Amsterdam,

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[36] W. Sauter, *The Proposed Patients' Rights Directive and the Reform of (Cross-Border) Healthcare in the European Union*, cit. at 31, 126-9.

[37] W. Sauter, *The Proposed Patients' Rights Directive and the Reform of (Cross-Border) Healthcare in the European Union*, cit. at 31, 128.

[38] Conclusions of the 1999 Tampere European Council at [14], [15] (emphasis mine).

gave the Council five years to take measures relating to 'minimum standards on procedures in Member States for granting or withdrawing refugee status'. Apparent consensus, yet a general lack of enthusiasm for the project can be observed. The word 'minimum' recurs throughout the texts and it has been suggested that some Member States saw an opportunity to minimise conformity with international refugee law. [39] Others, notably Sweden and Denmark, strongly objected to aspects of the EU Joint Position on the ground that it involved 'levelling down'.

Against such a background agreement would clearly not be easy. The Commission deliberately left the choice of form and manner to Member States by choosing a directive as the most appropriate way forward; moreover, in a working document issued prior to drafting, it went so far as to ask Member States what level of harmonisation they wished for, which procedural issues they wished 'to preserve and strengthen' and which they did not.[40] The resulting Asylum Procedures Directive 2005 (APD)[41] confirmed agreement on a number of procedural standards, including some, such as rights to an interpreter, access to a legal adviser and a degree of legal representation, which would be costly and might be difficult to implement. The asylum decision was to be taken on the basis of a personal interview, 'individually, objectively, and impartially, and after an appropriate examination'. It must be given in writing and must state the reasons for rejecting the application in fact and in law. Significantly, the Directive specifically provided that asylum applicants have the right to 'an effective remedy' against all asylum decisions thus opening the way to judicial review by the CJEU. It is fair to summarise the copious and complex case law as amounting with a few exceptions to 'light touch review'.[42]

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[39] G. Goodwin Gill, *The Individual Refugee, the 1951 Convention and the Treaty of Amsterdam*, in E. Guild and C. Harlow (eds), *Implementing Amsterdam* (2000), 153.

[40] J. van der Klaauw, *Towards a Common Asylum Procedure?* in *Implementing Amsterdam*, cit. at 39; Commission, *Towards common standards on asylum procedures*, SEC 271 final (03.03.1999).

[41] Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326 (13.12.2005) pp. 13–34.

[42] Notably Case C-69/10 *Samba Diouf* [2000] ECR I-7151 (Luxembourg). But contrast Case C-277/11 *MM v Minister for Justice, Quality and Law Reform* [2012]

So far so good. But in 2010 a Commission report revealed that transposition of the 2005 Directive was still incomplete in some Member States and incorrect in others; there were 'flaws' in the application of central provisions of the Directive, such as the requirements for personal interviews, legal assistance and representation; the provisions on accelerated examination procedures and effective remedy were not being complied with.[43] An empirical study conducted by the Office of the UN High Commissioner for Refugees (UNHCR) confirmed the deficiencies, revealing – as might have been expected -significant divergences in asylum practice across the EU and gaps in law and practice in the implementation of the APD. The APD had not in short:

> achieved the harmonization of legal standards or practice across the EU. This is partially due to the wide scope of many provisions, which explicitly permit divergent practice and exceptions and derogations. It is also due, however, to differing interpretations of many articles (including mandatory provisions), and different approaches to their application. In some areas the minimum requirements of the APD appear not be fully met, whether in law or practice. [44]

The UNCHR concluded that there was a 'need to develop and adopt a second generation legislative act' introducing 'simplified procedures'.[45]

In the light of the Stockholm Programme, which had underlined the need for a common asylum procedure and uniform

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ECR 744 (Ireland), giving rights to representation on the basis of Art 41 ECFR. For a comprehensive examination of the case law, see M Reneman, *Speedy Asylum Procedures in the EU: Striking a Fair Balance between the Need to Process Asylum Cases Efficiently and the Asylum Applicant's EU Right to an Effective Remedy*, 25 Int'l J. Refugee L. 717 (2013).

[43] Report from the Commission to the European Parliament and the Council of 8 September 2010 on the application of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM(2010) 465.

[44] UN High Commissioner for Refugees, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations* (March 2010), at 4.

[45] Ibid, at 5.

status for asylum-seekers based on high protection standards and uniform procedural arrangements,[46] and of the Lisbon Treaty, which had called for 'a fundamentally higher level of alignment between Member States' asylum procedures', the Commission too had been pushing for closer integration. It published a plan for a text to set in place 'obligatory procedural safeguards as well as common notions and devices, which will consolidate the asylum process and ensure equal access to procedures' but, largely due to irreconcilable disagreement between Council and Parliament, the proposal had to be withdrawn.[47]

There was concern too over implementation. A further UNCHR study of Greece found long delays, improperly kept records and case files that did not record responses to even standard questions. At the appellate stage, summaries were cursory and negative decisions routinely standardized. There were no recorded minutes of the hearing so that 'it was not possible to ascertain the interpretation of the law applied by the appeal body or for that matter to deduce, from the decisions taken, whether the law was applied at all'. At the time of the study, there was a backlog of 19,015 appeals. The UNCHR recommended that governments should refrain from returning asylum-seekers to Greece for processing until further notice and repeated its admonition over training. [48]

Meanwhile the English Court of Appeal, faced with similar evidence, asked the Court of Justice whether it was obligatory to return the applicants to the place of first entry as the Dublin Convention required.[49] The Court replied that return could not be automatic; minor infringements of the asylum directives would not suffice to prevent transfer but substantial grounds for believing that there were systemic flaws in the asylum procedure

[46] European Council, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*, OJ C 115/32 (2010).

[47] Commission Communication, *Policy plan on asylum: an integrated approach to protection across the EU,* COM(2008) 360 final at [3.2]; Proposal for a Directive on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast), COM(2009) 554 final; 2009/0165 (COD).

[48] UNCHR Position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation", 15 April 2008.

[49] Joined Cases C-411, C-493/10 *NS v Home Secretary, ME and others v Refugee Applications Commissioner* [2011] ECR I-13331.

and reception conditions, such as the Court of Human Rights had found in Greece,[50] would be enough. As the Court of Appeal must have known, Greece is not alone. Advising the House of Commons of major changes in the administration of UK immigration services - declared by a previous Home Secretary to be 'not fit for purpose' – Theresa May, the Home Secretary, referred recently to 'historical backlogs running into the hundreds of thousands', 'a closed, secretive and defensive culture' and 'a vicious cycle of complex law and poor enforcement of its own policies, which makes it harder to remove people who are here illegally'.[51]

A new proposal from the Commission for a recast directive was now submitted and, after substantial amendment, became law in 2013.[52] The recast Directive follows the main outlines of the 2005 APD but unexpectedly includes numerous changes: mandatory training requirements, time-limits for registration and lodging of applications, personal interviews, reports and recording etc. While this in many ways represents 'an important improvement' and 'significant progress', the end product is - as the European Council for Refugees and Exiles (ECRE) has observed - both complex and malleable:

> [T]he recast Directive still allows for considerable flexibility for Member States in the interpretation and application of a number of its key provisions and maintains the possibility of applying a number of procedural concepts, which in ECRE's view, risk undermining asylum seekers' access to a full and thorough examination of their request for international protection in practice. Moreover, the overall legal complexity of the recast Asylum Procedures Directive

[50] *MSS v Belgium and Greece* ((2011) 53 EHRR 2.
[51] HC Deb col 1500 (26 March 2013) (Mrs Theresa May MP).
[52] Directive 2013/32/EU on common procedures for granting and withdrawing international protection, OJ L 180 (29.6.2013) p. 60. And see LIBE Report on the proposal for a directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast) COM(2009) 554 final; 2009/0165 (COD) (Rapporteur Sylvie Guillem).

> risks compromising its correct transposition and implementation.[53]

Other aspects of the Directive, such as interview procedure, right to an effective remedy and the provisions on accelerated asylum, leave much to be desired. Significantly, the ECRE urged Member States to use their powers to adopt more favourable provisions to ensure that the objective of fair and efficient asylum procedures in the EU Member States is achieved.

This example, chosen by the author before the current refugee crisis led to widespread breakdown and disapplication of asylum procedure, shows how hard it is to achieve complete harmonisation of administrative procedures in the face of cultural diversity. Fifteen years after the Tampere declaration, phase 1 of the project it set in motion was arguably incomplete; phase 2 had hardly begun. Choice of a directive resulted in a text that was arguably too wide in scope, was open to differential interpretation, contained too many exceptions and depended on a consensus that was in practice lacking. At ground level, implementation proved well-nigh impossible in Member States that seemed to lack both the will to implement and the administrative structures to underpin effective execution. Thus a project aimed at convergence and simplification did not succeed in ending disparity and could be said to have resulted in greater complexity.

### 3. Convergence through codification

A helpful starting point for discussion of codification is (once again) a paper by Mario Chiti, this time prepared for the European Parliament in the context of its initiative to codify the law on European administrative procedure.[54] The idea was not new; it has been around since the early1990s, when the two options of a statutory codification or a statement of general principle contained in a soft law instrument were discussed at an EUI workshop. At that point in time, the advantages of legislation

[53] ECRE, *Information Note on Directive 2013/32/EU on common procedures for granting and withdrawing international protection* (Brussels: ECRE, undated).
[54] M. Chiti, *Towards an EU Regulation on Administrative Procedure?*, 21 Riv. it. dir. pubbl. com. 1, 3 (2011).

were seen as being that it would follow the precedent of the majority of the fifteen existing Member States; that it would underpin legitimacy by allocating the normative function to the legislature; and that it would strengthen legal certainty, as rules are more precise and more specific than jurisprudential principles. There were precedents in sector-specific regulation: in competition, the famous 'Regulation 17/62' was in place and a codification was under way in the field of state aids.[55] In common law jurisdictions, Harlow indicated, soft law would perhaps be more acceptable even though it would tend to enhance judicial discretion.[56] Soft law was in fact the method later employed by the European Ombudsman and endorsed by the European Parliament as the *European Code of Good Administrative Behaviour*.[57]

Further action became realistic after the Lisbon Treaty introduced provisions that might serve as a legal basis. Briefly, TFEU Article 298 provides that 'the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration' and describes the implementation of EU law as a matter of 'common interest'. TFEU Article 197 authorises Union support for Member State administration but provides that no Member State shall be obliged to avail itself of such support. It also specifically excludes any attempt at 'harmonisation of member state law and regulation' in this field. Experts differ as to the scope and meaning of these ambiguous provisions, which are analysed exhaustively in Professor Chiti's paper. Chiti conceded that the way was now open for the Union 'to direct administrative action in the Member States' – a 'major expansion of the powers of the Union over the previous situation' that he did not entirely welcome. Tactfully, he advised the Parliament to avoid potentially intrusive interventions into national administrative law and procedure, arguing that the codifiers should aim for a 'euro-compatible outcome' in the shape of 'a law that is integrated in an original way with the national administrative laws; without eliminating their special

[55] See G. della Cananea, *From Judges to Legislators? The Codification of EC Administrative Procedures in the Field of State Aid*, 5 Riv. it. dir. pubbl. com. 967 (1995).
[56] See further C. Harlow, *Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot*, 2 ELJ 3 (1996).
[57] Available on the website of the European Ombudsman.

characteristics'. They should 'intervene only when necessary and as appropriate, both in order to respect the principles of subsidiarity and proportionality that govern the exercise of the powers of the Union, and not to freeze the positive administrative dialogue between the Union and the States'.[58]

Leaving legal competence aside, five options are available to a potential codifier in the field of EU administrative procedure:

(i) an Administrative Procedure Act (APA) applicable at both Union and national level;
(ii) a Union-only APA;
(iii) a soft law procedural code applicable to the Union;
(iv) a soft law procedural code applicable throughout EU administrative space;
(v) limited sector-specific codifications, as attempted by the Commission for asylum procedure and, more successfully in the field of public procurement.[59]

The options were explored at some length by members of the academic ReNEUAL project. Jacques Ziller made the case for a comprehensive APA, arguing that 'soft law instruments would miss the purpose of providing for sufficient homogeneity across institutions, bodies, offices and agencies and establishing default rules to fill the gaps in existing and future sector specific regulations'.[60] Ziller conceded, however, that the degree of detail would be a difficult issue. In the event, ReNEUAL opted for a set of model rules framed as six separate books, designed as a draft proposal for 'binding legislation' at Union level with the aim of reinforcing the general principles of EU law. But the European Parliament voted only for an elaboration of 'the fundamental principles of good administration' applicable at Union level in 'individual cases to which a natural or legal person is a party, and other situations where an individual has direct or personal contact

[58] 'Towards an EU Regulation' p. 4.
[59] See Directive 2014/24/EU on public procurement, OJ L94 (28/03/2014) and, more especially Directive 2007/66/EC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ L 335 (20.12.2007) pp. 31–46, (the Remedies Directive).
[60] J Ziller, *Alternatives in Drafting an EU Administrative Procedure Law,* PE 462.417 (2011).

with the Union's administration'.[61] This format would clearly have little impact on the administrative procedure and practices of Member States.

A soft law procedural code, on the other hand, could be much more influential. Even if published and applicable only at Union level, it could forward Professor Chiti's objective of 'euro-compatible pluralism'.[62] Such a text could follow the pattern of the US *Restatements of Law* which, according to the American Law Institute, are designed to indicate trends in the case law and on occasion to recommend what the law should be. *Restatements* are not binding authority but are highly persuasive. The attractions of this soft law approach are obvious. It has the advantage of flexibility and could, George Bermann argues, 'foster the evolution of national administrative law in the direction of bridging gaps between EU and national administrative law methods'.[63] Again, such a text would not need legislation; the format of an inter-institutional agreement could be used.

But Bermann warns too of a danger. Both Commission and Court of Justice have a record of imposing on Member States higher standards than are imposed on the Union. The Restatement approach could very well provide a green light for intrusion into national law either by the Commission, which could turn to the conditionality principle, asking for guarantees of quality and standards across all public administration settings. Similarly, it could turn to other semi-coercive soft law methods to 'level up', as, for example, the Open Method of Coordination, used for coordination purposes in the social policy area.[64] Again, such a document could be used by the CJEU as an interpretative benchmark in much the same way as the Charter was used before

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[61] Resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INI) P7_TA-PROV(2013) 0004. adopting the Berlinguer Report to JURI, A7-9999/2012 PE492.584v02-00 (12 November 2012).

[62] 'Towards an EU Regulation', above.

[63] G Bermann, *A Restatement of European Administrative Law: Problems and Prospects*, in S. Rose-Ackerman and P. Lindseth (eds), *Comparative Administrative Law* (2010).

[64] J. Mosher and D. Trubek, *EU Social Policy and the European Employment strategy*, 41 JCMS 63 (2003); E. Barcevičius, J. Weishaupt, J. Zeitlin, *Assessing the open method of coordination : institutional design and national influence of EU social policy coordination* (2014).

the Lisbon Treaty made it binding with the status of the Treaties, a point expanded below.

## II. Taking subsidiarity seriously

George Bermann, in a study of subsidiarity that has never been bettered, situated his evaluation in a framework of direct effect and supremacy. Bermann saw the avowed purpose of the Court of Justice at the time of Maastricht as being to establish 'all those constitutional premises that it considered necessary in order for Community policy to be fully effective in the Member States'; it would be difficult to find 'a clearer example of instrumentalist judicial decision-making'.[65] Bermann blamed the Court of Justice for fostering integration at the expense of subsidiarity; its overriding objective was to 'strengthen the force and effect of Community law' and with this in mind it had 'taken virtually every opportunity that presented itself to enhance the normative supremacy and effectiveness of Community law in the national legal orders'.[66] Percipiently, Bermann noted that failure to take subsidiarity seriously was fuelling a demand for the idea among the European people, adding that the Court of' Justice had contributed to a sense of erosion of local political autonomy.[67] This is a point of particular relevance to our times.

The subsidiarity principle meant, on the other hand, that the Union institutions should refrain from acting, even when constitutionally permitted to do so, if their objectives could effectively be served by action taken at or below the Member State level.[68] Bermann deduced that the Member States had 'seemed inclined to make subsidiarity the standard power-sharing principle for matters that did not fall within the Union's exclusive competence' and that, viewed as a whole, the Maastricht Treaty 'reflected a strong linkage between the expansion of Community competences and the necessity of self-restraint in their exercise'.[69]

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[65] G. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 Col Law Rev. 331, 353 (1994).
[66] Ibid.
[67] Ibid at 277 and 401.
[68] G Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and US*, cit. at 65, 334.
[69] Ibid.

The drafters of the TEU had 'put language into virtually every new treaty chapter underscoring their intention that the Member States continue to exercise primary responsibility' and had taken 'similar precautions in areas expressly subjected to coordination, most notably the whole 'Third Pillar' area of justice and home affairs'.[70] Subsequent events support this interpretation. An interpretative Protocol was annexed to the Amsterdam Treaty,[71] while new provisions in the Lisbon Treaty were designed to reinforce subsidiarity by installing national Parliaments as watchdogs. These are not manifestations of an integrationist mindset.

But Bermann recognised that:

> even a subject plainly reserved as such to the states ... is transformed into a Community matter to whatever extent the federal policy branches find that the cross-border mobility of goods (or, by parallel reasoning, workers, services, or capital) would be advanced by bringing the various national rules on the subject into closer alignment with each other.[72]

In consequence, Bermann urged a balancing or proportionality test:

> Courts should more regularly ask whether the incremental gains in free movement that result from the Court's rejection of a particular Member State marketing rule are substantial enough to justify the Member State's loss of freedom to govern subjects that lie squarely within its sphere of competence.[73]

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[70] Ibid.

[71] Now Article 5(3) TEU and Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

[72] G Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and US*, cit. at 65, 356.

[73] G Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and US*, cit. at 65, 401.

His points are amply illustrated in the *British American Tobacco* case,[74] where several Member States intervened to take the subsidiarity point directly in a case concerning Community competence to regulate tobacco advertising. Significantly, the Court of Justice chose to consider whether the objective of the proposed action *could be better achieved at Community level*, reversing the weight of the key subsidiarity question, which asks whether the objectives could effectively be served by action taken *at or below the member state level.* By stating the legislative objective to be elimination of trade barriers caused by differences in national law, the Court was able abruptly to conclude that action at EU level was appropriate. And the Court entirely failed to ask itself Bermann's question whether the incremental gains in free movement were substantial enough to justify member state loss of freedom to govern subjects that lay squarely within their sphere of competence. The Court's underlying assumption is, in short, almost always that a 'common approach' is necessary to contribute to the smooth functioning of the internal market and allow commercial operators 'to act within a single coherent regulatory framework'.[75] On this view, the very notion of subsidiarity is (as Advocate General Toth once put it) 'totally alien to and contradict[s] the logic, structure and wording of the founding Treaties and the jurisprudence of the European Court of Justice'.[76]

**1. Luxembourg: side-lining subsidiarity**

Nearly twelve years after Bermann wrote, Judge Vassilios Skouris, speaking extra-judicially, noted that the subsidiarity principle, although it 'should perhaps play a pivotal role with regards to the proceedings of the Court', had not left any remarkable traces in its rulings and arguments based on

[74] Case C-491/01 *R v Health Secretary ex p Imperial Tobacco* [2002] ECR I-11453 at [177-85]. See also Case C-376/98 *Germany v Parliament and Council* (Tobacco Advertising) [2000] ECR I-8419, where the Court found (exceptionally) that the EU legislators had overstepped their competence but without considering subsidiarity. And see Joined Cases C-154/04, C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451 at [101-8].

[75] Case C-58/08 *Vodafone and Others* [2010] ECR I-4999at [51-71].

[76] A Toth, *The Principle of Subsidiarity in the Maastricht Treaty*, 29 CML Rev. 1079, 1105 (1992).

subsidiarity had not had a major impact on the outcome of cases.[77] Judge Skouris was quick to defend prevailing court practice. There were stringent criteria for harmonisation and differences between national rules did not suffice to justify legal harmonisation; the differences must be 'likely to curtail fundamental freedoms, meaning that they have a direct impact on the functioning of the single market'. He swiftly moved the discussion on to the safer ground of proportionality, arguing that measures of legal harmonisation must comply with the principle of proportionality in being suitable to achieve the envisaged goals and not disproportionate; if these criteria were met, 'the leeway in performing autonomous and independent subsidiarity reviews is rather limited'; indeed, 'to the extent that, aspects of the principle of subsidiarity are also found in the principle of proportionality, these aspects become part of the general validity of the proportionality principle'.[78]

This line of reasoning has been called by Thomas Horsley '*de facto* subsidiarity review' or acting 'in line with the logic of the subsidiarity principle'[79] but it is in truth very different. Proportionality-testing starts from a premise of competence on which are based the three proportionality questions: Whether the measure exceeds the limits of what is appropriate and necessary in order to attain the objectives pursued? Whether the measure is the least onerous available? And whether the measure causes disadvantages that outweigh the objectives?[80]

This leaves unanswered the key subsidiarity question, which is whether the action is necessary *at all*; could it have been performed as well or better at a more local level? Or to put this somewhat differently, whether there is sufficient 'value added' at Union level to justify the loss of member state autonomy? This

[77] Judge Vassillios Skouris, *The role of the principle of subsidiarity in the case law of the European Court of Justice*, Keynote Speech at European Conference on Subsidiarity (04.5.06).
[78] Ibid.
[79] T Horsley, *Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?* 50 JCMS 267, 270 (2012).
[80] Joined Cases C-27, C-122/00 *Omega Air and others* [2000] ECR I-2560 at [62]; Case C-331/88 *Fedesa and others* [1990] ECR I-4023 at [12-13].

question, which relates to competence, is correctly the prior question.[81]

It is perhaps not surprising that in only one case can it be said to have taken subsidiarity seriously in a case squarely involving administrative procedural autonomy. In the *Estonia* case,[82] Member States were charged with responsibility for calculating quotas for the purpose of emissions trading. A dispute broke out as to the proper method of calculation between Estonia and the Commission, which had attempted to substitute its own methodology for that of the national authorities. The General Court outlawed the attempt, invoking the principle of subsidiarity to rule that, in an area of shared competence like environmental policy, the burden fell on the Commission to prove that the powers of the Member State were delimited by EU legislation. But although the decision was confirmed on appeal, the ruling on subsidiarity was overturned on the ground that, once the legislature had decided it was necessary to legislate at Union level, the principle was not applicable in areas of shared competence. This is a prime illustration of the false reasoning criticised earlier.

Set in its legislative context, the reasoning of the General Court is amply justified. The legislation in issue was a modification of the core IPPC Directive, which established the system of integrated pollution prevention and control across the EU.[83] This was one of a set of environmental directives seen by specialists in environmental policy-making as an attempt to balance action at Union level with a new policy of decentralisation and deregulation governed by the principles of subsidiarity and proportionality.[84] This is clearly evident in the initial Commission proposal, which takes subsidiarity rather seriously. The Commission defended action at Community level on the ground that a new scientific methodology for pollution control had been

[81] This may be why Craig classifies subsidiarity as a question of competence rather than as a general principle of administrative law: P. Craig, *EU Administrative Law*, 2nd ed, (2012) ch 14.

[82] Cases T-263/07 *Estonia v Commission* and T-183/07, *Poland v Commission* [2009] ECR II-3463 at [52] confirmed on appeal as Case C-505/09 *Commission v Estonia* [2012] ECR I-179.

[83] Directive 96/61/EC, OJ L 2003/275, p. 32 as amended by Directive 2003/87/EC and 2004/101/EC.

[84] See eg, R. Macrory, *Regulation, Enforcement and Governance in Environment Law* (2010) 675.

introduced and centralisation would allow those Member States that had already adopted the new methodology 'to obtain the full environmental benefit of their initiative'. But the Commission recognised that an integrated approach could not 'just be imposed' and it was not intended:

> to attempt to impose one institutional structure for the whole Community- arrangements which are successful in one country may not be appropriate in another owing to differences, inter alia, in national legal and administrative structures. It sets out only a minimum of provisions which must be followed, while allowing the Member States the flexibility to fit those provisions to national and local conditions. [85]

Moreover, the proposal was based on a survey of member state methods and on impact assessment and its lengthy progression towards legislative implementation contained a number of further processes, including opinions from EU committees and consultations.

These procedures reflect a general tightening-up of Commission administrative procedures under the influence of a managerialist ethos and the 'Better Regulation Agenda.[86] Impact assessment and consultations have become a standard procedure in Commission policy- and rule-making.[87] These developments harmonise with Bermann's earlier suggestion that the subsidiarity principle should be recast as 'an essentially procedural principle', which would require certain steps to be taken before any decision was taken to opt for action at Community level.[88] Like reason-giving, such practices are readily capable of being policed by a court and evaluated along similar lines to criteria used to evaluate the quality of scientific evidence in the risk assessment case law of

[85] Commission, '*Proposal for a Council Directive on integrated pollution prevention and control*' COM 93/423 final at [2.4] and [2.7]

[86] European Commission, 'Better Regulation Agenda' and 'Better Regulation Guidelines', both available on the Commission website.

[87] See generally, C. Harlow and R. Rawlings, *Process and Procedure in EU Administration* (2014), chs 1 and 2.

[88] 'Taking Subsidiarity Seriously' p. 336.

the General Court.[89] Other procedural steps, such as surveys commissioned from an outside, independent body could be phased in, or consideration of 'yellow card' opinions from national parliaments (below) could be made mandatory. In this way, written procedural requirements that typify administrative law systems would lead to a greater intensity of review of subsidiarity requirements than is presently the case. This would allow subsidiarity to take its proper place as a general principle of administrative law, applicable in support of procedural autonomy.[90]

But is this really likely? Can the Court of Justice really be cajoled into greater liking for the subsidiarity principle? Recent case law suggests otherwise. In *Lesoochranárske zoskupenie*,[91] an environmental group claimed standing rights in the Slovakian courts in terms of the Aarhus Convention provisions on access to justice in environmental matters to which both the EU and its Member States are signed up. In its response to a preliminary reference, the Court of Justice repeated its now largely standard formula that, although the Aarhus Convention did not have direct effect in EU law, rights could be created in EU law when the EU had legislated on the subject matter, as it had done in the instant case with the Habitats Directive;[92] it was then for the national court in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention. Similarly, the Court has ruled that Member States cannot use their discretion to deprive environmental protection organisations of rights created *both* by the Habitats Directive and by the Aarhus Convention.[93] Note the priority attached in these rulings to EU law. But the Aarhus Convention is ratified individually by

[89] See C. Anderson, *Contrasting Models of EU Administration in Judicial Review of Risk Regulation*, 51 CML Rev 1 (2014).
[90] C. Harlow and R. Rawlings, *Process and Procedure in EU Administration,* cit. at 87, 327.
[91] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-01255 at [50].
[92] Council Directive 92/43/EEC of 21 May 1992, [1992] OJ L206/7, as amended by Council Directive 2006/105/EC, [2006] OJ L363.
[93] Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg* [2011] ECR I-03673, [44].

Member States and not by the EU in a representative capacity; it is therefore with Member States that the responsibility for implementation should lie. Instead, the integrative jurisprudence of the Court of Justice opened the door to a new Commission centralising initiative[94] in a field where the Member States had explicitly rebuffed an earlier proposal for standardisation.[95] The Commission highlighted concern for 'the legal uncertainty of stakeholders' but between the lines of the proposal one espies a rather different motive: a Commission keen to expand the boundaries of its competence into the area of national judicial systems.

The Lisbon Treaty hands the Court an additional integrationist weapon by according treaty status to the Charter. Like the Maastricht Treaty, the Charter indicates the intention to protect member-state rights. ECFR Article 51(1) specifies that it is addressed to the institutions, bodies, offices and agencies of the *Union* 'with due regard for the principle of subsidiarity' and applies to Member States only when they are implementing Union law. Article 51(2) specifies that it is not intended to 'extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties'. In *Dano*,[96] where the question arose whether Charter rights were applicable when a Member State was legislating in respect of special non-contributory cash benefits payable to a non-national EU citizen seeking work, the Court of Justice (to use Horsley's terminology) acted 'in line with the logic of the subsidiarity principle' and applied '*de facto* subsidiarity review'. Basing itself on Article 51, the Court reasoned that the applicable Regulation 883/2004 was not intended to lay down the conditions creating the right to benefits; consequently, it was for Member States to legislate on the

[94] Commission initiative on access to justice in environmental matters at Member State level in the field of EU environment policy (11/2013) available on the Commission website.

[95] COM(2003) 624 final – 2003/246/COD COM(2003) 624 final – 2003/246/COD. And see *Improving the delivery of the benefits from EU environment measures: building confidence through better knowledge and responsiveness* (COM/2012/95).

[96] Case C-333/13 *Dano v Jobcenter Leipzig* (2014) ECR I-2358 (Grand Chamber).

matter and when they did so, they were not implementing EU law.

Article 41, however, creates a right to good administration, the effect of which on Member States is an open question.[97] One case in particular, concerning the impact of Article 41 on Dutch asylum law, is suggestive.[98] The CJEU was asked whether an admitted breach of the right to a hearing in respect of a deportation order made by Dutch administrative authorities could amount to a breach of ECFR Article 41(2)(a)? Advocate General Wathelet took the innovative line that the right to a hearing comprised two stages. Stage one applied in the pre-litigation administrative context and was governed by Article 41. An infringement of the Charter by (national) administrative authorities at this stage could not be rectified merely by the fact that judicial review was available at the second stage of judicial hearing. This was covered by ECFR Article 47 (right to an effective judicial remedy), which guarantees the rights of the defence to anyone who has been charged. The two were 'very different rights', which must not be conflated or merged.[99] Article 41 was clearly:

> of general application and applies in all proceedings which are liable to culminate in a measure adversely affecting a person. Moreover, that provision applies even where the applicable legislation does not expressly provide for such a procedural requirement.

As is so often the case, the judgment of the Court of Justice was less explicit. Remarking that the Directive 2008/115 was 'intended to provide a detailed framework for the safeguards granted to the third-country nationals', the Court observed that it

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[97] See H. Hoffman and B. Michelson, *The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case*, 9 EuConst 73, 96-100 (2013).

[98] Case C-383/13 *G and R v Staatssecretaris van Veiligheid en Justitie* [2013] I-533. See similarly Joined Cases129, 130/13 *Kamino International Logistics* [2014] ECR I-2041 but contrast Joined Cases C-141/12 *YS*, C-372/12, *M & S* (17 July 2014), concerning residence permits, where it was said that Art. 41 is addressed 'solely' to Union authorities and cannot be relied y on against national authorities.

[99] *G and R*, Opinion at [46-51].

left significant gaps. It was, however, 'settled case-law' that the rights of the defence formed 'an integral part' of the EU legal order and were 'enshrined in the Charter'. It followed that national administrations acting within the scope of EU law must observe the rights of the defence. In cases like the present, where the governing EU law contained no specific provisions, national law was applicable subject to the well-known principles of equivalence and effectiveness. But – and the reservation is significant - the rules must comply with EU law and Member States must 'take account of' the case law of the Court of Justice on the application of the applicable Directive.[100]

**2. National parliaments – towards a rainbow alliance?**

The onus must therefore rest primarily with political actors. Member state representatives in Council can protect national interests although, as their efforts are usually shrouded in obscurity, we cannot know when they do. Since Lisbon, however, national parliaments are more specially the guardians of subsidiarity, being mandated by Article 69 TFEU to ensure in accordance with the arrangements laid down in Protocol 2 (above) that proposals and legislative initiatives comply with the principle of subsidiarity. Every recent proposal for legislation from the Commission contains evaluations of the proposal in terms of proportionality and subsidiarity and the arrangements for forwarding documents to national parliaments have (at least in principle) been greatly strengthened.[101] This lays the foundation for the so-called 'yellow' and 'orange card' procedures, which (briefly) provide for Reasoned Opinions from national Parliaments or their chambers that can, given the right majority, force the Commission to review its draft.

At the time of introduction, these procedures were generally seen as likely to be ineffective. Since then, however, there are signs that national Parliaments may be taking them seriously. Commission reports on subsidiarity and proportionality

[100] Directive 2008/115/EC on common standards and procedures for returning illegally staying third-country nationals, OJ 2008 L 348 p. 98; *G and R*, Judgment at [35-37].

[101] See for detail, Arts 1 and 2 of Protocol 1 on the Role of National Parliaments in the European Union, OJ C 310/204 (16.12.2004).

record an increase in the issuing of reasoned opinions following early successes when the Commission withdrew the so-called Monti II proposal to curtail European workers' right to strike in response to a yellow card.[102]

National parliaments –or some of them- seem to be becoming more assertive on EU issues and the scheme is seen as strengthening the hand of parliaments at national level and making ministers more accountable.[103] Links between national parliaments through COSAC are now stronger and the Conference of Speakers has published online Guidelines for inter-parliamentary relations. There are four inter-parliamentary websites with links to national Parliaments and IPEX regularly publishes Commission proposals on its website, facilitating yellow cards. In addition, a number of assertive parliamentary chambers recently came together to call for strengthening of the procedures,[104] proposing that the Commission should be bound to withdraw or amend its proposal when a yellow card was triggered and – bolder –that parliaments should also monitor compliance with both the proportionality principle and legal basis. These proposals are currently under discussion.

These are hopeful signs but whether the new forces can be harnessed in aid of national administrative procedures is questionable. To attract political attention, an issue must be a matter of high visibility and political salience. Administration and administrative procedure are not usually matters of high political salience, although they may be ancillary to such issues- as both the health services and asylum procedures cases demonstrated. The Commission proposal for a European Public Prosecutor's Office, described by the UK House of Lords as 'a very significant and

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[102] I. Cooper, *A yellow card for the striker: national parliaments and the defeat of EU legislation on the right to strike*, JEPP online, 1 (2015).

[103] H. Brady, *The EU's 'yellow card' comes of age: Subsidiarity unbound?* (2013) available online. And see A. Cygan, *The Parliamentarisation of EU Decision-Making: The Impact of the Treaty of Lisbon on National Parliaments*, 36 EL Rev 480 (2011).

[104] British House of Lords EU Committee, *The role of National Parliaments in the European Union*, HL 151 (2014/15); Dutch Tweede Kamer *Democratic Legitimacy in the EU and the role of national parliaments: work in progress* (November 2013); Danish Folketing, European Affairs Committee, *Twenty-Three Recommendations to strengthen the role of national parliaments in a changing European governance* (January 2014).

disruptive incursion into the sensitive criminal law systems of the Member States' and 'unnecessary, excessive and insufficiently justified', was in this respect exceptional.[105]A yellow card from 11 national parliaments initiated long negotiations with the Council and EP concerning changes, which are not yet concluded.

**III. Careful Convergence please!**

There are many reasons why administrative procedures tend to converge, not all of which are connected with Europe. We live and work in an information society in which information technology shapes our conduct. There are other significant international treaties, notably the European Convention on Human Rights, the WTO and, as already mentioned, the Aarhus Convention. And so on. In this paper, however, I have focused on three main ways in which the European project has led or, in the case of codification, might lead, to convergence of administrative procedures within a single 'European administrative space'. The first method, through application of the general principles of law by the CJEU, is general, indirect and often tangential, though it often provides a helpful stepping stone for the Commission. This process, which bites deeply into the doctrine of procedural autonomy is, I would argue, both of doubtful legitimacy and generally inappropriate. The Court of Justice lacks expertise. It does not have at its disposal the procedural tools routinely demanded of modern lawmakers - the type of information collected by the Commission, for example, in respect of its proposal for the IPPC directive (above). Even less is it in a position to assess the 'spill-over effects' of rulings on national law and legal orders - such as the impact of changes in standing rules on judicial review in Slovakia or Germany (above). It is not in a position to gauge the impact of an individuated decision on a member-state public service; there are costs in administrative processes as the English Court of Appeal warned in the *Watts* case (above). In such situations, careful consideration must be given to Bermann's key question whether the incremental gains for the Union are

[105] EU Committee, *Subsidiarity Assessment: The European Public Prosecutor's Office,* HL 65 (2013-14) at [13-14]; EU Committee, *The impact of the European Public Prosecutor's Office on the United Kingdom*, HL 53 (2014–15).

substantial enough to justify incursions into national space. Is there enough 'value-added'? The Court of Justice pays lip service to the concept of autonomy but fails in practice to observe it. The principle of national procedural autonomy should weigh more heavily in judicial balancing and the Court should be more ready to employ its self-denying ordinance. Judicial legislation is commonly contested on the ground that it is undemocratic; equally, it is likely to be ineffective.

It is easy to assume that Member States share similar traditions of administrative law or administrative procedure with minor variations but in practice this is not the case. As indicated earlier, common principles of good administrative procedure were easily identified but these were differently interpreted and applied.[106] The body of research on the Europeanization of national administrations is too voluminous to be considered here[107] but it is incumbent on us to bear in mind that, as Konstantinos Papadoulis observes in his study of Greek aviation policy:

> It is expected that common rules and regulations within the EU should lead to administrative convergence. However, culture and civil service structure and function of national administrative systems and styles vary. Responsiveness is not merely a matter of formal and institutional reform... divergence in the responses of national governments during the implementation process of EU public policies reflects a combination of administrative culture and style, political objectives and socio-economic interests... [108]

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[106] Statskontoret, *Principles of Good Administration in the Member States of the European Union* (Stockholm: Statskontoret, 2005).

[107] See, eg, C Knill, *The Europeanisation of National Administrations: Patterns of Institutional Adjustment and Persistence* (2001); H Kassim, *The European Administration: Between Europeanization and Domestication* and E. Page, *Europeanization and the Persistence of Administrative Systems* in J Hayward and A Menon (eds), *Governing Europe* (2003).

[108] K Papadoulis, *EU Integration and Administrative Convergence: The Greek Case,* 43 JCMS 349, 350-1 (2005). See similarly G Noutcheva and S Aydin-Düzgit, 'Lost in Europeanisation: The Western Balkans and Turkey' (2012) 35 West European Politics 59.

How much stronger would this message be if applied to the common asylum procedure.

The path to effective convergence lies in a 'bottom up' approach, which has the advantage of being based on national experience and allows national officials on whom the burden of enforcement falls, to participate in the planning. Administrative practice is rooted in the culture and day-to-day practice of officials. Change requires more than legislation; it requires a change of mindset; unless there is a very genuine will on the part of national politicians and officials to change their practices, change will not happen. Public procurement procedure, for example, involves a central area of Community competence where harmonisation has proceeded slowly over a long period of time. Yet the Commission has conceded that it struggles 'to bring some common disciplines to regulation of this critical government function'[109] while an independent survey of implementation has concluded that 'the harmonisation process of European law on public procurement can also be seen as a significant example of the actual European unification process: slow, irregular, imperfect, complex'.[110] The current refugee crisis has demonstrated the fragility of the solidarity on which a harmonised asylum process depends. Across Europe, society is today becoming less open to external influences and cultures while at the same time being more protective of their own. The path to convergence must start with consultation and participation and proceed via action plans, position papers and framework directives, underpinned by peer review and training.

I am not of course suggesting that there is no room for convergence of administrative law and procedure. I do insist, however, that harmonisation and standardisation are tasks for the EU legislator to be undertaken with caution. Euroscepticism is no longer an 'awkward English phenomenon' but a trans-European phenomenon.[111] Reform of Regulation 1049/2001, the Union's disgracefully limited access to information legislation, is currently

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[109] Commission Staff Working Paper, *Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation*, SEC(2011) 853 final, p. iv.

[110] M. Morón (ed), *Public Procurement in the European Union and its Member States* (2012), 9.

[111] See the essays in R. Harmsen and M. Spiering (eds), *Euroscepticism: Party Politics, National Idnetity and European Integration (*2004).

stalled.[112] The ambitious codification project has been, as indicated earlier, whittled down; its outcome is uncertain. Against this background, Bermann's warnings[113] must be taken seriously.

Richard Rawlings and I concluded in a recent joint paper that the arguments in favour of pluralism and diversity were powerful, 'more especially in the context of an enlarged and enlarging Union'. We saw a serious danger of undercutting or weakening established administrative procedures tailored to national political understandings and cultural values. We thought the deadening effect of too much standardisation should be firmly resisted. It was

> a source of strength that diverse national practices reflected in national codes are there to be drawn on. At one and the same time these reflect particular historical experience and cultural traditions while becoming increasingly open to European and external/comparative influences. [114]

It is, however, more appropriate on the present occasion to leave the last word to Professor Chiti:

> Despite the clear growing importance of the European administration (services, offices, bodies, agencies) and its special law, the overall framework of public administration in EU member state is still diverse. The national legal cultures and the various institutional experienced that have characterised European States should not be considered a limit for the Union, but a richness (in line with general recognition of the richness of its cultural diversity...) which comes from the past, but which is also an opportunity for the future.

Do we really want it to be otherwise?

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[112] See Commission, *Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents*, COM(2008) 229 final 2008/0090; European Parliament resolution of 14 September 2011 on public access to documents (Rule 104(7)) for the years 2009-2010 (2010/2294(INI)).

[113] Above, text at n. 67.

[114] C. Harlow and R. Rawlings, *National Administrative Procedures in a European Perspective: Pathways to a Slow Convergence?*, 2 IJPL 215 (2010).

# ALL ROADS LEAD TO ROME: THE INTERNATIONAL CONVERGENCE OF PRINCIPLES OF ADMINISTRATIVE JUSTICE

*Jeffrey Jowell**

*Abstract*

This paper aims to highlight the continuation of the process of convergence that Mario Chiti has identified in his work, subject of course to different ways of applying or implementing those principles. In addressing this topic, the article starts by discussing the growth of English administrative law, then proceeds to European administrative law, followed by reference to international developments which have not yet been discussed (this is the 'new frontier' under the theme in this session). The development of administrative law is based upon the fundamental requirements of the rule of law. This is because the central purpose of the rule of law is to shift arbitrary decision-making to accountability.

TABLE OF CONTENTS



## 1. Introduction

I feel privileged to be among this distinguished group of administrative lawyers meeting here in Rome today, united in the important common enterprise of public law. United too in the celebration of our colleague, Professor Mario Chiti, both for his immense contribution to European administrative law but also through his extraordinary efforts over the years in bringing together academics, practitioners and judges from across Europe to share experience and learn from one another, as we are today.

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I have known Mario since he came to London in 1978 to research on the subject of regional government at the London School of Economics. I attended his talk one evening on a subject that was little considered in the UK at that time (but which has since become of major importance as we have devolved powers to Scotland, Wales and Northern Ireland and cities such as London). A year or two later, when he was teaching in Pisa, Mario invited me to join a small group studying the latest edition of a major English work on the judicial review of administrative action by Professor Stanley de Smith. Even then, Mario was considering to what extent there might be common principles between England and Italy at a time when scholars in both in Europe and in the England were of the consistent view that our systems were wholly different.

There followed seminars in comparative public law arranged by Mario after he moved to Florence, and he invariably contributed brilliantly to seminars in London where his participation was eagerly sought. In recent years I have been so pleased to have collaborated with Mario again, on a very successful exchange between the Bingham Centre for the Rule of Law, which I now direct, together with the United Kingdom Supreme Court and the Italian Consiglio di Stato, which Mario has been advising.

In addressing my topic today I shall start by discussing the growth of English administrative law, then proceed to European administrative law (which has been well-covered today), followed by reference to international developments which have not yet been discussed (this is the 'new frontier' under the theme in this session). The reference in my title to all roads leading to Rome indicates the continuation of the process of convergence that Mario has identified in his work, subject of course to different ways of applying or implementing those principles which Carol Harlow has warned about.

## 2. The growth of English administrative law

In England, for the most part of the twentieth century it was rare for individuals to be able successfully to challenge state power. This was because when laws conferred upon officials discretionary power (to act generally in the public interest, or as

they 'saw fit'), that power tended to be interpreted literally by the courts as being entirely in the subjective judgment of the decision-maker and not open to judicial control. From about the mid-sixties however, shortly before Mario first came to England, some judges began insisting that statutes should be interpreted purposefully (teleologically) and subject to implied requirements that the affected person should receive a fair hearing before his rights and interests were affected. The courts also sought to ensure that power not be exercised arbitrarily (the ground of review of 'unreasonableness', or 'irrationality', a ground later supplemented by the European- influenced ground of 'proportionality'). Lord Denning, who was mentioned earlier today, was perhaps the first judge, together with Lord Reid, who expanded administrative law in this way, followed by such as Lord Woolf, Lord Bingham, Lord Steyn and others. The basic "grounds" of review of official decisions were eventually described succinctly under three heads: "legality", "procedural fairness" and "rationality".

What prompted this almost sudden change of approach to discretionary power? Was it just a personal view of justice on the part of certain judges? No. There was already a constitutional source which provided a solid foundation upon which to base their decisions, namely, the principle of the rule of law. When Dicey wrote his seminal work on the constitution in the late 19th century, he identified two principles which guided the 'English' Constitution (as he called it), even despite the fact that the constitution was not codified. The first principle was the sovereignty of parliament, which gives supremacy to government elected by the people. The second principle was the rule of law.

Now we do not accept all that Dicey says these days, but it should be acknowledged that his genius was to appreciate that even a sovereign parliament should be constrained by the rule of law. And if Parliament chooses to override the rule of law, it must do so clearly and unambiguously. However, Dicey overplayed his hand by claiming that parliament should never confer discretionary power upon public officials, for in his view this would inevitably lead to the arbitrary exercise of that power. He was greatly criticised for that by Professor Jennings and others, an onslaught which was so effective that it almost silenced the notion of the rule of law forever. Jennings and others rightly observed that discretion is necessary in any modern society and accused

Dicey of implicitly seeking to preserve a free market economy. However, if we accept, as we now do, that discretionary power is necessary, yet that it must be controlled, the rule of law can be brought back to life as a constraining principle which tempers the excesses of an all-powerful parliament and state.

I shall return to the rule of law shortly, but in the meantime let me just outline, for this is often not clear, that the rule of law contains just four simple components. One of the reasons why it is often misunderstood is that each of the four components seeks to achieve different objectives, and do different work.

The first component is legality, which requires that everyone is subject to the law and not the arbitrary exercise of power. The second component is certainty. Law must be accessible and not changed without fair warning. The third is equality. Law must be applied equally to everyone. And the fourth requires access to justice and rights. It is this fourth component that permits challenge of decisions - challenge by means, where required, of a fair hearing before an independent judiciary. Such a challenge also permits rights to be asserted (some of which are contained within the rule of law itself, such as the right to equal treatment and freedom from arbitrary arrest or detention).

We see now the link between those components of the rule of law and the grounds as they then developed of judicial review, which permitted challenge to decisions which were infected with illegality, uncertainty, the lack of a fair hearing or the kind of arbitrariness contained in decisions which offend rationality or equality.

Incidentally, it is sometimes said, by scholars and others who should know better, that the rule of law is a 'thin' concept, of procedural significance only, and can therefore accommodate unjust laws such as slavery or the cruel commands of the Party. Under that version of the rule of law it could be said to prevail in countries such as China where the law may well be certain, and often equally applied. The Chinese system is better described, however, as 'rule *by* law', as there is no way that individuals may challenge the law, or its implementation, or assert a number of rights with any real chance of success.

**3. European administrative law and the wider Europe**

Moving now to Europe other than the United Kingdom: The development of common principles has been well-covered here today and some of the pioneers in this exercise, in addition to Mario Chiti, have been mentioned. One other should be mentioned too: Roger Errera, a member of the French Conseil d'Etat, who came to the UK twice during the 1980s and shared the 'Continental' approach to principles of administrative justice with us, to great effect. He also lectured widely in the countries such as Hungary after the fall of the Soviet Union. I should also declare that I was a member of a group led by Guy Braibant, also a member of the Conseil d'Etat, who has also rightly been mentioned today, which travelled, in the early eighties, to countries of the then Soviet Union, in order to test whether their principles of public law and those of Western Europe were similar. As much as I admired Guy Braibant, I remained sceptical of his hypothesis that the systems were not dissimilar. For while the judiciary were simply not independent in those countries, whenever public interest was pleaded by officials, judges were simply not able to contradict that plea. After the fall of the Soviet Union things changed, and mention should be made here of the work of the body formed by the Council of Europe known as the Venice Commission, which assisted with the constitutions and 'institutions of democracy and the rule of law' of the former Soviet Union countries. Significantly, one of their main tasks was to develop an independent judiciary (as well as prosecution service). It should also be noted that the leadership of the Venice Commission was in the hands of some very able Italian lawyers, notably its President, the late Antonio La Pergola, its Secretary (now President) Gianni Buquicchio, and its Italian member, Professor Sergio Bartoli.

**4. International developments**

I turn now to the international adoption of principles of administrative law: The first question to ask here is: Can there be such principles? Earlier this week the President of Hungary, in the context of a different issue -migration into Europe - accused the President of Germany of "moral imperialism". To the extent that administrative law principles are based on the rule of law, which I

argue they are, to what extent is the rule of law a principle of universal application? Is it a Western construct, only applicable in developed countries and not suitable for societies in transition?

The answer to those questions may be gleaned from a paper on the rule of law produced by the Venice Commission in 2011. I happened to chair the committee leading up to that paper and I can tell you that it took 5 years to reach agreement on its content. This was because there was initially much doubt as to whether the different cultural features of concepts such as *Rechstsstaat*, *l'Etat de Droit* and others could claim any common ground. In the end however there was unanimous acceptance, among the 47 members of the Commission, that the rule of law was both a common concept and a practical one (the paper ends with a 'checklist' of rule of law requirements).

The Venice Commission document lists a number of requirements of the rule of law along the lines I have mentioned above, namely, legality, certainty, no arbitrariness, equality, access to human rights and justice before independent and impartial courts. The elements of administrative law are deep within these requirements, which insist on challenge to arbitrary or discretionary decisions in accordance with settled principles. The Venice Commission were greatly assisted in their report by a recently published book on the rule of law by Lord Tom Bingham (who I have mentioned already as one of the British pioneers of administrative law and after whom is named the Bingham Centre for the Rule of Law, which I have the honour to direct). Bingham lists 8 "ingredients" of the rule of law, a number of which also provide for the opportunity to challenge official decisions that were infected by lack of good faith, fairness, were outside the purpose for which the power was conferred, and which exceeded the limits of those powers or were unreasonable.

Let me now turn to a further development, namely, the constitutionalisation of justice, as set out in recent constitutions, and beginning in South Africa under the leadership of the Mandela government in the mid-1990s. Section 33 of The South African constitution of 1996 proclaims a constitutional right to "just administrative action", under which everyone has the right to administrative action that is "lawful, reasonable and procedurally fair" including the right on request to reasons for decisions and access to government information. That African innovation was

soon replicated elsewhere in Africa, such as in Malawi, where it was called the right to "administrative justice", defined a little more extensively this time as including actions which are lawful and procedurally fair but substituting the requirement of "reasonableness " with action that is "justifiable in relation to reasons given with [a person's] rights, freedoms, legitimate expectations or interests". In Kenya the right was to "fair administrative action", defined as action which is "expeditious, efficient, lawful, reasonable and procedurally fair". Further afield in the Commonwealth, in the Maldives, the right, as in Kenya, is to "fair administrative action", defined as action that is "lawful, procedurally fair and expeditious". And in the Cayman Islands, there is now a constitutional right to "lawful administrative action", requiring the decisions of all public officials to be "lawful, rational, proportionate and procedurally fair".

We often see such rule of law measures as exports from the West to developing countries but note that in these cases out of Africa came a right to "good administration" that was adopted under Title V of the European Union's Charter of Fundamental Rights. Article 41 of the Charter is somewhat differently phrased to the Commonwealth rights, proclaiming perhaps more narrowly "the right [...] to be heard before any measure which would affect him or her adversely is taken", the right of every person to access to his or her file, and the obligation to give reasons for decisions.

**5. Conclusion**

I hope to have shown that the development of administrative law is based upon the fundamental requirements of the rule of law. This is because the central purpose of the rule of law is to shift arbitrary decision-making to accountability. And its central mechanism to achieve that (apart from its moral force) is the opportunity to challenge decisions which offend a person's rights - private rights and fundamental human rights (the latter including the fundamental right to administrative justice which have so recently been constitutionalised in the countries I have mentioned). In this sense the rule of law should not only be seen, as it has sometimes been rightly portrayed, as an instrument of economic growth and investment (encouraged by stable, predictable laws and mechanisms of legal accountability). It

should also be seen to be an instrument of empowerment, in the sense that the opportunity to assert rights and challenge wrongdoing should be equally available to all, and not only to the privileged few and the powerful.

Let me conclude by quoting the final page of Tom Bingham's book on the rule of law, on which I could not hope to improve:

"In the Hall of the Nine in the Palazzo Pubblico in Siena is Ambrogio Lorenzetti's depiction of the *Allegory of Good Government*. Justice, as always, is personified as a woman, gesturing towards the scales of justice, held by the personification of Wisdom. At her feet is Virtue, also a woman. A judge sits in the centre, surrounded by figures including Peace. The *Allegory* is flanked by two other paintings, illustrating the *Effects of Good Government* and the *Effects of Bad Government*. In the first, well-to-do merchants ply their trade, the populace dance in the streets and in the countryside well-tended fields yield a plentiful harvest. The second (badly damaged) is a scene of violence, disease and decay. What makes the difference between Good and Bad Government?

I would answer [writes Bingham] predictably: The rule of law. The concept of the rule of law is not fixed for all time. Some countries do not subscribe to it fully, and some subscribe only in name, if that. Even those who do subscribe to it find it difficult to apply all its precepts quite all the time. But in a world divided by differences of nationality, race, colour, religion and wealth it is one of the greatest unifying factors, perhaps the greatest, the nearest we are likely to approach to a universal secular religion. It remains an ideal, but an ideal worth striving for, in the interests of good government and peace, at home and in the world at large."

# 'PUBLIC LAW DISPUTES' IN A UNIFIED EUROPE [1]

*Giacinto della Cananea**

*Abstract*

This essay is an attempt to contribute to the discussion on legal comparison in the field of public law. First, it argues that, historically, rival approaches to comparative legal analysis have been followed in the European context and that, methodologically, the time is ripe for considering whether a new approach is justified by the existence of a common core of principles. Second, the essay argues that, for all the importance that has traditionally been given to the distinction between judicial monism and dualism, other aspects are arguably more important, notably the distinction that emerges from law and institutional practice between a particular class of disputes – which is called 'public law disputes' - and other classes of disputes and the principles and criteria that govern proceedings related to such disputes. Finally, on the basis of this analysis, some remarks are made with regard to the relationship between dissimilarity and similarity.

TABLE OF CONTENTS



[1] Earlier versions of this article have been presented in the workshops on administrative justice organized by the Faculties of law of Naples – Suor Orsola Benincasa and Udine. I wish to thank Aldo Sandulli and Elena D'Orazio for inviting me to discuss the paper; Mauro Bussani and Jacques Ziller for their helpful comments on an earlier draft; Adrian Bedford, for his linguistic revision. The usual disclaimer applies.

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## 1. Introduction

It is trite wisdom – but wisdom nonetheless - that, whenever interests and visions of the good differ, conflicts or

disputes are likely to arise[2]. If disputes may inevitably arise in all human affairs, the question that arises is, first and foremost, how is it possible to solve a conflict in a fair, just, timely and (possibly) cost effective manner. There is much, in this respect, that might be learnt from our neighbours[3]. Not surprisingly, both legal academics and practitioners have always devoted attention to how legal systems solve disputes, in an attempt to understand and import best practices, with regard to both private law and public law. A different approach has been followed by those who deny that legal comparison in the field of public law may be meaningful, whether on normative or on epistemological grounds[4].

This essay is an attempt to contribute to this debate. It has three main goals. First, it argues that rival approaches to comparative legal analysis have been followed in the European context (sections 2-3). Second, for all the importance that has traditionally been given to the distinction between judicial monism and dualism (examined in section 4), other aspects are arguably more important: the distinction that emerges from law and institutional practice between a particular class of disputes – which is called 'public law disputes' - and other classes of disputes (section 5) and the principles and criteria that govern proceedings related to such disputes. Finally, this analysis will suggest some remarks on the relationship between dissimilarity and similarity, also in view of harmonization of legal institutions in this field (section 7).

## 2. Three Rival Approaches

It is important to point out that two very different methods have been followed in the course of history. But it is precisely the awareness that history matters that suggests that such methods ought to be considered dynamically, as opposed to a static

[2] S. Hampshire, *Justice Is Conflict* (2000), 5 (holding that conflicts are inevitable even within a unitary polity); A. MacIntyre, *After virtue. A study in moral theory,* 2nd ed (2007) (noting that there is no self-evident truth).

[3] R. Caranta, *Learning From Our Neighbours*: *public law remedies harmonization from bottom up*, 4 Maastricht J. Eur. & Comp. L. 220 (1997).

[4] For an epistemological approach, P. Legrand, *Droit comparé* (1999), 2; *European Legal Systems are not Converging*, 45 Am. J. Comp. L. 90 (1998).

manner. Next, an alternative approach, that looks consistent with some contemporary developments of public law and that emphasizes the importance of a common core, will be examined.

**A) The Traditional Approaches: Contrastive and Integrative**

For American comparative lawyer Rudolf Schlesinger[5], two main approaches in the history of European law can be distinguished; that is, the contrastive and the integrative approaches.

Schlesinger's starting point is one that is shared among historians of law[6]: for a long period of time, not only were scholarly writings by European jurists consulted in all parts of the Old Continent, but that also reported judicial opinions also formed part of the legal materials and authorities that were consulted in the past by anyone who sought to ascertain the principles of the *jus commune*. All this changed in a period that varies from one country to another, during the age of codification that begun in the second half of the eighteenth century. This change justified Schlesinger's argument that the approaches to comparative law should be seen in a dynamic perspective.

Such a dynamic perspective is important because it shows that several schools of though have existed in relation to the explanation of the legal realities of different epochs, a methodological point to which we will return later. It also permits to fully appreciate a salient distinction – among others - between hard sciences and legal science. While in the former the success of a new scientific paradigm within a given epistemic community – such as Copernican astronomy - may be based only on the attraction that it exercises, as a more accurate representation of

[5] R. Schlesinger, *The Past and Future of Comparative Law*, 43 Am. J. Int'l L. 747 (1995).

[6] See R.C. Van Caenegem**,** *European Law in the Past and the Future. Unity and Diversity over Two Millennia* (2001), (pointing out that the *ius commune* developed in the faculties of law. It was thus a common "learned law", that consisted of two theoretically well distinct, but in practice interconnected elements, i.e. the canon law of the Catholic Church and the civil law of Justinian's *Corpus Juris Civilis)*. See also A.M. Hespanha, *Panorama historico da cultura jurìdica europeia* (1999, 2nd ed.).

unchanged realities, in the latter a paradigm shift may derive from important changes in the order of the reality. This is what happened in the case of the French Revolution, according to those who hold that it produced an entirely new public law in the Continent, because it ushered in a new language of rights that were based on equality and. not only was the whole of society redefined in terms of "nation", but the relationship between the State and individuals changed as well[7]. The integrative approach that characterized the long era of the *jus commune* implied a strong emphasis on analogies. As another comparative lawyers, Gino Gorla, has shown, this allowed jurists to invoke the use of the law of another land, on the basis of criteria that enhanced *vicinitas*, that is to say proximity, not merely in the geographical sense, but from the point of view of the analogies between the home and the host legal system[8].

The age of codification was characterized by a very different institutional and cultural context. The emphasis previously placed on natural law faded, due to the imposition of a positivist framework, as well as to the rise of legal nationalism: Latin was replaced by national languages and materials of other legal systems were treated as "foreign" law[9]. Because of these factors, all those who were engaged in the study and practice of comparative law (for example, legislators and their advisors considering whether a certain legal institution could be "transplanted" into their home legal system) were "compelled to emphasize differences rather than similarities". This emphasis on differences characterized the contrastive approach that continued to prevail well into the second half of the twentieth century[10], when a revival of the integrative approach seems to have emerged.

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[7] E. Garcia de Enterria, *La lengua de los derechos. La formaciòn del derecho Publico tras la Revoluciòn Francesa* (1995), 58 (holding that a new language emerged for the new legal order). See, however, Tocqueville, *De la démocratie en Amerique* (1835) (pointing out that the Revolution transformed the political constitution of France, not the administrative constitution).

[8] See G. Gorla, *Il ricorso alla legge di un "luogo vicino" nel diritto comune europeo* (1973), in *Id.*, *Diritto comune e diritto comparato* (1981), 617.

[9] R. Schlesinger, *The Past and Future of Comparative Law*, cit. at 5, 751.

[10] *Id.*, 751.

**B) Dissimilarity and Similarity: the Legacy of Albert Venn Dicey**

Probably the clearest example of the contrastive approach is that which was used by Albert Venn Dicey, the Victorian constitutionalist, in the oft-cited *incipit* of the twelfth chapter of his treatise of constitutional law, entitled "Rule of law compared with *droit administratif*". It deserves to be quoted in full:

"In many continental countries, and notably in France, there exists a scheme of administrative law – known to Frenchmen as *droit administratif* – which rests on ideas foreign to the fundamental assumptions of our English common law, and especially to what we have termed the rule of law. […] The extent of this protection has in France … varied from time to time. It was once all but complete; it now far less extensive than it was thirty-six years ago. It forms only one portion of the whole system of *droit administratif*, but it is the part of French law to which in this chapter I wish to direct particularly the attention of students"[11].

In France, Dicey observed, public law was characterized by dualism, reflecting the principle that the judiciary should not have the power to annul acts of the executive. This power was reserved to the *Conseil d'État*, which obtained greater autonomy only after 1872, when the system of *justice déléguée* replaced that of *justice retenue*. In sharp contrast with this vision of separation of powers, Dicey observed, in England public authorities were subject to the ordinary law of the land and, consequently, their actions could be challenged in the ordinary courts of the land. Dicey argued that this organizational difference reflected a more profound cultural and political divide. His argument was essentially that while the French system developed as an instrument of despotism, in England the traditional liberal ideas required the control of governmental power.

Whatever its intellectual soundness and adherence to legal realities, Dicey's idea of administration without administrative law had important practical consequences. It lent force to the arguments of all those advocating a liberal order in which public administrations and citizens are subject to the same law, administered by the same judiciary. For example, the founder of

[11] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1959, 10th ed.) (hereinafter: *Law of the Constitution*), 328-9.

modern administrative law scholarship in Italy, Vittorio Emanuele Orlando, proposed such a vision of administrative law, whilst accepting German theories about the specificity of public law[12]. As it is so often the case with *idées reçues*, these ideas enjoyed a long currency. As recently as forty years ago, Dicey's successor at Oxford, Sir William Wade, still conceived administrative law narrowly, as the judicial review of administration and Massimo Severo Giannini, an eminent Italian administrative lawyer, stated in his textbook that administrative law was not a general feature of modern States[13].

Dicey has been criticized by his compatriots – including Robson and Jennings, Craig and Loughlin[14] – and by other scholars – Hauriou and Goodnow[15], Cassese and Fromont[16]. They all criticized his polemic approach to *droit administratif*. He did not pay attention to the legal institutions of his epoch, which in England were increasingly characterized by the conferral of discretionary powers to public authorities. He also overemphasized the 'illiberal' traits of French administrative law, relying essentially on how Alexis de Tocqueville had illustrated them half a century earlier. In both respects, he was not simply describing the institutional framework, but was 'building' it. But, paradoxically, had he looked at the case law of the French Council

[12] V.E. Orlando, *Introduzione*, in *Id*. (ed.), *Primo trattato completo di diritto amministrativo italiano* (1900).

[13] M.S. Giannini, *Diritto amministrativo* (1988, 2nd ed.), 21 where the author repeated the opinion set out in his *Foreword* to the Italian translation of Wade's *Administrative Law* (1964): *Diritto amministrativo inglese (*1969), VII. For a critical – though questionable – interpretation of the Italian legal framework, see A. Orsi Battaglini, *Alla ricerca dello Stato di diritto. Per una giustizia "non amministrativa"* (2005).

[14] W. Robson, *Justice and Administrative Law* (1927); W.I. Jennings, *Administrative Law and Administrative Jurisdiction*, 20 J. Comp. Legisl. & Int'l L. 99 (1938); M. Loughlin, *Public Law and Political Theory* (1992), 3; P. Craig, *Administrative Law* (2003, 5th ed.), 7.

[15] F. Goodnow, *Comparative Administrative Law. An analysis of the administrative systems, national and local, of the United States, England, France and Germany* (1903), 6.

[16] S. Cassese, *La construction du droit administratif: France et Royaume Uni* (2000), 40; M. Fromont, *Droit administratif des Etats européens* (2009). See also S. Flogaitis, *Administrative law et droit administratif* (1986).

of State, he might have seen that it was the only English-like institution that France had in that epoch[17].

These remarks are undeniably forceful and serve to warn against the misuses and abuses of the comparative method[18]. Anyway, three important points should be borne in mind. First, Dicey was writing primarily for his students[19] and this may in part explain his use of a clear-cut contrast between the two models. Second, it is fair to observe that Dicey clarified that *droit administratif* was not a unique French feature, because it had emerged in "most of the countries of continental Europe"[20]. Indeed, an administrative court existed in Germany since 1863. Last but not least, Dicey added that what prompted comparison was not only dissimilarity, but also similarity. In particular, in the latest editions of his treatise Dicey did not hesitate to acknowledge that what he still called *droit administratif* had "of recent years, been so developed as to meet the requirements of a modern and democratic society and thus throws light upon one stage at least in the growth of English administrative law"[21]. This remark signals an essential point of method: the dimension of change, which can be better appreciated from a comparative viewpoint, coherently with the maxim "history involves comparison"[22].

**C) An Alternative Approach: Building on a Common Core**

The relationship between comparison and history is not important only for a better understanding of the fact that the institutionalization of a positivist and nationalist outlook in legal studies can be properly regarded as an ideological triumph, not without relevant achievements in terms of the construction of a legal science based on some "knowledgeable" legal sources. It is

[17] F. Moderne, *Origine et evolution de la jurisdiction administrative en France*, 9 Revue administrative 15 (1999).
[18] E. Stein, *Uses, Misuses-and Nonuses of Comparative Law*, 72 Nw. U.L. Rev. 198 (1977).
[19] W.I. Jennings, *Administrative Law and Administrative Jurisdiction*, cit. at 14, 100 noted that probably "very few of those who took their constitutional law from Dicey took the trouble to found out if Dicey was right".
[20] A.V. Dicey, *Law of the Constitution*, cit. at 11, 330.
[21] *Id*., 356.
[22] See F.W. Maitland, *Why the History of English Law is Not Written*, in H.A.L. Fisher (ed.), *The Collected Papers of Frederic William Maitland* (1911), vol. 1, 488.

also important in order to understand why by the late twentieth century it has become evident that an approach emphasizing only similarities or differences fails to respond to the felt necessities of our time, in the realm of public law.

Europe is no longer characterized only by a plurality of national legal systems. In fact, there are 'regional' institutions, such as the Organization for Co-operation and Security in Europe (OSCE), which deals with security, and the Council of Europe, with its Convention of Human Rights. There is, thus, a Europe of rights, much wider than the EU, that goes from the Atlantic to the Urals[23]. There is, secondly, a European legal space, in which other States have joined the Members of the EU[24]. There is, finally, the EU itself, a union of legal systems based on the assumption that at least some values and principles of law are shared and that such values and principles are constitutive elements of the political decision to create the EU.

An important manifestation of these shared values and principles, though not the only one, consists in the inclusion of fundamental rights, "as they result from the constitutional traditions common to the Member States" (Article 6.3 TEU) within the "general principles of the Union's law", together with those guaranteed by the ECHR. It is precisely because a certain constitutional tradition is recognized as being common, that it produces the legal effects that are attributed to the general principles of law. In other words, this "fact" has its own legal importance, independently of the effects stemming from EU law.

This opens up a range of important issues for examination and encourages us to call for a heightened attention not only to the adequacy of approaches that emphasize either similarities or differences. The assumptions underlying the adoption of the same theoretical approach for, say, a comparison between the U.S. and a Japan and an analysis focusing on Europe should be subject to critical scrutiny. At the same time, the question that arises is whether it is possible to draw a map of the values and principles

[23] See, in particular, A. Stone Sweet & H. Keller (eds.), *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (2008).

[24] For this concept, see M.P. Chiti, *Lo spazio giuridico europeo*, in *Mutazioni del diritto pubblico nello spazio giuridico europeo* (2003), 321; A. von Bogdandy, *National legal scholarship in the European legal area – A manifesto*, 10 I-CON 614, 618 (2012).

that form a sort of common core, in the field of public law[25]. My conjecture thus comes close to the research on the common core of European private law carried out, in the wake of Schlesinger's research, by scholars such as Mauro Bussani and Ugo Mattei[26].

### 3. A Retrospective

Let us return now the thoughts from which the previous section began. I emphasized that we would make a mistake in believing that Dicey, for all its rejection of French *droit administrative*, did not use comparison and history. I suggested, rather, that the way in which he did use them was in part flawed for his didactic purposes, as well as for his normative purposes; that is, to construct a system that did not allow collectivism or at least could contain its development. Incidentally, this may seem a more plausible suggestion when referring to comparative legal analysis than that which refers to it as a method that only has the purpose of knowledge. Practical use seems far more intimately bound up with the circumstances in which administrative justice is considered than theoretical knowledge. Nevertheless, it is true that a more accurate knowledge of legal institutions is a prerequisite for legal theories. A major example, in this respect, is provided by Eduard Laferrière's treatise about administrative justice. Otto Mayer and Antonio Salandra, though in different senses, provide a more normative analysis. This quick retrospective will be completed by some remarks about the development of legal institutions.

#### A) Comparison and History in Eduard Laferrière

Edouard Laferrière, who was the vice-president of the French *Conseil d'Etat* (that is to say the 'effective' head of that fundamental advisory and judicial body) and – according to

[25] For further remarks, see M. Van Hoecke & M. Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 Int'l & Comp. L. Q. 495 (1998); S. Cassese, *Beyond Legal Comparison*, Annuario di diritto comparato e di studi legislativi, 2012, 388.

[26] M. Bussani and U. Mattei, *The Common Core Approach to European Private Law*, 3 Colum. J. Eur. L. 339, 340 (1997).

another influential French public lawyer, Réné Chapus - has founded the scientific study of administrative justice[27].

Laferrière was, in particular, the author of the leading treatise of his time, the *Traité de la jurisdiction administrative et du recours contentieux*. This was by all means a landmark text, due to the richness of the data gathered and, most of all, for its structure. Like Dicey, Laferrière opened his treatise with a comparative analysis and he expressed the opinion that the structures of public law were heavily influenced by national traditions[28]. Unlike Dicey, however, he did not hesitate to highlight the similarities to other European countries. He observed that, despite contrary opinions, the system of administrative justice was not the sole prerogative of France. Quite the contrary, he forcefully argued, administrative justice existed in all other continental systems of public law[29].

When illustrating the main "foreign" systems[30], he began with the usual remark that they were characterized by many variables ("*grande diversité*"). But he soon added that it was not impossible to order them according to some main types and, more interestingly for our purposes, that some of them (those of most German States, Portugal and Spain) had the same principal structures of French public law, notably separation of powers and a dual jurisdiction over the disputes between citizens and the State[31]. He distinguished these systems from two other categories. One was characterized by the absence of a dual jurisdiction but at the same time the enforcement of severe limitations to the review carried out by ordinary judges (Belgium and Italy). The last group was based on a radically different way to conceive the separation of powers between administrative and judicial bodies (UK and US)[32].

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[27] R. Chapus, *Droit du contentieux administratif* (2006, 12th), § 5. For an assessment of his works, see P. Gonod, *Édouard Laferrière, un juriste au service de la République* (1998).

[28] E. Laferrière, *Traité de la jurisdiction administrative et du recours contentieux* (1896, 2nd ed.), XI ("*l'empreinte de nos traditions nationales et de notre génie propre*").

[29] *Id.*, X ("*la legislation comparée offre d'utiles enseignements. Elle montre que la juridiction administrative n'est pas, comme on l'a dit quelquefois, une institution spéciale à la France, elle existe dans tous les grands Pays*").

[30] *Id.*, 25.

[31] *Id.*, 27.

[32] *Id.*, 84-87.

Interestingly, like Dicey, Laferrière used a dynamic approach. For example, he pointed out that Italy, after the choice made in 1865 to suppress all special administrative proceedings, had been obliged to create a new panel within its Council of State, in order to solve the disputes between citizens and the State[33]. He likewise observed that England had increasingly set up administrative tribunals, in order to solve the disputes of this type, vesting quasi-judicial powers in officials, although he thought that the main principles were left unchanged[34].

Using a comparative approach, Laferrière thus provided a much richer picture of the legal realities of his time. He also took the dimension of change into due account, in the sense that "comparison involves history"[35]. This is, as observed before, a fundamental methodological point, to which we will return later.

**B) 'Tempering Power through Justice': Otto Mayer, Vittorio Emanuele Orlando and Antonio Salandra**

A combination of history and comparison also connotes both the "foundational" treatise of Otto Mayer on German administrative law[36] and one of the first comparative treatises, that of Antonio Salandra.

Unlike Dicey, Mayer argued that French administrative law - of which he gave a full account in his book of 1886[37] - could be considered not only as an ideal-type, but as a model. Mayer, who taught in Strasburg, annexed to the German Empire after 1870, was profoundly and almost inevitably influenced by the French legal culture, to the extent that he affirmed that it was only after writing about French administrative law that he felt ready for the

[33] *Id.*, X.

[34] *Id.*, 28. He also noted that, for centralized services, the English legal framework was increasingly more similar to those typical of continental systems (81).

[35] G. Gorla, *Comparison involves history*, in *Id.*, *Diritto comparato e diritto comune europeo*, cit. at 8, 41.

[36] O. Mayer, *Deutsches Verwaltungsrecht* (1894), *Le droit administratif allemand* (1903-1906). On this influence, see E. Kaufmann, *Verwaltung und Verwaltungsrecht* (1914).

[37] O. Mayer, *Theorie des Französischen Verwaltungsrechts* (1886).

task he had set to himself, and that he translated his treatise into French[38].

But if we were to observe only this, we would not render justice to his thoughts about public law, for three reasons. First, Mayer was fully aware of the differences that in many respects existed between French and German concepts and legal institutions, especially in view of the contrast between the uniform nature of the former and the differentiated nature of the latter. Second, Mayer pointed out that two phenomena, related but distinct, were legally relevant. One was the influence played by French law on German law either indirectly, when it was adapted to the realities of the host State, or directly, when it was simply copied ("*simplement copié*"). The other was the parallelism of ideas and theories that developed ("*parallélisme des idées communes à tous les Pays*"). Although such parallelism might be constructed in a purely functional manner, in the sense of the new necessities produced by the growth of government, this was not the case. Indeed, Mayer followed a different path and this brings us to the third issue. Mayer put French administrative law in the broader European context. He observed that in the various nations that constituted the "old European civilization", administrative law was based on certain general principles that were the same everywhere[39]. One of such principles was separation of powers. Another was the belief that there should be a legal machinery for ensuring that public authorities do not exceed their powers, which he encapsulated in the concept of «*Rechsstaat*». While this concept was distant from the ideal of the Rule of Law, as theorized by Dicey, it largely corresponded to the French concept of «*régime de droit*», which he used throughout his treatise[40]. Last but not least, Mayer affirmed that he had followed the French doctrines of fundamental rights and *res judicata*, because German legal culture lacked corresponding doctrines[41].

Mayer was not isolated in his belief that there were common principles of public law. The scholar who founded on

[38] For this remark, see R. David, *The Major Legal Systems in the World Today. An Introduction to the Comparative Study of law* (1984), 82.
[39] O. Mayer, *Le droit administratif allemand*, cit. at 36 ("*le droit administratif […] a pour base certains principes généraux qui sont partout les memes*").
[40] O. Mayer, *Le droit administratif allemand*, cit. at 36, § II.6.1.
[41] O. Mayer, *Préface de l'edition française*, in *Id.*, *Le droit administratif allemand*, 2.

entirely new bases the study of public law – administrative and constitutional law – in Italy, i.e. Vittorio Emanuele Orlando, shared the same belief. Interestingly, Orlando neither engaged in critical theory nor developed ponderous methodologies with which to root out the exact meaning of legal theory. He simply and bluntly affirmed that a new political regime – that of Italy after political re-unification – required new legal theories and that new and more satisfactory legal theories could be taken from German scholarship, in particular the distinction between private law and public law and the construction of distinct theories for the latter, under the prism of *Rechtsstaat*[42]. And he involved the best talents of his time in his treatise of administrative law.

It was precisely in those years, soon after 1900, that Salandra published his treatise of administrative justice[43]. Like Dicey, he placed at the heart of his work the contrast between authority and liberty and expressed concern that the growth of government activities, which was manifest in increased budgets and staff, could gravely diminish individual freedoms[44]. Unlike Dicey, however, he expressed the view that it was precisely the increasing mass of public business that required the introduction of new bodies and procedures, suited to avoiding a significant departure from the principles of free government[45]. In other words, administrative courts were viewed as instruments of *Rechtsstaat*[46]; that is, for all its mightiness, law limits even the State. Using a slightly different order of concepts, fifty years later sir William Wade considered American and English efforts in "tempering power with justice"[47].

But the most significant departure from the contrastive approach followed by Dicey regards the method followed by Salandra. Like Laferrière, Salandra distinguished the public law systems of continental Europe on the basis of a criterion of affinity. He thus accentuated the common traits of the systems of

[42] V.E. Orlando, *I criteri tecnici per la ricostruzione giuridica del diritto pubblico* (1887), in *Diritto pubblico generale* (1956), 3.
[43] A. Salandra, *La giustizia amministrativa nei governi liberi* (1904).
[44] *Id.*, 5.
[45] *Id.*, 9.
[46] K.F. Ladford, *Formalizing the Rule of Law in Prussia: The Supreme Administrative Law Court, 1876-1914*, 37 Central European History 203 (2004).
[47] W. Wade, *Towards Administrative Justice* (1963), 48. See also the review of this book by L.L. Jaffe, 16 Stanford L. Rev. 485, 486 (1964).

administrative justice that existed in France, Italy, and Spain, as well as in the German States at the beginning of the twentieth century. But he went one step further, and a very important one at that, when he affirmed that the principles governing the French system of administrative justice were not only principles widely shared elsewhere, especially in some jurisdictions, but could be considered as legally significant. This was not simply a way of emphasizing their importance. Indeed, Salandra's intention was quite different. He argued that, unlike the rules of other legal systems that were set out in any orderly account of comparative legislation, the French principles could fulfill a twofold function. They could be included among national sources of law or, at least, be used for their interpretation. The underlying assumption was the "commonality of the principles" upon which the French and Italian systems of public law were based, which was particularly evident in the circumstances in which the French provisions had been directly reproduced or imitated[48].

**C) Administrative Law: the Third Century**

This far we have seen that the objection raised by Dicey against the French and other systems of continental Europe, i.e. that of the risk for liberal democracy was contrasted by other scholars, according to whom there was no disconnection between the values and principles of liberal democracies and the existence of a specialized jurisdiction for public law disputes. The crucial questions are thus normative and empirical. Normatively, all these authors believed that those values and principles had to be preserved, though they dissented on how to do so. Empirically, two developments have emerged, i.e. the growth of government and administrative law and the emergence of public law disputes.

As Dicey himself recognized in his other great work, the *Lectures on Law and Public Opinion*, radical developments of society and government took place in the period between 1880 and 1914. The "legislative public opinion" had changed "running more and more in the direction of collectivism"; that is, requiring several new public activities[49]. There were not simply an unprecedented

[48] A. Salandra, *La giustizia amministrativa nei governi liberi*, cit. at 43, 94.

[49] A.V. Dicey, *Lectures on Law and Public Opinion in England* (1905; 1926 2nd ed.), 64.

growth in the quantity of government business and important qualitative changes, by way of legislation increasingly attentive to new social needs. There was also, as a result of these changes, a growing need to adjust the structures and procedures used by public authorities. New administrative bodies were set up, altering the simple structures of governance that characterized Victorian England. Moreover, legislation entrusted government with discretionary powers to implement public policies. What was significant was not just this practice but, rather, its scale. At the same time, the courts were often excluded from the review of administrative action and increasingly often the executive branch of government was allowed to be a judge in its own cause, thus acting outside the dictates of the Rule of Law[50].

Similarly, recent studies on the early period of US administrative law confirm that, although it was fully recognized only at the beginning of the twentieth century, it has been a part of American law since the founding of the Republic[51], though it has evolved as consequence of the "changed nature of society and the altered role of government to deal with those changes"[52].

These developments were, sooner or later, common to most European countries. Since specialists have already told this story in far greater detail, only a couple of aspects need be mentioned here. First, the States of the twentieth century were not simply those of the nineteenth century with a few changes. They reflected, rather, a new kind of social and legal organization with unlimited goals. Since 1950, there has increasingly existed much more than a cradle-to-grave administrative welfare state. As observed by Jerry Mashaw, by deciding on access to prenatal care, abortion in public hospitals and abortion pills, public administrators affect private, individual choices concerning births. Other decisions affect access to basic education, unemployment and pension schemes. Still another set of decisions may determine whether and how it is possible to "rest in peace", when cemeteries have to accommodate the building of infrastructures such as

[50] P. Craig, *UK, EU and Global Administrative Law* (2015).
[51] J. Mashaw, *Creating the Administrative Constitution* (2012).
[52] B. Schwartz, *Administrative Law: the Third Century*, 29 Admin L. Rev. 291 (1977).

highways and railroads, for example[53]. Second, everywhere legislation has entrusted public authorities with wide discretionary powers. Sometimes, it has even been as a substitute for administrative adjudication[54]. In both respects, it has raised serious issues of justice, not attenuated by the more recent shift of administrative action from direct intervention to regulation[55]. The question that thus arises, as we entered into the third century of administrative law[56], is what happened to administrative justice.

**D) The Development of Administrative Justice**

We may note that French legal institutions are characterized by a remarkable continuity, in the sense that more than two centuries ago the *Conseil d'Etat* was created and 140 years ago, in 1875, a system of *justice déléguée* (delegated justice) replaced the old system of *justice retenue*. Similarly, in England there is no such thing as a special judge for public law disputes. Scholars such as Robson and Jennings argued for the rationalization of what they regarded as haphazard arrangements for tribunals. While the Donoughmore Committee endorsed their call for some general rules, their proposal to create a sort of administrative court of appeal, distinct from the High Court, was rejected ([57]).

Even a quick look at the rest of Europe, however, shows that deep changes have occurred. Between 1865 and 1889, both Belgium and Italy followed the English model. They abolished their bodies entrusted with administrative and judicial functions and left all disputes concerning public authorities in the hands of civil law courts, regarded as 'the ordinary courts' of those legal orders. However, in Italy the ways in which the courts handled

[53] For these remarks, see J. Mashaw, *Due Process in the Administrative State* (1986), 14.

[54] E. Forsthoff, *Rechtsstaat im Wandel* (1964).

[55] Much literature describes the shift from the interventionist State to the regulatory State: for an excellent synthesis, see G. Majone, *From the Positive to the Regulatory State*, 17 J. of Public Policy 139 (1997) and S. Rose-Ackermann, *Law and Regulation*, in K.E. Whittington *et al*. (eds.), *Oxford Handbook of Law and Policy* (2008), 576.

[56] B. Schwartz, *Administrative Law: the Third Century*, cit., 291; M. D'Alberti, *Diritto amministrativo comparato* (1992), 7.

[57] M. Loughlin, *Public Law and Political Theory*, cit. at 14, 178.

public law disputes was not satisfactory. Accordingly, from 1890 a new panel of the *Conseil d'Etat* was entrusted with the task of handling such disputes. Belgium made more or less the same choice in 1948[58], while in the Netherlands the Council of State was entrusted with the task of resolving disputes since 1861, similarly to French *justice retenue*, a form abandoned almost thirty years ago. Meanwhile, other legal systems had followed a similar path. In Germany, administrative courts had been set up by Baden in 1864 and Prussia in 1872. The Weimar Constitution explicitly acknowledged their role in 1919[59]. Austria, too, set up administrative courts and kept them distinct from the judiciary. Sweden did created its Court of Government in 1908[60], as well as separate courts for taxation and insurance, while Finland did so in the framework of its Constitution (1918), but they had many features in common[61].

What is even more interesting, for present purposes, is the destiny of administrative courts in Central Europe. After 1919, with the dissolution of the Austrian Empire, the political landscape changed dramatically. In particular, Poland was reunified, after centuries, Hungary was divided from Austria, and Czechoslovakia was created. All these countries set up their own administrative courts, with a view to defending the rights of citizens against misuses and abuses of power[62]. Their systems were more or less influenced by the model of the Austrian Supreme Administrative Court, and were thus distinct from ordinary courts[63]. After those countries were annexed or occupied by the Nazi, administrative courts were abolished and, being

[58] F.G. Scoca, *Administrative Justice in Italy: Origins and Developments*, 2 It. J. Public L. 126 (2009) (explaining the reasons adduced by the supporters of 'administrative justice'); A. Piras, *Trends of Administrative Law in Italy*, in *Id.* (ed.) *Administrative Law: The Problem of Justice* (1997) 241 (discussing the 'liberal' reasons of the reform of 1865).

[59] Weimar Constitution, Article 107 "In the *Reich* and in the states administrative courts have to exist, according to the laws, to protect the individual against bureaucratic decrees".

[60] N. Herlitz, *Swedish Administrative Law*, 2 Int'l & Comp. L. Quart. 226 (1953).

[61] N. Herlitz, *Legal Remedies in Nordic Administrative Law*, 15 Am. J. Comp. L. 687, 7002 (1967).

[62] See the note *The Czechoslovak Juridical Council: A Bold Attempt at Solving the Problem of Administrative Justice Abroad*, 6 Modern L. Rev., 143 (1943).

[63] M. Wierzborski and S.C. McCaffrey, *Judicial Control of Administrative Authorities: A New Development in Eastern Europe*, 18 Int'l Lawyer 645 (1984).

considered as 'bourgeois' institutions, they were not reestablished under the Soviet Rule; incidentally, the same thing happened in East Germany in 1952. However, as the century progressed and both political and legal reforms were introduced, administrative courts were reestablished, in Poland before the fall of the Berlin Wall (1989)[64], in Czechoslovakia soon after it. In Bulgaria, too, the Supreme administrative court was restored in 1991. Meanwhile, the consolidation of the administrative judge was – together with the creation of the Constitutional Court – an important element in the strategy of judicial empowerment in Turkey[65]. More recently, after the dissolution of USSR, Czechoslovakia and Yugoslavia, some of the newly created States have set up administrative courts (for instance, the Czech Republic and Croatia).

At this stage it ought to be clarified that all this does not suggest that continental countries are simply 'converging' towards the French model, while England keeps its 'distinctiveness'. It suggests, rather, two things. First, legal realities evolved and legal theories should take this into due account. Otherwise, they risk becoming mere abstractions. Second, although various kinds of public law disputes are cognizable in the civil courts of Continental Europe, most of its States have an elaborate structure of administrative courts parallel to the civil courts[66].

**E) A Constitutional Dimension**

The steps directed to setting up administrative courts in so many countries of Europe are symptoms of an important fact, namely that administrative justice has a constitutional dimension. This dimension can be appreciated in three respects that are related but distinct.

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[64] M. Wierzborski and S.C. McCaffrey, *Judicial Control of Administrative Authorities: A New Development in Eastern Europe*, cit., 646; C.T. Reid, *The Approach to Administrative Law in Poland and the United Kingdom*, 36 Int'l & Comp. L. Quart. 817, 822 (1987).

[65] H. Shambayati and E. Kirdig, *In Pursuit of 'Contemporary Civilization': Judicial Empowerment in Turkey*, 62 Political research Quarterly 767, 771 (2009). See also R. David, *The Major Legal Systems in the World Today. An Introduction to the Comparative Study of law*, cit. at 38, 82 (noting the influence of French law on Turkish institutions).

[66] M. Shapiro, *From Public Law to Public Policy, or the "Public" in "Public Law"*, 5 Political Science 410, 412 (1972).

First, although there are several distinctive traits between national systems of administrative justice, their underlying rationale is that judges must "secure the legality of all acts of administration", to borrow the words of the Austrian Constitution[67]. This echoes the statement by scholars such as Laferrière, Mayer and Orlando that a public authority may not act outside its powers. Similarly, a comparative survey recently published by OSCE on administrative justice asserts that its existence "is a fundamental requirement of a society based on the rule of law. It signifies a commitment to the principle that the government, and its administration, must act within the scope of legal authority"[68]. A more ambitious conception of modern systems of judicial review emphasizes their efforts to meet the growing demand of "tempering power with justice"[69].

Secondly, and consequently, unlike the systems of administrative justice of the nineteenth century, modern systems of administrative justice are characterized by a development of profound constitutional significance, the enactment of national bills of rights. For instance, Article 19 (4) (1) of the *Grundgesetz* has been interpreted as establishing an approach to administrative law that focuses on the protection of individual rights[70]. The rights that national constitutions recognize and protect are not entirely the same, but they have much in common. Their commonality is increased by supranational bills of rights such as the ECHR and the Charter of Fundamental Rights of the EU. From the viewpoint of EU law, while the latter has the same legal value of the treaties, the rights recognized by the former have been included by the Court of Justice between the general principles of law of which it has to ensure the respect and are nowadays referred to in these terms by Article 6 TEU.

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[67] Austrian Constitution, Article 129. For similar doctrines in other continental countries, see A. Travi, *Lezioni di giustizia amministrativa* (2014, 11th ed.), 2; G. Vedel – P. Delvolvé, *Le système français de protection des administrés contre l'administration* (1991), 82 (conceiving legality as requiring the administration be subject to law). See also P. Craig, *Formal and substantive conceptions of the rule of law: an analytical framework,* 31 Public L. 487 (1997).

[68] OSCE, *Handbook for Monitoring Administrative Justice* (2013), 12.

[69] W. Wade, *Towards Administrative Justice*, cit. at 47, 48.

[70] J. Schwarze, *Europaisches Verwaltungsrecht* (1985), English translation *European Administrative Law (*1992), 125.

Thirdly, various safeguards concerning administrative justice are constitutionalized. These safeguards include the independence of administrative courts and their judges[71] and access to justice for public law issues, which is provided without limitations. A direct connection between administrative and constitutional courts has also been established, for example in France, by way of the preliminary question of constitutionality[72].

**4. Identifying Public Law Disputes**

The discussion in the previous sections focused on the dynamics of administrative justice. We now turn our attention to two main topics in as follows: the emergence of 'public law disputes', and the arguments in favour of an 'objective' criterion to distinguish them from other types of disputes.

**A) The Emergence of 'Public Law Disputes'**

Both history and comparative constitutional analysis show that while legal actions long consisted essentially in disputes between private parties (citizens and other individuals, groups, business), with few exceptions, the last two centuries have seen the rise of disputes between private individuals and public authorities.

Let us consider how some European constitutions acknowledge this distinction. Since Article 74 (1) of the German *Grundgesetz* distinguishes between private law ('*burgerliches Recht'*) and public law ('*öffentliches Recht'*), and Article 34 (1) states that liability rests with the relevant public body if a person entrusted with a public office infringes his duties, the distinction between private law and public law has a constitutional significance[73]. Since the German Code of Administrative Court Proceedings specifies that the Federal Administrative Court has jurisdiction, among other things, over "public law disputes which are not of a constitutional nature between the Federation and the *Länder* and between individual *Länder*", it can be argued that the distinction is

[71] See, e.g., Austrian Constitution, Article 129 A (concerning administrative tribunals); Italian Constitution, Article 108 (2); Greek Constitution, Article 87 (1).

[72] For further remarks, see D. Costa, *Contentieux Administratif* (2014, 2nd ed.), 28.

[73] J.P. Schneider, *The Public-Private Law Divide in Germany*, in M. Ruffert (ed.), *The Public-private Law Divide: Potential for Transformation*? (2011), 85.

well established in German law[74]. Following an only partially similar approach, after clarifying that "against administrative acts", judicial review is always allowed (Article 113), the Italian Constitution makes a distinction between rights and legitimate interests, in the sense that the disputes that concern them fall within the jurisdiction of civil and administrative courts, respectively. But this provision also allows the legislator to decide that certain disputes concerning rights may fall within the jurisdiction of administrative courts. While this confirms that there is no fixed division of labour between administrative and civil courts, it can be argued that the questions that it raises are neither few nor trivial. We should ask ourselves whether there is a 'sound' criterion for deciding matters of jurisdiction, as distinct from whatever the Parliament of the day opines. Whether limits to parliamentary discretion exist and the Constitutional Court can enforce them is another matter[75].

Let us look now at the situation that emerged in England after the House of Lords ruling in *O'Reilly v. Mackman*. Their Lordships dismissed the action brought by some prisoners on grounds that, due to the improvements made to the judicial review procedure in 1978, it would be an abuse of process for the court to allow an ordinary action, rather than judicial review, to be pursued by a person seeking to establish that a decision of a public authority infringed rights protected by public law. Two important principles were thus laid down. First, by referring to the procedure consisting of application for judicial review as the "procedure available by which the remedy of a declaration or injunction may be obtained for infringement of rights that are entitled to protection under public law"[76], the court distinguished public law remedies from others. Secondly, it affirmed the procedural exclusivity of the judicial review procedure, meaning that this is the only way in which claimants may raise public law issues in the courts. However, this raised numerous problems. Not only did it require English courts to distinguish private and public

[74] A similar provision is established by the Austrian Constitution, Article 133 (1).
[75] A. Travi, *Giustizia amministrativa* (2010, 3rd ed.), 351.
[76] *O'Reilly v Mackman* [1983], § 38, for Lord Denning.

law in a way that they had never done before[77], but it also drew the attention of academics and practitioners to the influence played by European Community (EC) law, which was based on the distinction between these fields[78].

Whatever the historical and institutional differences between the legal systems of England, Germany and Italy, they are facing a similar problem; i.e., how to distinguish public law issues from other issues. At the same time, they are influenced by a powerful force for change, EC/EU law, which is characterized by primacy and direct effect. It is necessary, therefore, to consider the available criteria for distinguishing public law issues in the light of EU law, seen in terms of its strict connection with the ECHR.

**B) Deficiencies in the Subjective Criterion**

It may be helpful to examine briefly the options available to legal systems in determining the nature of disputes, from the viewpoint of the distinction between public law and private law. A legal system may well use more than one option. It may do so in a variety of ways. Once a certain option has been chosen, it may be enshrined in constitutional provisions, which have the advantage of stability. Alternatively, the option may be enshrined in legislation, with or without constitutional mandate. This has the advantage of certainty, although the variety of claims brought before the courts may well require that the general rules established by legislation be supplemented by a *lex specialis*. There is also a further option, consisting of the judicial adaptation of one or more criteria. Courts generally enjoy considerable latitude as to how they define and refine such criteria.

That said, concerning the sources of law, let us return to the criteria that may be used, either alternatively or jointly. There is, first of all, a criterion that focuses on the claimants' counterparties, i.e., the public authorities and which can thus be called 'subjective'. Another criterion, on the other hand, focuses on the public nature of the functions performed and can thus be called

[77] M. Elliott and R. Thomas, *Public Law* (2014, 2nd ed.), 522. For further discussion, see C.F. Forsyth, *Beyond O'Reilly v. Mackman: The Foundations and Nature of Procedural Exclusivity*, 44 Cambridge L. J. 415 (1984).
[78] M. Loughlin, *Public Law and Political Theory,* cit. at 14, 215.

'objective'. Constitutions and statutes do not explicitly use the terms 'subjective' and 'objective', but such terms express the ideas that underlie both criteria and permit us to compare two different approaches.

The 'subjective' criterion is instinctively appealing. It distinguishes public authorities and public bodies from both physical persons and moral persons acting in the private sector. There is no need to subscribe to the philosophical theories – such as that of Hegel - that emphasize the role of the State viewed as a moral person, to realize that it must protect and promote a much wider range of interests and, therefore, be subject to a particular set of principles and standards, though some of them (such as fairness and good faith) have much in common with the principles and standards that apply to individuals and private bodies[79].

This explains why this criterion is used in national and supranational rules. Thus, citing once more Article 113 (1) of the Italian Constitution as an example, judicial review is "always" granted for the "acts of public administrations". The fact that the legislative intent refers to public authorities is confirmed by the third indent of the same provision, whereby legislation determines which judicial bodies may annul the acts issued by public administrations. Similarly, one the fundamental principles of Economic and Monetary Union (EMU), the prohibition of excessive government deficits[80], applies to Member States, as well as to their regional and local authorities[81]. Likewise, EU Directive 2014/24, which "establishes rules on the procedures for procurement by contracting authorities with respect to public contracts"[82], clarifies that the term 'contracting authorities' means first of all "the State, regional or local authorities"[83].

However, it is precisely these legal provisions, and others with a similar content, that show how insufficient the subjective criterion is. It is over-inclusive and under-inclusive at the same time. It is over-inclusive, because it tends to include all activities

[79] D. Oliver, *Common Values and the Public-Private Divide* (1999), 12.
[80] Article 126 (1) TFEU.
[81] Consolidated version of the TEU, Protocol (n. 12) on the excessive deficit procedure, Article 2 (1).
[82] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, Article 1 (1).
[83] Directive 2014/24/EU, Article 2 (1) (1).

carried out by public authorities and their acts, while only some of those activities aim at achieving the general interests of society and are thus characterized by authoritative features.

An example regarding ownership may clarify this. In all the legal systems in continental Europe, all directly influenced by Roman law to some extent, all rights concerning goods can be transferred by way of transaction; moreover, the right to be registered as proprietor either of a piece of land or of a building may be acquired without a transaction, provided that the interested party has been in adverse possession – with the intention to posses it - for at least a certain period of time. Neither option is available, however, for public lands, buildings, or chattels such as vehicles and pieces of furniture[84]. At the end of the nineteenth century, especially in Germany and Italy, these safeguards were regarded as the symptoms of the existence of a legal regime of public ownership entirely divorced from the legal regime of private ownership. Gaston Jèze, who observed – ironically - that the stationery used by public employees was not protected by such safeguards, highlighted the excesses deriving from this conception[85]. But still today it is important to clarify that many activities performed by public authorities, including purchasing a computer, simply do not have authoritative traits. Accordingly, the disputes concerning these activities may not be regarded as public law disputes.

The subjective criterion is also under-inclusive, because it considers only the cases in which public functions are performed by public authorities, while in an increasing number of cases, such functions are performed by private bodies. Consider again the two EU provisions mentioned before. It was noted that the prohibition of excessive government deficits applies to national and local governments alike. It must be added that it also applies to social security funds to the exclusion of commercial operations. The 'nature' of the body that manages them is thus legally irrelevant for these purposes. Consider also public procurement. Much of this, such as the delivery of utilities, is carried out by private bodies with some public function. EU law thus requires both public authorities and 'bodies governed by public law' to respect

[84] J.B. Auby et a., *Droit administratif des biens* (2008, 5th ed.), 5.
[85] G. Jèze, *Définition du domaine public*, Revue de droit public 695 (1910).

certain principles and procedure. 'Bodies governed by public law', in this respect, means that such bodies have legal personality, are established for the purpose of achieving certain goals in the public interest, and are funded or controlled by the State or another public authority[86].

The subjective criterion is also under-inclusive, because it considers only the cases in which public functions are performed by public authorities, while in an increasing number of cases such functions are performed by private bodies. For this reason, national legislators and courts have set out criteria and indicators of 'publicity', because public bodies – broadly conceived – must be subject to distinct and higher legal requirements[87]. The two EU provisions mentioned before do the same thing. The prohibition of excessive government deficits applies, in addition to national and local governments, to social security funds to the exclusion of commercial operations. The 'nature' of the body that manages them is thus legally irrelevant, for these purposes. Consider also public procurements. Many of them are carried out by private bodies charged by some public function, such as the delivery of utilities. EU law thus requires both public authorities and 'bodies governed by public law' the duty to respect certain principles and procedure. 'Bodies governed by public law', in this respect, means that such bodies have legal personality, are established for the purpose of achieving certain goals of public interests, and are funded or controlled by the State or another public authority[88].

**C) The Objective Criterion**

To argue from the deficiencies of a certain criterion is, of course, a simple way to justify another criterion; in our case the objective one. But it is not a wholly satisfactory way to proceed. The reason is, the objective criterion is also necessary in order to limit the exercise of authoritative powers, so as to prevent and punish misuses and abuses, which thus reinforces the argument based on the deficiencies of the subjective criterion. Few examples,

[86] Directive 2014/24/EU, Article 2 (1) (4).
[87] Sir J. Laws, *Monism and Dualism*, 12 Eur. Rev. Public L. 401, 405 (2000); W. Leisner, *Legal Protection Against the State in the Federal Republic of Germany*, in A. Piras (ed.), *Administrative Law* (1998), 4.
[88] Directive 2014/24/EU, Article 2 (1) (4).

taken from national and supranational judicial practice, may clarify this rationale.

In all national legal systems, there is a need to distinguish commercial activities from non-commercial activities for fiscal purposes. Tax law is based on such a distinction and its implications can be very significant. Precisely for this reason, it is often the case that a non-profit organization seeks to obtain better treatment, for example by arguing that it is subsidized by government funds and must, therefore, abide by certain public rules. This does not mean, however, that such an organization may be regarded as a public authority. A UK case, *Riverside Housing Association*, provides an apt example[89]. It was argued that, being a body governed by public law and being subject to a special legal regime, *Riverside* was entitled to tax exemptions. But the Tribunal argued that the concept of a public body is to be construed in a narrow sense. Coherently with the jurisprudence of the Court of Justice, exceptions are justified only for bodies carrying out governmental functions, such as finance regulators, and not for a body that is itself the subject of regulation.

The jurisprudence of the ECJ is relevant also from another point of view, relating to the free movement of persons. This is one of the founding principles of EC/EU law. It implies, in particular, the right to obtain a job elsewhere. It is not, however, an unlimited right. Indeed, Article 39 (4) TFEU provides an exception for posts within the public service. The question that thus arises is whether this term should be taken literally. An affirmative answer has been given, *pour cause*, by national governments, anxious to keep their public employment reserved to their nationals. But since the Commission launched its '1992 programme', it reacted against what it considered as excessive protectionism. Its dispute with Belgium in the late 1970s provides not only a good example, but a precedent. The Commission argued that Belgium, by excluding nationals of other Member States from vacancies for works in its railway stations (plumbers, carpenters, and electricians), had failed to fulfil the obligations stemming from the Treaty of Rome. Belgium replied that it was precisely the Treaty that excluded 'employment in the public service' from free movement. Advocate-general Mayras relied on

[89] House of Lords, *Riverside Housing Association v White*, UKHL 20 [2007], § 29.

a precedent, *Sotgiu*, where the Court had already taken the view that the derogation was justified by a connexion with the exercise of official authority[90]. He wished to integrate the criterion based on authority and thus looked at both the commentaries of the Treaty and national judicial practice. As a result of this, he devised a criterion that would integrate that based on authority. This criterion focused on "the interests whose protection justifies" the derogation[91]; i.e., the general interests acknowledged and protected by the legal order and that justify the exercise of power by States and other public authorities, more precisely of "powers conferred by public law lying outside the ordinary law"[92]. The Court agreed with its Advocate-General and found Belgium liable for infringing EC law; it also followed the same criterion in what rapidly became settled case law, in order to avoid misuses and abuses of power.

It is interesting to observe that the same concern has emerged in the field of human rights. In particular, when interpreting Article 6 ECHR, the European Court of Human Rights has repeatedly affirmed that there is in principle no justification for the exclusion from its guarantees of disputes concerning administrative issues. In order for the exclusion to be properly justified, it is not enough that a certain activity must be carried out by a civil servant. It is also necessary that an employee hold a post that participates in the exercise of public powers and that, as a consequence, there exists, as the Court found in *Pellegrin*, a "special bond of trust and loyalty" between the employee and the State viewed as employer[93]. The Court followed the same criterion in other cases concerning the issuing of building permits[94], and licences for the sale of alcoholic beverages to the public[95]. It is settled case law, therefore, that it is of little consequence that a dispute concerns an administrative act or measure. What really matters is whether the competent body in

[90] ECJ, Case Case 152/73, *Sotgiu v Deutsche Bundespost*.
[91] Conclusions delivered by AG Mayras, Case 149/79, *Commission v Belgium*.
[92] *Id*., 3916.
[93] Eur. Ct. H. R., judgment of 8 December 1999, *Pellegrin v France* (application n. 28541/95).
[94] Eur. Ct. H. R., judgment of 7 July 1989, *Ringeisen v Austria* (application n. 10873/84).
[95] Eur. Ct. H. R., judgment of 7 July 1989, *Traktorer Aktiebolag v Sweden* (application n. 10873/84).

the exercise of the functions of a legally established public authority has carried out such an act or measure[96]. That being the case, the jurisdiction of the competent national court cannot, among other things, be impaired by the recognition and enforcement of judgments rendered by the court of another State[97].

**D) A Synthesis**

From the remarks made thus far it should be clear, first of all, that I use the objective criterion, not the subjective criterion, in order to determine the field of 'public law disputes', as distinct from private law disputes, regardless of whether the latter arise between individuals or affect public authorities that are acting in the exercise of their rights under private law. As a second clarification, I am not referring merely to the exercise of public powers or *puissance publique*, to borrow the more apt French expression, because it highlights that public authorities (and, in some circumstances, bodies governed by public law) may use powers to which there are no parallels in private law[98]. Although this is a necessary element, it is not a sufficient one, because it must be integrated by another element, which concerns the interests acknowledged and protected by law.

To sum up, general interests must justify the exercise of authoritative powers – *puissance publique* – by States and other public authorities. The underlying assumption – which itself ought to be made explicit – is that the exercise of power, thus understood, should be justifiable to all citizens and social groups

[96] See also, for the UK, the *Human Rights Act*, Article 6(3)(b) (stating that "public authority includes any person certain of whose functions are functions of a public nature) and 6(5) ("a person is not a public authority by virtue only of (3)(b) if the nature of the act is private").

[97] See Council Regulation n. 44/2001 of 22 December 2000, Article 1 (1) (providing that the Regulation "shall not extend, in particular, to … administrative matters").

[98] S. Romano, *Poteri, potestà*, in Id., *Frammenti di un dizionario giuridico* (1948), 134; G. Vedel – P. Delvolvé, *Le système français de protection des administrés contre l'administration*, cit., 17 (characterizing an 'administrative decision' as unilateral and binding).

as a principle common not only to liberal democracies, but also to well-organized polities that do not belong to this category[99].

This notion of 'public law disputes' has the advantage of avoiding the risks of under-inclusiveness and over-inclusiveness that affect the subjective criterion. However, it is questionable for the very same reasons. A first question that arises is whether this way of looking at public law disputes neglects the distinction between administrative and constitutional disputes, while for example the German code certainly distinguishes between them. The problem with this objection, however, is not simply that it obviously reflects a distinction between issues of legality and constitutionality that may not be shared – at least for the purposes of judicial review – by all legal orders included in the European legal space. Another problem is that such distinction is merely negative and residual in nature, because it refers to 'public law disputes that are not of a constitutional nature'[100]. Referring to public law disputes as characterized by exercises of authoritative powers justified by general interests has, instead, the advantage of providing positive criteria for their identification. It is also less narrow than 'administrative jurisdiction', which postulates a special court or system of courts[101].

Finally, it should be clear that this notion of 'public law disputes' does not coincide with the notion of 'public law litigation', as it has emerged in US legal scholarship, although there is some overlapping. The term 'public law litigation' has been coined to designate litigation where a broadly intended public interest, i.e., one that goes beyond the particular interests of the parties, is at stake[102]. While this term includes antitrust, environmental and public utilities and other litigation where the available remedies involve some consideration of public interest, and thus comes close to 'public law disputes' in the sense used

[99] *Contra*: J. Rawls, *Justice as Fairness* (2001), 89.

[100] German Code of Administrative Court Procedure, Article 50 (1) (1). An English translation was published as an appendix in M.P. Singh, *German Administrative Law in Common Law Perspective* (1985).

[101] M. Fromont, *Droit administratif des Etats européens*, cit. at 16, 131.

[102] The term was coined by A. Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976); Id. *Foreward: Public Law Litigation and the Burger Court*, 96 Harv. L. Rev. 4, 5 (1982) from which the citation is drawn. But the substance was not entirely new: see L. Jaffe, *The Citizen as Litigant in Public Actions: the Non-Hohfeldian or Ideological Plaintiff*, 11 Un. Pa. L. Rev. 1033 (1968)

here, at least in some variants it is used to designate disputes involving constitutional rights or broad policy issues[103]. But this is not necessarily the case, if someone contends that a certain procedure rather than another had to be followed to issue an authorization or if the fact-finding activities that preceded the issuing of the permit to modify a building were not performed accurately.

**5. Judicial Structures**

After clarifying in which sense and within which limits "public law disputes" are distinguished from other disputes that concern public authorities and bodies, it is time to consider how national systems of administrative justice are shaped. The present section and the next will focus on two schools of thought: that which is based on the traditional dichotomy between monism and dualism and the other one that is centered on judicial proceedings.

**A) Monism versus Dualism: an Over-emphasized Issue**

We began this section with a familiar distinction often made between monism and dualism. The distinction is this: monist systems are based on a unitary jurisdiction, that of the ordinary courts of the land, while dualist systems have both civil and administrative courts. Thus stated, the distinction is clearly an oversimplification, in light of the developments previously considered[104].

At the beginning of the 1980s, Mario Nigro, an Italian administrative lawyer, made an attempt to keep the dichotomy between monism and dualism, whilst trying to provide a more differentiated vision of the reality. He distinguished three main models: first, the systems based on monism, where public law issues were not distinct from others and justice was rendered by ordinary courts (England); second, the systems where public law issues were not only distinct from others, but also fell mainly within the jurisdiction of administrative courts (France and other continental countries); third, dualism in the true sense, i.e. a

[103] O. Fiss, *Forward - The Forms of "Justice"*, 93 Harv. L. Rev. 1 (1979).
[104] *Supra*, Section 3, §§ C-D.

system based on two jurisdictions (Italy)[105]. This picture of reality was certainly to be preferred to the dichotomist accounts that still flourished. However, it was not immune to weakness. Being a realist, Nigro was well aware that national systems of administrative justice were put under pressure by the growth of the positive State, but he hesitated to accept the view that this affected the main pillars of public law.

Anyway, the main problem with his account is neither that of adherence to tradition nor of factual accuracy (for example, the House of Lords' ruling in *O'Reilly* had just been issued), but regards its underlying philosophy. Like most of his predecessors, when trying to draw a map of contemporary systems of administrative justice, Nigro relied on structures; that is, institutional design. Of course, institutional design forms part of conventional legal analysis. However, we may wonder whether it still makes sense to focus mainly, if not only, on the distinction between monism and dualism[106]. Adequate attention ought to be devoted also to the extent to which a 'system' of administrative justice may be regarded as such. Other comparative surveys, for example, distinguish the advisory and judicial role of administrative judges[107]. Moreover, we should not content ourselves with an analysis that describes how institutions are shaped in order to provide justice in the administrative State. From this point of view, the focus should not only be on structures but also, or mainly, on functions; that is, on justice regarded as a service to society. In this respect, aspects other than organization do matter, including access to courts, the intensity of judicial review[108], and the adequacy of remedies[109]. While these aspects will be considered in the next section, in the remaining portion of

[105] M. Nigro, *Giustizia amministrativa* (1983, 3rd ed.), 39. Both Nigro's contemporaries and successors expressed doubts about his characterization of the Italian system of administrative justice.

[106] See M.P. Chiti, *Monism or Dualism in Administrative Law: A True or False Dilemma*?, 12 Eur. Rev. Public L. (463 (2000) (arguing that the divide has lost relevance).

[107] G. Braibant, *Monisme(s) ou dualisme(s)*, 12 Eur. Rev. Public L. 371 (2000); M. Fromont, *Droit administratif des Etats européens*, cit. at 16, 120.

[108] R. Caranta, *Learning from our Neighbours: public law remedies harmonization from bottom up*, cit. at 3, 220.

[109] M. Fromont, *La place de la justice administrative française en Europe*, 47 *Droit administratif* 8 (2008).

this section I will focus on the systematic nature of the remedies against misuses and abuses of power.

**B) A More Systematic Structure of Jurisdiction**

Initially, with the notable exception of France, where the division of labour between administrative courts (*juge administratif*) and ordinary courts (*juge judiciaire*) was established after the half of the nineteenth century and was put under the supervision of is the *Tribunal de Conflits*, jurisdiction on public law disputes was far from systematic. This was obviously the case in England, not only for the suspicion against administrative law but also for the reluctance to rationalize and systematize the law, viewed as the product of experience. It was likewise the case in countries that had set up administrative courts. For instance, in Italy, there were doubts concerning the legal nature of the new panel of the Council of State that was entrusted with the power to decide about claims regarding legitimate interests. Several observers thought it was an administrative body, not a judicial one, and it was not regarded as a part of the judiciary. Another example is that of Sweden, where still at the half of the twentieth century it was held that administrative had been established for specific purposes, had no universal jurisdiction over the legality of administrative acts and, therefore, did "not form a 'system'"[110]. Other examples might be mentioned, but they would not change the substance of our discourse. Administrative justice was not the product of an architect's design but, rather, the consequence of deep social and institutional changes. Accordingly, it had a limited systematic nature, or none at all.

In order to understand the importance of the systematic nature of available remedies, three aspects will be considered: a) whether the advantages of specialization have been recognized; b) whether there is a single site of judicial authority, though with more than one panel, or a plurality of courts and tribunals and c) if so, whether the relations between such courts and tribunals are relatively rationalized by constitutions, statutes, and judicial decisions. The adverb 'relatively' is used to convey the idea that our legal institutions, though not forming a coherent whole, an

[110] N. Herlitz, *Swedish Administrative Law*, cit. at 60, 227.

ideal that rarely occurs in public law, may be positively influenced by legal standards and institutional practice.

The advantages of specialization have been recognized more or less everywhere, including Britain, with the creation of the Administrative court within the Queen's Bench. While the change of name was, or has been regarded as, a cosmetic change, a more significant change occurred at the end of the twentieth century regarding the composition of the court. There used to be a full rotation of judges between the administrative and commercial courts. But this is no longer the case, in the sense that only some of the judges of the High Court apply to be eligible for the Administrative court. Its administrative division is thus an increasingly specialized body of judges, distinct from those who deal with business matters. Other States, including Romania, have set up an administrative chamber within their supreme or cassation court.

The increasing complexity of the machinery of government is reflected by the plurality of courts and tribunals and by the resulting necessity to rationalize the links between them. Let us consider the country traditionally regarded as the motherland of administrative law, France. It has preserved its framework with the generalized jurisdiction of the administrative judge, at the heart of which there is still the Council of State[111]. However, there are more than forty regional administrative courts and an intermediate level of appeal courts. As a result, the role of the Council of State is different, because for most issues it is a court of last resort.

On the other side of the Channel, very important changes have taken place, too. The House of Lords traditionally had both legislative and judicial competence, even though only the Law Lords exercise judicial functions. The Constitutional Reform Act (2005) has given rise to a separate system of judicial review, with the creation of the Supreme Court of the United Kingdom. Another reform derives from the Tribunals, Courts and Enforcement Act (2007). Where there were disparate boards, commissions, and tribunals there is now a 'two-tier system', with a first-tier tribunal and an upper tribunal in a number of areas or

[111] P. Delvolvé, *Le Conseil d'État, Cour suprême de l'ordre administratif*, 123 Pouvoirs 51 (2007).

sectors[112]. In particular, the Administrative Court exercises a supervisory jurisdiction over lower courts, mainly through the procedure for judicial review. The oft-cited remark made by Lord Diplock that "the development of a coherent system of administrative law in England was the greatest judicial creation" in his lifetime[113] might not be unjustified also in respect to administrative justice.

Consider, now, Austria, Germany, Italy. In Germany the general jurisdiction concerning public law disputes is distributed between three levels: administrative courts and a higher court within each Land, and the Federal Administrative Court (*Bundesverwaltungsgericht*), which holds a competence as court of first and last resort in some particular areas[114]. In Austria, after the reform of 2013, there are a Federal Administrative Court (*Bundesverwaltungsgericht*), a Federal Fiscal Court (*Bundesfinanzgericht*), and nine Administrative Courts in the States (*Verwaltungsgerichte*). Similarly, in Italy, there are two tiers of administrative courts: regional courts and the Council of State. But there is an additional two-tier system of jurisdiction on the responsibility of public employees for the management of public money. The Court of Auditors administers this jurisdiction in its judicial capacity, not without some tensions with civil courts.

While this is a distinctive trait that Italy shares with France, Greece, Portugal[115] and Spain, a cursory look at other European legal systems shows that a two-tier or three-tier system of judicial review exists in all these States, as well as in Bulgaria, Finland, Hungary, Lithuania, Luxembourg, Poland, Slovenia, Sweden. Some States - including Austria, Finland, Germany, Italy, and Slovenia – have also set out codes governing the judicial proceedings that take place before administrative courts. However, some kind of *lex specialis*, either in the form of a code or

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[112] M. Adler, *Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice*, 69 Modern L. Rev. 958 (2006).

[113] Lord Diplock's citation is borrowed from the ruling of the House of Lords in *R. v. Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Business Ltd*, 2 All England Reports 93, 104 (1981).

[114] W. Leisner, *Legal Protection Against the State in the Federal Republic of Germany*, cit. at 87, 155.

[115] Portuguese Constitution, Article 209 (2) (including the Audit Court within the judiciary).

in that of court orders, exists also in legal systems that have not set up administrative courts.

Two conclusions follow from all this. First, not only is it nowadays axiomatic that public law disputes are legally distinct from other classes of disputes, but there is a specialization of the courts that administer them, though not necessarily a special judge. Second, not only may the jurisdiction of administrative courts be concurrent or alternative with that of civil courts, but it is also systematically structured.

### 6. From Structures to Functions

When considering how public law disputes are dealt with by national legal systems, several important variables emerge concerning actions and remedies. Legal comparison also shows some common traits, which concern the accessibility of judicial review, interim relief, and more generally the role of the courts as masters of their own standards of review.

#### A) Variety of Actions and Remedies

Comparative surveys point out three main functional differences concerning the handling of public law disputes: preliminary administrative remedies, distinctions between the interests that may obtain judicial protection and, more importantly, actions.

Until some decades ago, it was generally accepted in several legal systems that "administrative remedies must be exhausted" before resort to the courts could be permitted. However, while in some cases – for instance, Germany - this rule has been enforced by the courts ([116]), in other cases application of this rule increasingly lost the certainty that its constant reiteration would have ensured. Interestingly, constitutional courts have, on occasion, be reluctant to accept that exhaustion of administrative remedies was required when an agency's decision was challenged, because this was regarded as negatively affecting the effectiveness

[116] W. Leisner, *Legal Protection Against the State in the Federal Republic of Germany*, cit. at 87, 6; M. Fromont, *Droit administratif des Etats européens*, cit. at 16, 114.

of judicial protection, in the sense that delayed justice amounts to denial of justice.

A second important distinctive trait concerns the interests that are acknowledged and protected by law. While this may not be particularly problematic in some legal systems, so long as claimants have a sufficient interest, in other legal systems this is not the case. There has been, in particular, much discussion in the literature about the nature of two general categories, legal rights and legitimate interests, especially when such distinction has been related to the division of jurisdiction between civil and administrative courts, respectively. In the past, this discussion has occasionally assumed a sort of metaphysical aspect, which was probably excessive. By contrast, more recently it has been suggested that the over-emphasis on subjective categories is but a further example of both the formalism that besets public law and the inclination of its specialists to indulge in abstract discussions, that might often be avoided by simply using the category of rights. But we use categories in all fields of law, both public and private. It is inevitable that they will require boundaries and distinctions, and this will cause discussion as to whether a particular interest should fall within one category or another. However, this does not imply that the existence of categories is formalistic. They can be, and often are, very helpful not only for the sake of intellectual clarity, but also for practical purposes, in the daily practice of courts. There is also evidence that in most judicial systems process rights are distinct on the basis of the protection that the legal order accords to the substantive interests at stake. As observed by Paul Craig, the term right designates instances where the challenged administrative action affects proprietary or personal right of the applicant, while the term interest "is looser and has been used even when the individual does not in law have any substantial entitlement in the particular case"[117]. The treatment afforded to these categories or to their sub-divisions can moreover differ significantly.

This brings us to the third variable; that is, actions. In the past differences concerning actions were neither few nor of scarce importance. European systems of administrative justice allowed

[117] P. Craig, *Perspectives on Process: Common Law, Statutory and Political*, 52 Public Law 275, 280 (2010).

claimants to bring their cases only if they fulfilled the requisites for a certain action and excluded other claims. The main implication of what is perhaps the most cited decision of French administrative law, the *arrêt Blanco*, is precisely that it excluded the application of the rules laid down by the civil code with regard to non-contractual liability[118]. This did not imply that this form of liability was excluded, but that it was governed by other rules. In other jurisdictions, it functioned in a narrow and limited orbit, due to the reluctance of the judges to impose significant financial burdens on the State. Still today, the panoply of actions (for annulment or rescission, of declaratory nature, for damages, against inaction) that may be brought against public authorities in Germany has no equivalent in other legal systems. Perhaps more importantly, the German model that is based on a general clause concerning judicial protection against public authorities[119] has gained support in other legal systems, including that of Slovenia[120].

The variables just indicated are not the only ones that matter. Other differences include the composition of courts, including the presence of a public officer that is not a member of the court, and the relationship between the rules that govern public law disputes and those that are laid down by codes of civil procedure. Perhaps the greatest diversity exists as to the method of ascertaining facts, especially when they are contested, and it is in this regard that the assessment of those facts made by the competent administrative agency may be particularly influential. There are still other differences concerning the role of precedents[121] and available remedies against judicial decisions. Considered as a whole, these variables influence the capacity to respond to the needs and demands placed upon courts by the rapid changes taking place in the third century of administrative law. It remains to be seen whether the general trend operating in

[118] *Tribunal des conflicts*, 8 February 1873.

[119] W. Leisner, *Legal Protection Against the State in the Federal Republic of Germany*, cit. at 87, 165.

[120] Slovenian Constitution, Article 153 (1); Administrative Dispute Act n. 105/2006, Article 1.

[121] See W. Leisner, *Legal Protection Against the State in the Federal Republic of Germany*, cit. at 87, 9 (noting that, while in Germany there is no rule of the precedent, lower courts generally follow the decisions of the supreme courts, as in France and Italy).

favour of the introduction of a particular framework for public law issues has played a role in the opposite direction, that of similarity.

**B) Shared Standards of Review**

The question whether national systems of judicial review are characterized not only by numerous variables but also by some similarities ought not to be considered simply in the light of the idea that every civilized government has assumed the duty of doing justice between itself and its citizens.

There is discussion in the literature as to whether other cultures, particularly that of Germany, unilaterally received French legal concepts and principles or there have been mutual influences[122]. But, for present purposes, we do not need to take a side in this debate. Suffice it to note that courts would adjudicate on a matter of public law at the instance of an individual, citizens or business, provided that the latter could show a sufficient interest in the action brought against an allegedly unlawful administrative action (or inaction, where it is falls within the sphere of judicial review). However, the major premise of judicial review of administrative action is that courts perform a supervisory function in order to assure that other bodies adhere to the law. The 'law', in this regard, may be intended either as a particular duty that is claimed to be lodged by law in a certain body or officer to perform a particular action or to issue a particular measure or as the respect of certain standards of conduct. In this sense, jurisdiction contributes to the respect of law, objectively intended.

Two sides of the same coin must be distinguished. The first is based on the duty to render justice, in this case between citizens or business and any body that performs a public law function. For this purpose there has been established a set of principles for the exercise of judicial review. It is axiomatic that, for the safeguard of civil liberty, everyone must have access to courts. It is also axiomatic that judicial review must be carried out independently of control and impartially, in the sense that a court must "provide

[122] A. Fischer, *Aspects historiques: l'évolution de la justice administrative en Allemagne et en France au XIX et au XX siècle et les influences réciproques sur cette évolution*, 7 La révue administrative 6 (1999).

a disinterested determination of the case"[123]. This fundamental principle of justice, which is laid down by both constitutions and codes of judicial procedure, connotes not only civil courts but also, when they exist, administrative courts[124]. It is, in other words, an invariant. Another one regards the judicial process as such. Certain 'forms' that are necessary to justice do not bear simply a general similarity. They are, rather, necessary elements of jurisdiction that are particularly important in view of the structural asymmetry – of information and power – that exists between the parties, as well as of the fact that judges exercise sovereign powers, though acting on behalf of the people. An adequate and equal opportunity to be heard, the right to counsel, and the giving reasons requirement are deemed necessary. And, should national legal systems fail to respect them, private parties can bring an action before the European Court of Human Rights. EU law provides additional safeguards, allowing national courts to bring a preliminary reference to the ECJ and making the infringement procedure available for failure of a Member State court to fulfill the obligations stemming from the treaties.

The other perspective is that of the rule of law applicable. Some general principles of law, including the right to be heard before a public authority takes a decision adversely affecting individual rights or interests and the prohibition of retroactive effects, are shared by all the legal orders of EU Member States. The underlying assumption, which is a corollary either of the Rule of Law or of *Rechtsstaat*[125], is that every State is bound by its own laws, in the logic that is common to the concept of estoppel and to the old maxim *tu patere legem tuam, quem fecisti*. But sometimes the rule of law may be that of some other country. This is the case when a national *jurisprudence* adopts the principles followed by another country. For instance, Jennings held that Belgian courts (at that time, civil courts) since 1920 adopted the main body of French administrative law relating to *fautes de service*[126]. Another example is the way in which an Italian administrative court has interpreted its own law relating to the withdrawal of unlawful administrative

[123] These words are borrowed from L. Jaffe, *The Citizen as Litigant in Public Actions: the Non-Hohfeldian or Ideological Plaintiff*, cit. at 102, 1034.
[124] See, for instance, the constitutions of Germany and Italy (Article 102).
[125] M. Fromont, *Droit administratif des Etats européens*, cit. at 16, 232.
[126] W.I. Jennings, *Administrative Law and Administrative Jurisdiction*, cit. at 14, 100.

acts in the light of German doctrines of public law[127]. This is the case, likewise, when the ECJ has included a certain principle of law among the 'law' of which it has the mission to ensure the respect[128]. The principle of proportionality is probably the best-known example of this method, especially from an English viewpoint[129]. In this sense and within these limits, Schwarze's remark that the European Community was a community of administrative law is not unjustified[130].

**C) Recent Trends (I): Accessibility of Public Law Litigation**

While the principles just mentioned can be regarded as the foundations of public law systems, it is interesting to consider some recent trends. They concern both accessibility of public law litigation, in the sense specified before, and the granting of interim relief.

With regard to citizens' access to judicial review, it is helpful to mention the traditional limitations of judicial review in this field. First, judicial review was allowed against administrative acts, conceived – following Otto Mayer – as individual decisions or measures. By contrast, claimants could not challenge acts laying down general and abstract precepts, or rules. Nor could *actes de gouvernement* be subject to judicial review. A second limitation concerned standing; that is, whether a particular claimant is entitled to seek judicial protection[131]. The general rule was that an applicant had to show a particular interest before being accorded standing. The degree of practical difference between such limitations should not, however, be over-emphasized. If a court was not willing to judge a certain question, it could justify its decision either way. More recently, as the limitation concerning *actes de gouvernement* has been narrowed in some national legal

[127] Tribunale di giustizia amministrativa di Trento, 16 December 2009; for further remarks, see G. della Cananea, *Transnational public law in Europe: beyond the lex alius loci*, in M. Maduro, K. Tuori and S. Sankari (eds.), *Transnational Law. Rethinking European Law and Legal Thinking* (2014), 321, 329.

[128] Article 164 (1) of the Treaty of Rome, reproduced by Article 10 TEU.

[129] Sir J. Laws, *Monism and Dualism*, cit. at 87, 404; M. Fromont, *Droit administratif des Etats européens*, cit. at 16, 256.

[130] J. Schwarze, *European Administrative Law*, cit. at 70, 3.

[131] P. Craig, *Administrative Law*, cit. at 14, 717.

systems or even abandoned in others, the courts have showed an inclination to refuse standing on grounds of lack of a sufficient interest.

Well before the entry into force of the ECHR, whose Article 6 broadly recognizes the right to effective judicial protection, the first limitation was redefined by national constitutions and statutes. Consider, again, the German and Italian Constitutions, both entered into force before 1950. Article 19 (4) of the *Grundgesetz*, which states that anyone whose rights have allegedly been infringed by a public authority may have access to courts, has been interpreted in the sense that as a matter of principle access to administrative courts is unlimited. By contrast, although Article 113 (4) of the Italian Constitution prohibits any limitation of judicial review against particular classes of administrative acts, this clause has not been interpreted in the sense that previous legislation excluding that *actes de gouvernement* can be challenged is in contrast with the Constitution[132]. However, the courts have gradually side-stepped this limitation, by narrowing the scope of application of *actes de gouvernement*., for instance with regard to the extradition of foreigners. Similarly, the French administrative judge has narrowed the traditional limitation, by making a distinction between measures that are taken in the exercise of sovereign powers[133] and measures that can be regarded as detached from such powers and are, therefore, subject to duties of legality and fairness and reviewable (*théorie des actes détachables*)[134].

In many cases, judicial review is also allowed against secondary and tertiary rules. A distinction, however, ought to be made. Sometimes, legislation has made judicial review explicitly available. In other cases, the courts have refined the notion of regulation, by distinguishing rules from precepts, under the appearance of having a general content, are susceptible of adversely affecting particular individuals or groups. It is in this context that the French Council of State has taken a famous decision, which is worth mentioning. During the Algerian crisis, two approaches could be discerned. One line of cases appeared to

[132] Article 7 (1) of the recent Code of administrative proceeding still states that there is no judicial review against the acts or measures issued by a governmental authority in the exercise of political power.
[133] Conseil d'Etat, decision of 29 September 1995, *Greenpeace* (nuclear tests).
[134] Conseil d'Etat, decision of 30 May 1952, *Dame Kirkwood*.

show deference towards exercises of power by political authorities. Another line of cases explicitly excluded that legislation granting special powers to the executive branch of government could create military courts for judging citizens, with no appeal. Thus in *Canal et al*, the Council of State annulled the order issued by President De Gaulle precisely because the order was regarded as an exercise of the executive's regulatory power, as distinct from legislation[135].

Diversity and similarity of approach also characterize standing. Even when the same words, such as "person aggrieved" or "sufficient interest", are used it cannot be assumed that mean the same thing, or designate the same legal reality. The reason is that their meaning is heavily influenced by the institutional and cultural context in which such terms are used. Much depends on what a certain remedy seeks to achieve, but much also depends on judicial willingness to interpret it in a new manner, because different interests are at stake. For instance, the standing of non-governmental organizations (NGOs) in cases concerning the protection of either the environment or cultural sites is, more or less everywhere, a praetorian innovation; that is, an innovation decided by the courts and later accepted by legislation.

In many national legal orders a more liberal predisposition by the courts has emerged in respect of direct and indirect governmental interference with interests protected by law. Although the courts have generally kept the traditional view that an applicant must show some interest before being accorded standing, they have relaxed the criteria for considering a certain interest as satisfying the requirements for standing. Thus in the UK a company has been allowed to challenge an assessment for rating purposes without being required to show that it was more aggrieved than other taxpayers[136]; similarly, in Germany the test for standing has become more liberal that that which existed previously.

An issue that is closely related to standing is that of intervention. Traditionally, the rule was more or less rigid, in the sense that, once a claim was brought against an administrative act or measure, it had to be notified to all persons directly affected.

[135] Conseil d'Etat, decision of 19 October 1962, *Canal, Robin et Godot*.

[136] *R. v Paddington Valuation Officer Ex p. Peachey Property Corporation Ltd*, 1 Q. B. 380 [1966].

Such persons included obviously the public authority that had issued the contested measure. They also included the addressee of such measure, if different from the claimant. For instance, if the owner of the building next to the building for which a permit to add a new floor held the permit was illegal on grounds of either process or substance, then the person who had obtained the permit was allowed to take part in the proceeding. More recently, however, the courts have relaxed the rule, admitting persons who wished to be heard in opposition to the claim brought by the applicant.

At this stage of our analysis, it is interesting to pause a little, in order to reflect about dissimilarity and similarity. National judicial systems differ in several respects, including whether there is a generalized access to judicial review against unlawful administrative action or rather a variety of actions: to annul an act, to declare that a public authority has illegally refrained from acting, to seek compensation for damages deriving from administrative action or inaction. However, national systems "display interesting points of contact. Standing is one such instance"[137]. There was an initial recognition of standing in favor of anyone holding that either a right or an interest had been directly and adversely affected by unlawful administrative action. Subsequently, either legislation laying down such criterion has been amended or the courts have redefined its content, especially when constitutions laid down the principle of effective judicial protection in broad terms, as the Spanish Constitution did in 1978.

The importance of the ECHR in this respect cannot be neglected. It was noted earlier that, though Article 6 explicitly concerns civil and criminal proceedings, it has been widely interpreted by the European Court of Human Rights. The Court has devoted particular attention to access to judicial protection. In addition to the direct effect exerted by the ECHR, as interpreted by its Court, there is a sort of indirect effect. Such effect emerged, for instance, when the English Parliament approved the Human Rights Act 1998. Though the Act is grounded on the assumption that the Convention does not have direct effects, it has created a new head of illegality that can be used in judicial review actions. Everyone who claims to be victim of breach of Convention rights

[137] P. Craig, *Administrative Law*, cit. at 14, 740.

can bring an application for judicial review. A particular requisite must be fulfilled, however, from the point of view of the 'sufficient interest' that must be showed; that is, the applicant must be the victim of the unlawful administrative act or measure. Although this may be, and has been, regarded as a narrow test, it must be noted that the Act explicitly refers to Article 34 of the ECHR, the clause governing access to the Strasbourg Court, with a view to identifying the criterion as to whether a person is a victim[138]. In other words, there is a *renvoi* to the rules of another judicial system. While it is clear from both the Convention's wording and the jurisprudence of its Court that there is no *actio popularis* in this area, the Court has followed a liberal approach.

**D) Recent Trends (II): Interim Measures and Effective Judicial Protection**

Although constitutions and statues provide standards of conduct for public authorities, these may diverge from them. Judicial review is, therefore, an essential, albeit limited, safeguard against public authorities. In particular, an obstacle to the effectiveness of judicial review of administrative actions derives from the binding effects attributed to public authority measures (*décision exécutoire* in French law). Since such binding effects take place without the consent of private individuals[139], the latter are exposed to a risk – that of suffering harm unlikely to be remedied *ex post*, after the judge has upheld their action. Hence the importance of legal remedies to prevent such a risk, ensuring effective judicial protection. In this respect, the judges' power to issue interim relief plays a key role[140]. This role is not without side-effects however. Indeed, the decision-making processes slow down, with adverse effects on other individuals seeking to take advantage of such decisions. Moreover, increasing numbers of administrative decisions then come before the courts. However, these consequences must be balanced with the need to ensure that justice is done. Not only is the essence of judicial process that of ascertaining adequacy, but, as the saying goes, justice delayed is justice denied.

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[138] P. Craig, *Administrative Law*, cit. at 14, 737.
[139] O. Mayer, *Le droit administratif allemand,* cit. at 36, 83.
[140] P. Craig, *Administrative Law*, cit. at 14, 781.

That said, comparative analysis shows both similarities and differences. For example, the French *Conseil d'Etat* follows a restrictive policy with regard to "*conséquences difficilement réparables*" justifying the issue of interim measures[141]. By contrast, Italian administrative courts have often relaxed the prerequisites for this remedy over the last ten years. Their policy is, therefore, more favourable to individual claimants and more similar to the policy of the German courts[142].

However, comparative analysis shows that some basic choices, aiming to prevent the arbitrary exercise of power by public authorities, are shared by several national legal orders. Some of them, including France, have abrogated the norms that excluded interim relief against public administrations. In other countries, such as Italy and Spain, old legislation has been reinterpreted, in order to ensure its conformity with the constitutional principle of effective judicial protection. As a result, administrative judges may grant interim relief also using civil procedure remedies[143]. In common law countries, the courts have wide powers to issue *interim reliefs*, although the latter may be granted only provided that certain conditions are met. Such conditions concern the likelihood of succeeding on the merits, the risk of irreparable injury, the effects of the order on other parties and due consideration of the public interest. Interestingly, both the provision of such interim remedies and their conditions broadly correspond to those existing in European legal orders[144].

This finding is important in the light of both EU directives on remedies in the field of public procurements and the ruling of the ECJ in *Factortame I*. The Court had to evaluate whether the granting of interim relief was a mandatory duty in the specific institutional framework of Great Britain, which prohibited its issue against the Crown. A good dose of deference towards a deep-seated constitutional tradition would not have been unjustified. There also existed a means of showing the Court's reluctance to affect a national institutional framework: the principle that every individual Member State enjoys autonomy to

[141] See D. Lochak, *La justice administrative* (1994, 2nd ed.), 107.
[142] W. Leisner, *Legal Protection Against the State in the Federal Republic of Germany*, cit. at 87, 178.
[143] Corte costituzionale, sentenza 18 giugno 1985, n. 190.
[144] *La justice administrative en Europe* (2007), 71.

conduct trials according to its own, national procedures. It is true that the Court had set and enforced a precise condition, namely, that the exercise of rights deriving from Community rules should not be compromised. But financial compensation could have been considered sufficient.

It is also true that, proceeding from the specific solutions thought up by the legislators and judges, Advocate-General Tesauro had identified the outline of a general legal principle common to various legal orders, requiring judges to grant interim relief[145]. That happened in almost all the Member States' legal systems, however. The limitative value of the adverb "almost" is not without importance. It denotes the absence of an invariant in the strict sense. Thus the Court could have stated that, if there was a common tendency, it was not shared by the British legal order. There was no pre-existing general principle of Community law the observance of which the Court of Justice was bound to guarantee. It therefore could have shown a sort of deference towards English procedural law, whilst nevertheless observing its difference from *id quod plerumque accidit* (that which happens most of the time).

The Advocate-General's meticulous description of the various national systems contrasts with the summary fashion in which the Court judged interim relief to be indispensable. Of particular significance is the brief passage in which, in a certain sense, he freed himself of the issue of whether a general principle refuted by the Defendant State may be considered common to the Member States. The Court, on the other hand, limited itself to reasserting the established principle of the supremacy of Community law over national law, the premise that there was a need to guarantee the former's effectiveness and the corollary of the Court's own duty to apply Community law in a uniform manner [146]. Once the issue of the relationship between the legal orders had been posed in terms of hierarchy, it was no longer possible to assert the presumption that the British laws were compatible with Community law[147]. This would have prevented

[145] Opinion of Advocate-General Tesauro in Case C-213/89, *Factortame*.

[146] Court of Justice, Case C-213/89, *Factortame*, § 18-22. See also D. Oliver, *Fishing on the Incoming Tide*, 442 Modern L. Rev. (1991).

[147] W. Wade, *What has Happened to the Sovereignty of Parliament?* 107 *Law Quarterly Review* 3 (1991); *Id. Injunctive relief Against the Crown and Ministers*,

the rules being fully effective in a uniform manner in all the Member States. Hence the duty on national judges not to apply the rule that prevents them from granting interim relief.

The interpretation not of a specific rule but, rather, of the legal order's founding principles, in a systematic manner, thus served to rectify the line that the Court had previously followed. It allowed it to hold that non-written principles exist. The latter require judges to suspend the application of a legislative instrument in a situation for which the national legal order does not provide and where interests protected by Community rules are at stake.

**E) Balancing Interests**

Overall the trend in the last thirty years has been to increase both accessibility of justice and its effectiveness. This is not, of course, to say that judicial protection is as adequate as it could, and should, be. Much remains to be done, particularly from the viewpoint of making prompt and cheap remedies available to all, including those that are alternative to judicial proceedings. That said, the focus here is on common and distinctive traits of the various national systems of administrative justice. In this respect, there are parallels with the way in which accessibility and interim remedies have evolved. There is also an increasing influence exerted by supranational legal orders. Whether these trends may be interpreted in a conjunctive or disjunctive manner is another question, which will be examined in the next section.

Meanwhile, two general features of the various systems of administrative justice, can be highlighted. First, as observed before, all these systems aim at "tempering power with justice". Secondly, and consequently, while jurisdiction on private law issues is a jurisdiction about rights, that which relates to public law issues is essentially a jurisdiction about interests, that must be acknowledged, considered, and weighed. Its dominant form is, therefore, interest balancing.

As a result, with few exceptions, notably when consideration of human dignity is at stake, public law disputes are

*ibid*., 4 (founding fault with the argument that the *House of Lords* refrained from promulgating an injunction against a minister.

characterized by the judicial elaboration and application of variable standards[148], in the sense that they require from government officials and judges exercises in balancing the interests of private parties with the collective interests that government is trying to protect and promote by following a certain conduct. Such standards include administrative due process of law, reasonableness, and proportionality. Their common feature is the recognition of "trade-offs between collective and individual ends"[149]. Of course, individual ends are not viewed as absorbed by collective ends, as it happened in the eighteenth century, at the epoch of "*KammerJustiz*". But trade-offs between collective and individual ends are permeated by functional criteria, which were – instead - absent from natural rights doctrines and which call into question the ideas that underlie fundamental rights, as recognized by modern constitutions and conventions. The "ambiguity" that connotes administrative justice since its birth, therefore, has not been dissolved by the undeniable progresses of the institutions of public law.

**7. Dissimilarity and Similarity: Causes, Consequences, and Limits**

We began our analysis by pointing out the opposite comparative approaches that emerged in the history of European law, the integrative approach that flourished at the epoch of *jus commune* and the contrastive approach that emerged in the nineteenth century, when ideas and thoughts about law and government emphasized national cultures. Traditional differences – such as the various ways to interpret separation of powers[150] – were thus over-emphasized and were sometimes viewed as the consequences of different axiological positions, particularly from the perspective of the relationship between authority and freedom. There are, of course, important distinctive traits and there are good reasons for arguing that the essential features of

[148] For this concept, see H.L.H. Hart, *The Concept of Law* (1994, 2nd ed.), 143.
[149] J. Mashaw, *Due Process in the Administrative State*, cit. at 53, 47.
[150] M.J.C. Vile, *Constitutionalism and the Separation of Powers (*1967, 2nd ed.), 193 (contrasting English and French doctrines of separation of powers).

each legal culture must be preserved. However, legal cultures can, and do, evolve. Nowadays, within unified Europe all States distinguish public law disputes – in the sense specified earlier – from other disputes and, whatever their organization, the courts enforce standards of legality and fairness, as well as of objectivity and proportionality, that are distinct and higher from those relating to other classes of disputes. The questions that thus arise are, first, what are the causes of the common trends pointed earlier and, second, which are their limits, in order to protect the autonomy and diversity of national systems of administrative justice.

**A) Functionalism and European Integration**

The development of modern systems of administrative justice in Europe is incompatible with the views of Dicey and his successors. Whatever the intellectual soundness of such views, neither legislators nor judges have followed them, particularly the suggestion that the fundamental asymmetry that exists between individuals (or business) and public authorities (or bodies charged with public functions) might, and should, be mitigated or dissolved by the use of 'the ordinary law of the land', under the supervision of 'ordinary courts'. Because words are important, particularly in public law, it ought to be noted that the term 'ordinary' is far from being value-free. In fact, this term was coined in a period in which not only in England but also in France, Germany and other countries the institutions of government were profoundly reshaped and administrative and judicial remedies were being reshaped, too.

National systems of administrative justice are now much closer than they were just one century ago, due to three driving forces. First, for functional reasons, the problems that public authorities are confronted with are increasingly similar and this influences the solutions they use to solve such problems. Second, within the European legal space each legal system is more influenced by other legal systems than it used to be. Thirdly, in all fields of public law EU regulations and directives have established 'common' rules and such rules have been extensively interpreted by the CJEU, with a view to ensuring the effectiveness of EU

law[151]. As a result, legal remedies are increasingly homogeneous[152].

The importance of these driving forces cannot be fully appreciated without taking the peculiarity of the European context into due account. The fundamental peculiarity of the European legal space is not just the development of legal principles and rules in the context of its "regional" institutions, such as the EU and the Council of Europe, but the existence of a body of shared general principles of law, deriving from the common cultural roots and the influence exerted by Roman law, as interpreted by professors and judges. There is, in other words, a "*droit commun européen*", as Jean Rivero suggested almost forty years ago[153]. The European legal space is thus particularly favourable to mutual learning[154], if not to transplants[155].

This is not without problems, of course. Scholars have constantly discussed whether the utilitarian approach that underlies the attainment of collective ends undermines or even jeopardizes not only the constraints that the law places on exercises of power, but the place of individuals and social groups in the structure of modern governments. But few of them think that things would go much better if we were to use other standards and remedies, drawn from private law. It seems clear, moreover, that judges do not doubt that they would be far worse off if they were to follow these ideas and thoughts about the law. The standards that they elaborate and apply against exercises of power by public authorities are distinct and higher than those that are applied to private parties, even though the difference is often of degree, not of nature. Because this situation is generic in public law, at least in unified Europe, the doctrines that ignore or undervalue it are largely irrelevant. The crucial questions that

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151 D. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost? A Study on the "Functionalized Procedural Competence" of EU Member States* (2010).

152 T. Heukels – J. Tib, *Towards Homogeneity in the Field of Legal Remedies: Convergence and Divergence*, in P. Beaumont, C. Lyons, and N. Walker (eds.), *Convergence and Divergence in European Public Law* (2002), 111.

153 J. Rivero, *Vers un droit commun européen: nouvelles perspectives en droit administratif*, in M. Cappelletti (sous la direction de), *Nouvelles perspectives du droit commun de l'Europe* (1978), 389.

154 S. Cassese, *La construction du droit administratif*, cit. at 16, 146.

155 There is a vast literature on 'legal transplants' that indicates and weighs their pros and cons: see, A. Watson, *Legal Transplants* (1996, 2nd ed.).

need being discussed are, rather, whether only traditional differences persist or there also new ones and whether there are limits to harmonization of law.

**B) Culture Matters: Persistent and New Differences**

While the divide between monism and dualism has nowadays a relative importance, there are persistent differences concerning structures; that is, the organization of administrative justice. Whether, for instance, jurisdiction on public law disputes is not just distinct but it is also constitutionalized is, of course, an important element. Another one is whether administrative judges have only judicial or also advisory functions. Last but not least, whether there is a general clause concerning public law disputes or a set of particular clauses can be of both practical and theoretical importance.

Among the implications of the persisting importance played by history and culture is the following, which concerns alternative dispute resolution (ADR) procedures. EU directives on liberalized public utilities requested the Member States to make such procedures available for solving in a quick and cheap manner the disputes that arise between providers and users[156]. The Member States did so, but in so doing they made choices that reflect their different cultural and legal environments. For instance, the UK entrusted its electronic communications regulator (OFCOM) with a function that is supervisory in nature, on the functioning of ADR based on private law schemes. By contrast, Italy entrusted its regulator (AGCOM) with the task of carrying out both conciliation and arbitration, thus further weakening the traditional distinction between administrative rule-making and adjudication, on the one hand, and dispute resolution, on the other. The role of administrative courts, when judging about the decisions taken by the regulator in its arbitral capacity, is also different from that which characterizes traditional disputes.

It is on the basis of these empirical findings, as distinct from apodictically asserted irreconcilable differences of axiological or

[156] See Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, particularly Article 34.

epistemological nature, that the autonomy and diversity of national legal systems should be taken into serious account. Whether the preservation of a certain degree of autonomy and diversity can be argued, on normative grounds, is the question that will now be considered.

**C) The Case for a Limited Harmonization of Administrative Justice**

Three lines of reasoning sustain the view that harmonization of national laws in this area can be helpful, but within certain limits. They are based on the *telos* of the Union, on the relationship between the Union and its States, and on the legal framework that legitimizes and regulates harmonization, respectively.

The teleological argument is based not just on the genesis of the EC/EU, a union of States, but also on its foundational principle, as enounced by the preamble to the Treaty of Rome. Unlike other treaties, which follow a somewhat static approach, that Treaty followed a dynamic approach, looking at the "further steps to be taken in order to advance European integration"[157], to borrow the words of the TEU. However, the ambitious goal that was set out did not imply the elimination of the founding components of the Union; that is, the plurality of its social groups. Their persistency was mutually agreed by the States' representatives. There is evidence of this agreement in the preamble. By referring to the process of creating "an ever closer union among the peoples of Europe", it excludes a different goal, that of fusing those peoples. In other words, the EU is not simply a polity that comprises twenty-eight Member States and more than 500 million people and is, therefore, very differentiated, but it is a polity that acknowledges and protects such differentiation.

The teleological argument is reinforced by that from principles governing the relationship between the Union and the States. When negotiating the Treaty of Maastricht and the subsequent treaties, national governments did not just express

[157] Preamble of TEU, last indent ("resolved to continue the process of creating an ever closer union among the peoples of Europe"). For further analysis, see R. Dehousse (ed.), *Europe after Maastricht: An Ever Closer Union?* (1994).

concern about the 'creeping competence' of the Union. They raised a more fundamental concern about the safeguard of national identities. The remedy that was found was a declaration that the Union would respect the 'national identities' of the Member States, which are "inherent in their fundamental structures, political and constitutional"[158]. The Treaty should also be read in conjunction with the Charter of Fundamental Rights, which has the "same legal value of the treaties"[159], in particular with its Article 22 that request the Union to respect cultural and linguistic diversity. These words, especially 'culture', should of course be considered with a certain degree of caution. But there is no doubt that a systematic interpretation of these constitutional provisions may support a more robust protection of national legal structures and cultures[160].

A further argument reinforces these principled arguments. It can be inferred from the provisions that regulate harmonization. The main provision is that of Article 114 TFEU. It empowers the institutions of the EU to "adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action", but it specifies that such measures have a particular 'object'; that is, the "establishment and functioning of the common market". The underlying rationale is ensure an adequate consistency of legal standards, so that citizens and business do not obtain in a Member State a less favorable treatment. Particularly the directives concerning remedies in the field of public procurements have done much to eliminate major differences and create minimum standards. Adaptation processes have a dynamic dimension[161]. There is thus still much that can be done to define and refine such standards. But nothing, in the Treaties, authorizes to conceive and use harmonization of law as a step towards unification of law, in particular in this area, which goes well beyond the single market, broadly viewed.

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158 TEU, Article 4 (2).

159 TEU, Article 6 (4).

160 See C. Harlow, *Voices of Difference in a Plural Community,* 50 Am. J. Comp. L. 339 (1996); J.L. Quermonne, *L'Europe en quête de légitimité* (2001), 47 (emphasising "*le droit à la différence*").

161 C. Knill, *European policies: the impact of national administrative traditions on European policymaking*, 18 J. Public Policy 1, 7 (1998).

**8. Conclusions**

This essay has argued, first, that, contrary to the received idea that administrative law is a sort of national enclave, the comparative method has been particularly important in the foundation of national cultures and institutions of public law; second, that the European context has a distinctive nature not simply because of parallel developments, more or less reciprocal influences and integration, but for a more profound reason. That is, when considering the values and principles of public law in Europe, there is evidence that a sort of common legal patrimony exists, despite the innumerable differences that persist as well as the new ones that constantly emerge. In this sense, and within these limits, not only has Schlesinger's call for a heightened attention to the general principles of law equal applicability to the way in which we view public law, but adequate awareness of this common legal patrimony suggests that we should not use the comparative method in the same way in which we would do when considering two countries that do not share such an important set of general principles of law. This does in no way means going back to the legal institutions and the related thoughts about the law that were proper of an earlier epoch. It means, rather, that an adequate method of analysis, in our case the comparative method, must take the specific features of Europe into due account.

# ARTICLES

## THE NEW SEPARATION OF POWERS: HORIZONTAL ACCOUNTABILITY

*Pasquale Pasquino**

*Abstract*

Starting from an attempt to distinguish different meaning of the term/concept *accountability*, the article suggests a version of the doctrine of the separation of powers, where Constitutional Courts play a crucial role in the structure of divided power. The text tries to show that the historical starting point of this doctrine is the Hobbesian conceptual revolution that introduced the conception of individual equal rights. So doing, Hobbes destroys the traditional idea of mixed constitution (and limited and shared power) based on a non-equalitarian anatomy of the society and the existence of ontological different parts of the society, pushing to think differently the mechanism of divided/limited power.

TABLE OF CONTENTS



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**1. Fragestellung**

Consider the following statements:

a. The Prime Minister of the United Kingdom is accountable to the majority of the House of Commons by a convention of the British customary constitution.

b. The elected members of most of the legislative assemblies in contemporary representative governments are accountable to the voters on the Election Day for renewal of their *pro tempore* mandate.

c. "Party committees at all levels are accountable and report work to the congresses at their respective levels," as we read in an official English presentation of the structure of the Chinese Communist Party.

d. Tenured judges are somehow accountable to public opinion and to elected politicians.

This list, which one could easily expand, shows that the terms *accountable/ accountability* are used in a variety of discursive and sometimes technical, legal contexts with different meanings. In order to avoid a lack of analytical clarity on the topic of this entry, it shall be convenient to proceed in two steps. First, to clarify the possible general meanings of the term *accountability*. Then, to define the proper object of this entrée: the expression *horizontal accountability*, distinguishing it from a *vertical* one and describing, at the same time, its rationale and why it has value in contemporary constitutional *Rechtstaat*.

**2. Accountability**

By stipulation, it is possible to distinguish the forms or types of accountability in the statements above as: (a) political, (b) electoral, (c) by membership, and (d) reputational.

In our social life, we are accountable (we have to *rendre des comptes*, explain/ justify our past conduct) in almost all of our relations: in family and with friends, in school and at work, as citizens tax payers, etc. One could even claim that humans are *accountable animals*. Still, what do we mean by speaking of accountability? If the species can be distinguished in a meaningful sense, we need to ask what is common to the genus.

Speaking of accountability implies, to begin with, a relationship: X is accountable to Y, where X and Y can be alternatively single individuals and/or institutions (and their members).

In the minimalist sense, accountability implies that X (agent or agency) has to explain to Y what she has been doing, in our context, as a public official with some responsibilities or, more in general, as a member of a group or an institution.

The entry in the *Oxford English Dictionary* for *accountability* reads:

"The quality of being accountable; liability to account for and answer for one's conduct, performance of duties, etc. (in modern use often with regard to parliamentary, corporate, or financial liability to the public, shareholders, etc.); responsibility".

If the common element of different forms of accountability is *to account for one's conduct*, the "specific difference" may be determined by the *consequences* of the account, once given. These consequences cover a wide spectrum of possibilities, going from tarnishing one's reputation to the loss of an occupied position and to punishment, under specific legal circumstances. In the case of a loss of a position or function, we need additionally to distinguish the temporal enforcement of the consequences. The Prime Minister in a parliamentary government may lose her position at any time because of a vote of no confidence. Her "tenure time" is virtually *zero*. The non-renewal of the parliamentary mandate for an elected official (in the absence of *recall* ), instead, can take place only at the end of the electoral mandate, at the time of its possible renewal.

Now, these types of consequences of *accountability* have to be clearly distinguished from the case (d), the one in which the subject Y has tenure – which in turn can be unlimited or for a given period of time. This actor cannot be deprived of his position (except in the case of a transgression of legal duties or of moral obligations).

It is possible to present, moreover, a slightly different taxonomy, focusing on the consequences of what we call accountability. In many contexts, public officials have a duty or a legal obligation to explain and justify what they did or decided in

office; nonetheless, a number of different possible effects on their person and position can follow.

*Latissimo sensu*, accountability is a condition for the control by Y of X's behavior, a condition typical in principle of the relationship between a principal and his agent. A number of state organs are, for instance, under the obligation to present *ex post* a regular report to Parliament of what they have been doing.

*Lato sensu*, it consists of the strictly required obligation by public officials to justify their decisions with public arguments each time they are taken. Courts of justice in many political systems have a constitutional duty to give reasons for *each* of their opinions.

*Stricto sensu*, by political accountability we normally refer to the absence of life tenure of individuals occupying public office who, nonetheless, could have their mandate renewed. Hence, these officials need, in order to remain in office, to be approved by the agency that authorized that mandate, which has, moreover, the legal power to terminate the exercise of public office by someone previously appointed to that position. (The "agency" is here the members of a parliament, in the case of the cabinet; and the voters, in the case of elected representatives in modern representative regimes). Notice that, at least in the case of the voters, the power of dismissing the incumbent is entirely discretionary; it does not need any justification or giving reasons and results, moreover, from the aggregation of independent individual preferences. From this perspective, it is possible to assert that each voter exercises a microscopic fragment of the classical sovereign power, the one that could say: *sic volo, sic jubeo, stat pro ratione voluntas*. It is worth noticing that non-renewal in office is neither the fact of an individual will (as in the case of a single principal) nor of a body deliberating collectively, but the consequence of a mechanical tally of possibly incoherent, individual, uncoordinated preferences. The parallel between elections for renewal of a public office and the relationship between principal and agent – typical of private law – is for that reason, generally speaking, misleading.

Based on what I just said, it follows that the sanction resulting from accountability may vary significantly, from some real

punishment to losing the office or even almost nothing, except possibly reputation, as in the case of a Central Bank president explaining to political officials his recent financial measures.

The considerations, in the next section, will focus almost exclusively on the political-constitutional context where it is possible and now common to distinguish between *vertical* and *horizontal* accountability.

### 3. Horizontal Accountability

The expression of *vertical accountability* is now used currently to designate the relation between voters and elected officials in modern representative government. Elections (free, repeated, and – later on – competitive) have been considered, from the end of the 18th century, the *only* source of *legitimacy* of political authority in a "society without qualities". By this expression I mean a political community where public power cannot be legitimately exercised by virtue of *natural differences* among structurally unequal members of the community (as in classical culture, which distinguished *gnorimoi* from *demos*). In a culture, like the post-Hobbesian one that asserts equality of the adult (at least male) members of the body politic, exercise of political authority can only be thought of and be presented as based on concepts like *authorization* or delegation - and as temporary permission to exercise a function which is not held *sui juris*, but as entrustment. The Hobbesian concept of authorization originated in an anatomy of the city that knows only equal members in the political sphere and *no natural hierarchy*, i.e. no government that is not an artifact, and hence in need of a justification. If the members of a political community are equal and there are, nonetheless, good reasons to reject an-archy, i.e., absence of government, the *raison d'être* of the government needs to be rationally vindicated. This was the intellectual achievement of Hobbes' *Leviathan* and of his doctrine of authorization through a social contract.

At the end of the 18th century, in the republican (anti-monarchical and anti-aristocratic) political regimes, established in a stable form in the United States and provisionally in France,

through the respective constitutional revolutions enacted in the two countries, authorization took the form of exclusive procedure of *empowerment through elections*.

This 18th century theory of representative, republican government is at the origin of a reductionist ideology that ended up in the 20th century equating democracy with what the *abbé* Sieyes, in his manuscripts, described with the term *électionnisme.*

In reality, the institutional structure established in the two countries, which are at the origin of the political-constitutional system that we now call, with a shorthand term, democracy, is not identical at all with the Jacobin ideal consisting of Rousseau plus representation. A variety of institutional mechanisms were imagined and established by the liberal constitutions from the outset to tame and control political power, independently of vertical accountability (popular elections), between elections, and as a defense against what Madison called "tyranny of the majority". The Founding Fathers of modern representative government knew well that "popular will" is an expression hiding the synecdoche by which one part (the will of the majority) is presented as the will of everyone and of the whole. Since the decisions of the elected representatives impose, in fact, a general obligation over all the members of the political community, it seems useful to present the will of one part as the will of the entire body politic. This does not change the fact that that will is the expression of one section of the community (more exactly of the representatives of it) and that the minorities need to be protected in their fundamental rights.

### 3.1. The Hobbesian Moment

Here a step back is necessary. Hobbesian political philosophy, which is the origin of the justification of any form of modern representative government, assigned to political authority a specific and paramount function: establishing peace, understood as a guarantee of subjects' fundamental right (the integrity of their "life and limb"). Article 16 of the French Declaration of Human Rights epitomized and developed the constitutional doctrine of the

Hobbesian moment. There we read: "there is no constitution [meaning a just and rational political order] without guarantee of rights and separation of powers" – the latter being an instrument, an institutional technique to achieve and realize the first aim.

Representative government has, in principle, so says Hobbes' doctrine, the function of protecting the fundamental rights of all the citizens, not simply those of the majority (or plurality, meaning the largest minority), which through competitive elections – in the contemporary version of this regime – chooses the representatives and has the legal power to renew their mandate to govern.

It is because of this function that representative government (*vulgo* democracy) cannot be reduced to what became the exclusive principle of its authorization – elections – but involves other institutions protecting the ultimate goal for which the government exists and makes it rational for citizens to obey its commands: the guarantee of the individual rights.

The general term to characterize this pluralistic structure could be *divided power*. By this expression, I mean something different from the simple distinction of state functions (likewise the traditional triad: legislative, executive, judiciary). Instead, I refer to the fact that the constitutional order distributed what was called the sovereign power (in the standard language, the legislative function) among different coordinated organs, able to check each other. The relation between these organs or branches can be characterized as *horizontal (institutional) accountability.*

Some specifications are required concerning this expression – probably introduced into academic debate by Guillermo O'Donnell – if we do not want to use it just as a synonym for "checks and balances".

Vertical accountability implies apparently something like the relationship between a principal and an agent. The parallel, as already mentioned, is misleading. The constituency of an elected representative government is a special kind of agency lacking a unity of will. It is a bunch of individual agents, whose independent and uncoordinated wills can have the effect of censoring elected officials: meaning the refusal to renew their mandate. Moreover, in the

absence of a two-party system (or of a presidential election between two candidates), such a denial may end up with the impossibility of forming a governmental coalition (the elections in Germany in the last years of the Weimar Republic are a dramatic example of such a situation). Be that as it may, vertical accountability is the equivalent of a binary, yes-no, system. The agent is renewed in her function or not. Speaking of the election as a form of *control* over the actions of the representative and the governmental majority that she has been supported during her mandate seems simultaneously generous and confused.

Authorization through elections should be characterized rather as a mechanism of legitimacy in societal conditions where the competition is among competing/adversary elites and not enemies, since wars are not settled by votes, but unfortunately through violence and blood.

### 3.2. Divided Power

What we call horizontal accountability has a different structure from the vertical one and may take different forms; all of them have in common something that is similar to the principle of *collegiality* and the absence of a legal/constitutional monopoly of *Rechtserzeugung*, of law making, in the sense of the creation of legal norms.

Horizontal accountability means at the same time the end of the classical monistic idea of sovereignty *and* the end of the supremacy of electoral legitimacy.

When James Madison thought of taming the "legislative vortex" by distributing that function among three elected and vertically accountable organs (the two houses of Congress and the president), he did not imagine that a single political party could have been able to capture the three branches and thus void their function of horizontal control. It is only much later that the non-elected and non-vertically accountable federal judiciary became essential part of the constitutional structure of divided (sovereign) power (as Hamilton anticipated in *Federalist* 78 and Marshall repeated in his Supreme Court opinion of 1803).

This transformation became real in the United States (meaning different from the simple, original function attributed to the Supreme Court as judge of federal conflicts – the original jurisdiction of Article III, Section 2 of the U.S. Constitution) only near the end of the 19th century. Elsewhere, it generalized mostly after the Second World War in new democracies, when Constitutional Courts, introduced in post-authoritarian regimes, started to play a significant and increasingly important role in the fabric of law of constitutional democracies.

This event modified the original structure of the divided power, giving to non-elected organs a central role in preventing abuses of power and contributing to the guarantee of rights. The development in the 20th century of the *Parteienstaat* inside the structure of representative government made obsolete the classical mechanism of a distribution of the legislative power among different elected and independent elected branches of government (as it was imagined by Madison in the *Federalist* 47, 48, 51). Only non-elected organs, because of their independence from electoral results and from immediate control of political parties, can reestablish the checks inside the law-making power – which by the way, is worth repeating, cannot be reduced to the production of statutory legislation.

Our constitutional democracies can be presented as a new form of *mixed government*. The classical mixed constitution (*memigmene/mikté politeia* in Aristotle and Polybius, *republica* in Machiavelli) was based on the sharing of political authority among the constitutive and unequal parts of the city (*mere tes poleos*); elections played a marginal role, if any, in that structure (with the partial exception of the Roman Republic). The new form of mixed regime is based not on the distribution of public offices to the sociological components of the society, but on two different types of organs: elected and non-elected, with different types of legitimacy. It combines vertical and horizontal accountability: elections, on one side, and, on the other, the power for the non-elected organs of producing legal norms, otherwise of stopping or modifying decisions of the elected branches of law-making power. Elections, in constitutional democracies, have lost the monopoly as the

legitimacy-granting mechanism. Vertical accountability, for the reasons discussed, does not guarantee the general protection of citizens' rights. A government chosen by the majority (or plurality) of voters is deprived of the neutrality that Constitutional Courts can more easily provide, since their members have no incentive to satisfy a specific constituency, given the impossibility (with very few exceptions) for its members to be reappointed (or simply because they are appointed with life tenure, as in the United States). This independence makes the members of the Courts more able to fulfill the function of guaranteeing the constitutional rights of the citizens, the paramount function of political authority in the tradition of the western *Rechtsstaat*.

This independence vis-à-vis both the voters and the government – the usual (not the unique) parties to the conflicts that these Courts have to adjudicate – does free them, despite this legal independence, from constraints and limits on the exercise of their power. Elected organs still have the possibility to react to decisions of the Courts that they deeply disapprove, whether through constitutional amendments or reenacting statutes similar to the one cancelled or modified by these guardians of the constitution. Constitutional Courts are not a new sovereign, but a new organ of the mixed government that in a society of legally equal citizens has to establish the divided power within the constitutional structure, assigning to organs with different sources of legitimacy the possibility of controlling each other. Alternation in governmental position of elites competing for political office through election offers only a diachronic possibility of concern for and respect of citizens' rights (of a section of them, by the way: the winners rather than the losers of the electoral competition). The new mixed government establishes a synchronic or at least a continuous form of control among institutional elites of different types, acting according to different incentives: reelection, on one side; increasing of legal and political authority through the reputation of neutrality and impartiality in the protection of citizen's rights, on the other.

The circumstance that Constitutional/Supreme Courts have (sometimes) the last word does not make them the equivalent of a

sovereign agency. In the absence of closure, litigation would lose its very raison d'être. No one would go to court (with the exception of people behaving illegally) in anticipation that there would never be a final decision on the conflict. The old objection *quis custodiet custodies* would become *ipso facto* a recipe for anarchy and denial of a legal *remedy*, in absence of which there are no *rights*.

### 3.3. Decline of State Sovereignty

Horizontal accountability, this contemporary form of divided power, has a double face. On one side, within the structure of the constitutional order, it represents the end and disposal of both the myth of popular sovereignty and the Westminster model (in French, the *gouvernement d'assemblée*). On the other, in the system of globalized relations among states, it is the beginning of a phenomenon that is becoming more and more relevant: the decline of states' both *internal* and *external* sovereignty. The Westphalian order survived the transformation of the modern, independent, sovereign territorial state from principalities and monarchies to national representative democracy. In general, with the partial exceptions of China and the United States, nation-states are nowadays mostly semi-sovereign entities. International and supranational legal orders are increasingly interfering with and even dismantling states' sovereignty. The European Union is the most obvious and in a sense dramatic instantiation of this metamorphosis. To the inability so far by legal and political theory to explain and make sense of this metamorphosis has for some time now been given the name "democratic deficit". The weakness of our understanding is masked by this label of an alleged deficiency of the reality.

Various contributions in this volume show *ex abundantia* the interconnections between state and supranational governance and the reciprocal controls – with the inevitable tensions of this transition. The mechanisms and the justification of national democracy are no longer up to the emergent reality of the post- Westphalian system. Hegel famously observed that theory is like the owl of *Minerva*, which first begins her flight with the onset of dusk. The evening is

near. Theory is waking up.

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# GOVERNING THE URBAN COMMONS

Christian Iaione*

*Abstract*

The purpose of this paper is to investigate a crucial question relating to institutional design in the public sector. After two centuries of Leviathan-like public institutions or Welfare State, do we still need full delegation of every public responsibility and/or exclusive monopoly of the power to manage public affairs? In particular, is there space for a collaborative/polycentric urban governance matrix? In the "sharing", "peer to peer" "collaborative" age, there might be space for a new design of public institutions? Can urban assets and resources or the city as a whole be transformed into collaborative ecosystems that enable collective action for the commons?". To investigate this question I chose the city, conceptualized as a commons, as an observation point. A large, developed urban city like Italy is a unique point of study. It is a large community of its own, and it is also developed of individual smaller communities that have their own networks.

TABLE OF CONTENTS



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## 1. The shared care of urban commons and services of common interest

Where does a person go if she lives in a city, she is not fortunate enough to have got a garden and she desires to immerge herself into a natural environment to take advantage of all the ecological services that a green space can provide as practicing outdoor sports, reading a book on a lawn, breathing on average cleaner or fresher air within urban boundaries? How can that person enhance her own thirst for social relations and meet new and different people and therefore get in touch with other cultures and experiences she has never heard of? Where can she cultivate her own sense of community belonging, make her identity blossom through her own talents and passions and take part in her traditions? What are the infrastructure and services that increase the quality of urban life, enable people to live lives worth living or make

them feel free to move around? What are the facilities and services that let people share or cultivate lifestyles more consistent with their own individual sensibility and with whoever lives in the same space? And from a real estate point of view, what determines the higher or lower economic or simply the aesthetic value of a community? How can legislation and regulation develop mechanisms to facilitate the shared care of urban commons and develop a sense of community?

All these questions have one identical answer. They are the urban spaces and services of common interest. They satisfy several needs that come with living in a city because they are functional to a community's well being, as well as to the individual exercise of rights of citizenship. Specifically, they encourage higher quality of life and work, sociality, mobility, entertainment, sharing, sense of community and the possibility to cultivate abilities and passions. All these things immediately are affected by the higher or lower quality of infrastructure that a city provides its own inhabitants'. Unfortunately the urban spaces and services of common interest undergo a deep crisis period. This crisis is determined by two factors. One factor of crisis is the deficit and decline of the public or collective spaces, as in the suburbs as in the central areas, as in the moment of transformation as facility as during the maintenance one. On the contrary, the second factor of crisis occurs when citizens gradually lose their interest and attention for the urban public spaces, perceiving them as nobody's or local public authority's places, rather than everybody's places as common spaces. And this attitude of ownership and responsibility divestment from citizens permits the undisturbed and unpunished attack on these goods by those who do not manage to appreciate their importance for urban conditions of life and social cohesion.

According to the first factor, more and more pressing commitments imposed to the budget of local authorities lead them to intervene less and less on behalf of the needs of local communities. These commitments are dictated by the European Union's discipline about the stability pact and are derived from the Italian public debt. In addition to this, there is reduction of state money conveyances resulting from the Italian public accounts worsening as a consequence of the 2008 financial crisis. The public resources reduction impacts not only the services for people but it also strongly bears on the urban environment, in particular on the

public spaces. The growing lack of public resources is combined with more and more disinterest by citizens, in particular the youngest people, in the preservation, cure and maintenance of places of living and aggregation where community life happens. Conversely, responsibility forms for use and management of local public services find it hard to develop and propagate themselves. Most likely, this lack of interest arises from inadequate education of the citizenship by not only institutions but also by single families and schools. But in order to construct the urban well-being, the involvement of principal participants—that is, the citizens themselves who use and live in the city— in the urban ecosystem is crucial. In fact, according to Lefebvre the "ideal city" is «a perpetual oeuvre of the inhabitants, themselves mobile and mobilized for and by this oeuvre. [...] The right to the city manifests itself as a superior form of rights: right to freedom, to individualization and socialization, to habitat and to inhabit»[1]. So all the above-mentioned crisis factors have prompted a dangerous worsening of local/urban degradation. This is all putting a strain on physical shape/aspect and on the functionality of local communities, with particular attention on spaces and services of collective usage that are particularly important for urban life. First of all, urban spaces with particular "cultural value" (that is historical, artistic, architectural, landscape value) are the subject of study here. Beyond those, we also consider urban spaces and services that are not characterized by the above-mentioned value, but nevertheless bring local societies together and their decline determines a social and economic direct or indirect decline of local communities. Urban decline is also the product and the cause of decreased efficiency and involvement of citizens in planning and distribution of local services. In this sense the urban spaces and services are functional to local community well being and to urban life quality and so they must be considered "urban common goods". Institutions and civil society in alliance between them must be able to align in their production and care.

As Donolo claims,

> [the] commons are a group of goods necessarily shared. They are goods because they let the social life develop, the collective problems solution, subsistence of human being about his relationship with the ecosystem whereof

[1] H. Lefebvre, *Il diritto alla città* (1970) (original edition *Le droit à la ville*, 1968).

he is part of. They are shared because they provide their better qualities when they are treated and so ruled and regaled like "in common goods", accessible to everybody at least as a matter of principle. The common goods are shared although it is often possible and this is a reality more and more frequent, that someone or some group is excluded from their use[2].

So you first put a relational notion of common good compared to the traditional classifications based on morphological characteristics and their formal ownership. Somehow common goods are goods and this is to say objects to a certain extent. They are not always comparable to wares, but the most relevant thing is that they only exist because they are part of a qualitative relationship with one or more subjects (and not related to acquisition and appropriation). In other terms, object and subject cannot be separated when you speak about common goods. You don't have a common good, you share in common good. You cannot expect to "have" a square, a public garden, a park, you can only aspire to "be" active part of an urban ecosystem[3].

It seems necessary here to share the opinion of who thinks that the «commons goods become relevant as such only if they add theoretical awareness of their legitimacy to a procedure of *conflict,* for identification of some qualitative relations that involve them. In other words, the common goods are in this way because of contests where they became relevant as such and not because of presumed ontological, objective or mechanic characteristics that would characterized them»[4].

This means, for example, that a square is not a common good in and of itself only because it is a simple urban space, but it becomes a common good given its nature as «place for social access and for existential exchange»[5]. It is not possible to separate the physical features of an urban space considered as a common good from social ones. And so it would not be possible to exclude certain groups of people from an urban space that is subject to the principle of universal access, as a common good. An administrative measure that restricts particular categories of people from using a certain urban space should be considered void. In fact, as Mattei, a lawyer and

[2] C. Donolo, *I beni comuni presi sul serio,* Labsus.org, (31st May 2010).
[3] U. Mattei, *Beni comuni. Un manifesto* (2011) 52
[4] U. Mattei, *Beni comuni. Un manifesto*, cit. at 3, 53.
[5] Ibid.

civic law professor, asserts, the urban space par excellence is the square. This last «belongs to a typically global community or rather to everybody, geographically stable or wayfarers, who can in the abstract enjoy its function of exchange place. And this happens according to ways and forms whereof everyone is interpreter. [...] In range of common goods the subject is part of the object (and vice versa)».6

Those town planners who have defined what "public space" means are on the same wavelength. According to Crosta, a professor of urban and environmental policy and planning,

> [The]public space is not bound to collective use. It is reductive considering "public" a space used "in common". The in common use does not "make" the space a public space, also when it has to do with more different uses. The public character does not concern a single place where collective activities go over or a place destined for these. Instead, a space "results" public because it is built from the social action on certain conditions: it is a social construction not necessary, but possible.[7]

Vitellio explains

> that the public space, considered as the space with the function of facility or service produced by the state for the social life, is flanked and overlapped by other services and facilities not envisaged and not produced from a politic-administrative institution. [...] Privatized public spaces, advertised private spaces, almost public spaces rise up from interweaving of social relationships networks and single individual paths. In this way the characteristic of non-appropriation and non-removal of public space is problematic. But there are also places identified and projected as public and they are object of care and adoption from inhabitants, schools, associations, while others are often abandoned private places and they are made public through appropriation forms from social movements. [...] In this case, more than in other experiences, the public spaces do not give back only citizens as users/customers, but as *citizenry*, active people able to thematize the public matter.[8]

In the same way, the local services can and must consider themselves as common goods. In many cases it has to do with activities of tangible and intangible common goods management. For example, when you manage the local public transport system, you protect material common goods and immaterial common goods at the

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[6] Ibid.

[7] P.L. Crosta, *Società e territorio, al plurale. Lo "spazio pubblico" – quale bene pubblico – come esito eventuale dell'interazione sociale*, Foedus, I, (2000), p. 42.

[8] I. Vitellio, *Spazi pubblici come beni comuni*, in "Critica della razionalità urbanistica", 17 (2005), 9-20, at 12.

same time. In the first case these are the urban environment and the urban road network that otherwise would be congested by private transport. Secondly it has to do with the right of collective, shared, sustainable mobility of people, specifically the social relationships that this kind of mobility can create and the psychophysical well being produced without any doubt by freedom from a model of private transport-based mobility. Similar arguments could be made about water service, urban health service, gas and electric distribution service and about their networks and facilities. Ultimately, the idea of urban common goods concerns all those urban spaces and services we consider "local common goods" or "community goods". These last are reckoned as everybody's spaces and services and so as "common spaces and services." They are public only because they have mainly been put in some public administration's keeping, care or supervision, until now. But it is not necessary that the formal ownership forcedly be public. Common goods in private hands can exist. The "common" nature of urban common goods comes from the fact they are closely connected to an area's identity, culture, traditions and/or they are directly functional to social life development of communities settled in that area (for example a square, a park, a roundabout, a mountain path, a garden, a historical building, a school, coffee tables, etc.). These also count even though they have not always had the above-mentioned cultural importance and even though they are not formally owned by some public administration. Given their common nature, then they are characterized by a necessity to guarantee universal access and use and by the inescapable need for involving community members and anybody who has deeply cares for the urban common goods' survival, care and conservation in decisions and actions that regard them. This conclusion partially seems to go well with results where considerations of private lawyers have gotten as yet and with the Supreme Court's orientation. According to private lawyers', conclusions reached about by the so called Rodotà Commission are important. Through the decree of 21 June 2007, the Ministry of Justice sets up a study commission to elaborate a proposed change of regulation of the Italian Civil Code about common goods.[9] At the end of its deliberations, the Commission has characterized the "common goods" as goods

[9] About the results of the Rodotà Commission see U. Mattei, E. Reviglio, S. Rodotà (eds.), *I beni pubblici. Dal governo democratico dell'economia alla riforma del codice civile* (2010). See also M. Renna, *I "beni comuni" e la Commissione Rodotà*, Labsus (2009).

functional to exercise of fundamental rights and to development of persons. So they need a strong conservation also in favour of future generations. They are consumer goods used without rivalry but with problems of depletion. Not only can they belong to the public body but also to individuals. You have to be assured their collective use is within limits and according to modalities scheduled by the law. If the common goods ownership is public, they are placed not for sale but their concession is allowed only in the single cases provided by law and short-lived cases. Anybody can institute legal proceedings for protection of rights related to common goods preservation and use. But only the state is legitimized in an exclusive way for the exercise of action for damages.

This doctrine seems also to permeate the most recent ordinary case law of legitimacy. The Italian Supreme Court, in fact, said in United Sections (SS.UU.) from articles 2, 9, 42 of the Italian Constitution that it is possible to obtain the principle of the protection of the human personality, whose proper execution occurs not just in the state property domain or property of the state. It can also occur within those «goods that, independently by a preventive identification by legislature, for their intrinsic nature or finalization, prove functional to the pursuit and fulfilment of community's interests, on the basis of a complete interpretation of the entire regulatory system». And the Court was keen to stress the irrelevance of formal ownership and the close functional link between the common goods and the exercise of social rights. In fact, «[w]here an immovable property, independently by the ownership, because of its intrinsic connotations especially environmental and landscape, appears intended to the implementation of the welfare state [...] this good has to be considered common. That is to say you prescind from title deed which is instrumentally connected to the realization of all citizens interests». In addition, the Court emphasized that any immovable property is a common good if it helps to achieve benefits for the community. Moreover the Court stated that «rather than to the state apparatus, as public juridical person individually designed, the public good nature should refer to the state-community, as an entity exponential and representative of citizenship's interests (community) and as the body responsible for the effective implementation of the latter». The Supreme Court took care to remind the state-apparatus of renewal of

common goods on the state as the state-community[10], as an entity which exhibits everybody interests, «involves the charges of a governance that makes effective the various forms of enjoyment and public use of the good»[11]. Here you reveal the double limit of the findings accepted by the Rodotà Commission and the Supreme Court. You do not consider the planning capacity that society is able to express through both stable and organized actions and daily practice actions about direct management, care and maintenance of common goods. You only worry about ensuring the affirmation of use or open enjoyment of common goods. Nothing more. While with reference to urban spaces as common goods, new rights stand out, «"rights of care", not about ownership, by the exercise of that supportive and sensible freedom that nowadays represents the new way of being citizens». This is implied by the art. 118, last paragraph, of the Italian Constitution[12]. These rights are associated by Arena with third-generation rights.

Similarly, according to Cellamare,

[the] urban practices, as well as a geography of values and meanings, express a strong planning, they are full of projects. First, this counts for collective actions more or less organized and intentional, but also it counts for daily, ordinary practices that city uses and also consumes. These seemingly do not seem to cause big changes in body shape and structure of the city, while in reality have a strong influence on the

[10] Italian public law distinguishes the state as an apparatus, where the state is a structure of central power, and the state as a community, which includes all political and organizational autonomies (e.g., government and citizens).

[11] Italian Supreme Court, SS.UU., (14 February 2011), no 3665, in G.D.A. 1170 (2011), with comments of F. Cortese, *Dalle valli da pesca ai beni comuni: la Cassazione rilegge lo statuto dei beni pubblici*; as well as Diritto e giurisprudenza agraria, alimentare e dell'ambiente 7, (2011), 1, p. 473, with comments of L. Fulciniti, *Valli da pesca lagunari. La Cassazione reinterpreta i beni pubblici*. See also S. Lieto, "*Beni comuni", diritti fondamentali e stato sociale. La Corte di Cassazione oltre la prospettiva della proprietà codicistica*, Politica del diritto, 2 (2011) 331. Moreover see the "twin decision" Italian Supreme Court, SS.UU., (16 February 2011), no 3811, on which see the note of C. Feliziani, 12 agosto 2011, available at www.labsus.org.

[12] G. Arena, *Beni comuni. Un nuovo punto di vista*, LabSus.org (2010).

Art. 118, last paragraph of the Italian constitution states: *State, regions, metropolitan cities, provinces and municipalities promote the autonomous initiatives of citizens, individually and associated, for activities of general interest, on the basis of the principle of subsidiarity.*

characterization of places. [...] The urban practices, even the most "trivial" as strolling, are full of often implicit projects. It has to do with paths we choose, meeting places, related time, way we perceive the space we cross etc. The action shapes the space and complies with the space[13].

This planning capability expresses itself with great clarity in relation to construction, to methods of public spaces use and management, but also in relation to methods of living them. This is possible developing plan concepts for the spatial configuration of places, but also developing «methods (to) manage them, centred on self-organization, on cohabitation, on flexibility of the uses, on full utilization, on free accessibility, on care»[14].

## 2. The urban welfare

The protection and preservation of public spaces and local services, seen as urban common goods, inextricably have implications with social inclusion policies. Even the Supreme Court seems to have caught this profile where it reminds us of functionality of the common goods with respect to the creation of the welfare state. The functionality of the local services respect to the well being of people who live and are part of a certain community is self-evident. But what is also increasingly clear is the connection between welfare policies and spatial dimension. Redistributive inequalities, social conflicts, situations of personal distress manifest themselves in their most dramatic representation in the city. Then, in the modern era, the social inclusion subject has to be faced with aim that town planners call the welfare or urban well being[15].

In general, a condition without well being and therefore an "unease" condition will be determined whenever you deny the person freedom to evolve fully and which affirms his own dignity as a unique individual who can improve his own talents (art. 3,

[13] C. Cellamare, *Fare città. Pratiche urbane e storie di luoghi* (2008).

[14] C. Cellamare, *Fare città. Pratiche urbane e storie di luoghi*, cit at 13, 101.

[15] P. Bellaviti, *Una città in salute* (2006); Id., *La città, la salute e la pianificazione urbana*, in G. Nuvolati, M. Tognetti Bordogna (eds.), *Salute, ambiente e qualità della vita in ambiente urbano* (2008); id. *Benessere urbano. Approcci, metodi e pratiche per sostenere la capacità di "stare bene" nello spazio urbano*, Territorio, 47 (2008); Id., *Alla ricerca di un nuovo "benessere" urbano promuovendo la capacità degli abitanti a "stare bene" nella città*, in F. Pomilio (ed.), *Welfare e territorio* (2009); S. Munarin, C. Tosi, *Lo spazio del welfare in Europa*, Urbanistica 139 (2009) 88-112.

paragraph 2 of the Italian Constitution)[16]. This approach is consistent with the passage from a redistributive conception to a procedural conception of the principle of equality. Therefore, it is consistent with the nature of the canon which makes the Republic predominantly act to promote conditions through *ad hoc* public policies, giving effect to the rights of citizens, in particular the social ones, rather than a mere obligation to ensure by law the rights of public services[17].

Now, in order to allow the "full development" it is fundamental that the person feels good in their "space of living". And a city allows its citizens to "feel good" only if it provides them with a set of tangible and intangible goods and conditions, which will allow the person to grow and cultivate himself[17][18]. For tangible goods, one must have the possibility of owning a house or moving houses, having a job, living in a non-degraded environment and using gardens and public places. With regard to tangible goods, one must be able to outline or change his own plan of life, not perceiving any risk to his own safety, feeling welcomed from the place where he lives, making use of support social networks[19]. In the twentieth century, in its origins, the issue of individual or collective well being of citizens has been primarily addressed in its physical dimension. Therefore the welfare policies of most developed countries have mainly focused on the construction of a "public urban space", that has "houses, community facilities, green spaces and infrastructures»[20]. In fact, it was observed that the spatial dimension inevitably influences the quality of citizens' daily life and their forms of interaction and sharing. In other words, cities are the most important ecosystem for the development of the human personality. In fact, they represent the primary physical space by which you must ensure conditions of individual and collective well being, exercise of the rights of citizenship and the possibility of

[16] G. Arena, *Interesse generale e bene comune*, Labsus.org (2011).

[17] See C. Pinelli, *I rapporti economico-sociali fra Costituzione e Trattati europei*, in Pinelli, T. Treu (ed), *La costituzione economica: Italia, Europa* (2010), 31 and 37. In general, about the principle of equality, see L. Paladin, *Il principio costituzionale di eguaglianza* (1965); C. Rossano, Il principio d'eguaglianza nell'ordinamento costituzionale (1966).

[18] A. Belli, *Editoriale*, Critica della razionalità urbanistica (2005) 17.

[19] P. Bellaviti, *Disagio e benessere nella città contemporanea*, in Acts of the 14th Conference SIU "Abitare l'Italia. Territori, economie, diseguaglianze", (24-26 march 2011).

[20] B. Secchi, *La città del ventesimo secolo* (2005), 108-10.

coexisting differences[21]. Today, in fact, you deal with «city of differences»[22] because of the «plural populations that inhabit space and time of everyday life»[23] or «thousand plural bodies that inhabit cities, in their diversity and richness of genders, ages, styles of life and consumption, sexual dispositions, religion and spirituality, geographical and cultural origin, physical and mental health condition, income levels or social position. In fact, the city consists of urban spaces and with reference to uses that people make of them»[24]. At the same time, the lack of awareness and moderate or non-existent capacities for governance of public institutions is coupled with the social complexity of the contemporary city. This is at the origin of phenomenon of urban insecurity, degradation of the urban environment and conflict in the use of public spaces, rising of marginalization and exclusion areas (that is migrants and the homeless), elevation of barriers that prevent freedom of movement or expression of citizens. You think of workers who daily have to deal with the urban traffic problems, architectural barriers or degradation and, in some cases, lack of urban infrastructures dedicated to the elderly, children and the disabled, the deterioration of citizens health as a result of the overall reduction of the "urban well-being."

Until now the response of the Italian legislature to this problem has been the public offering of quantitative standards, established by law in the abstract, infrastructures and/or services. The national planning law no. 1150 of August 17 1942 puts the general town plan in charge of defining «areas intended to form spaces for public use» (Article 7, paragraph 2, no. 3). Moreover it establishes a general principle of the field by virtue of which "maximum relations between spaces intended for residential and productive settlements and public spaces for collective activities, public parks or parking only" must always be respected (art. 41

[21] Bellaviti, *Disagio e benessere nella città contemporanea*, cit. at 19 […]. The author notes «as the spatial dimension affects the quality of daily life of the different urban actors and their forms of interaction and sharing. In fact, the city with its space and its infrastructures is the individual and collective "real life" and it is the privileged "space" for well-being development, the emergence of citizenship rights and the realization of the coexistence of diversity».

[22] Bellaviti, *Disagio e benessere nella città contemporanea* cit. at 19, 1.

[23] G. Pasqui, *Città, popolazioni, politiche* (2008).

[24] G. Paba, *Corpi urbani. Differenze, interazioni, politiche* (2010).

*quinquies*, paragraph 8). Although the matter has passed into the sphere of regional legislative competences following the reform of Title V of the Italian Constitution[25], this relation between private spaces and public spaces is still regulated by a ministerial decree.

Specifically, the Ministerial Decree of April 2, 1968, no 1444 connects the settled number of inhabitants to the minimum equipment of public spaces or minimum spaces reserved for collective activities, and, more precisely, it requires 18 square meters of public spaces for every 80 cubic meters of construction. Of course it is a rule that suffers and has suffered many derogations, especially in intensively built areas or in the ancient units[26]. Moreover, it has to do most of the time with spaces that have been badly planned or designed, or managed even worse. Then, today, those spaces are drastically reduced or altogether cancelled because of lack of necessary public funds. It has evidently to do with an anachronistic solution that now is in crisis because it does not take into account the complex factors that have meanwhile emerged in modern society. It above all establishes a merely quantitative reserve of spaces that has never guaranteed their correspondence with the real needs of the community, nor their real realization[27]. This quantitative and hierarchical, centralist setting must be replaced by a polycentric, qualitative and relational logician contained in the concept of the urban welfare here put forward.

But the need for a change of perspective originates itself from the above-mentioned factors that are causing a crisis of the urban environment and consequently of the physical and social liveableness conditions of citizens, particularly the disadvantaged population groups. The urban welfare, understood as a set of conditions that allow citizens and community to "feel good" on their territory, depends on the existence of conditions that guarantee full access to local resources and play on the communities and citizens' capabilities in their maintenance and care. In fact,

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[25] According to the art. 117 of the Italian Constitution, every matter that is not directly and explicitly assigned to the State, is to be considered under the sphere of the regional legislative competence.

[26] See. P. Urbani, S. Civitarese, *Diritto urbanistico. Organizzazione e rapporti* (2010), 90.

[27] P. Stella Richter, *Diritto urbanistico. Manuale breve* (2010), 55.

> [the] town planning increasingly appears as a set of practices that support the "capability" of communities to "feel good" on the territory. A double capability. A social capability, that sparks complex relationships with the context and the claimants, aimed at a reciprocal learning, full of responsibilities, lightweight, that aims at taking care of things and to show concern for the others. An institutional capability, made up of institutional competence, technical capacity, promotion of inclusive processes and research of bonds with national policies frameworks from the "local"[28].

Therefore the city and its public and private institutions must give citizens the opportunity to take care of their own city in first-person[29]. This opportunity can help citizens to improve their individual and social capabilities and to build social cooperation, reciprocity and solidarity networks[30]. That "person flowering" Sen considers to be the real heart of "happiness" is the only value you must measure to test the real community well being. It can be reached prearranging conditions so that citizens (especially those of younger age) can freely and individually choose to take charge of taking care of, protecting and preserving the common goods of a city, for the whole community and for future generations. According to Sen, justice does not depend on treatment reserved to individual by the institutions or by political power. But it derives above all from the «ethical and cultural ties that unite the individual to society and create what is called atmosphere of freedom, the overall environment in which individual choices make sense»[31].

The development of individual skills becomes more important than the rules, procedures and institutions aimed at guaranteeing the fair treatment of individuals. If you really want to get justice you need to guarantee this "atmosphere of freedom". Then you need to pay attention to the social and cultural activities that enrich and do not depress the skills necessary to pursue individual choices, functional to individual's personal projects and expectations. Only in this way he

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[28] A. Belli, *Editoriale*, cit. at 18, 2.

[29] A. Amin, N. Thrift, *Città: ripensare la dimensione urbana* (2005); M.C. Nussbaum, A.K. Sen (eds.), *The Quality of Life* (1992).

[30] U. Mattei, *Beni comuni*, cit. at 3; S. Bowles, H. Gintis (eds.), *A Cooperative Species. Human Reciprocity and Its Evolution* (2011).

[31] N. Urbinati, *Liberi e uguali. Contro l'ideologia individualista* (2011), at 29, citing A. Sen, *Capability and Well-being*, in M.C. Nussbaum, A.K. Sen (ed), *The Quality of life,* cit. at 29, 30-66.

will be aware of his possible unease and what he needs to overcome it[32]. In this perspective, poverty exclusively does not depend on income, but above all the tangible and intangible actual resources of which the individual needs in his society to achieve the above-mentioned true well-being. It is possible through his action capacity[33]. So the government and the civil society must encourage the culture of individuality through policies that aim at correcting the social and material inequalities that market generates, by incentives or interventions[34]. Therefore it becomes important to verify the existence of an individuals' effective capacity to operate with autonomous responsibility in the society they live. You must begin to think that «political democracy and civil rights get freedom of other kind to grow [...] as well as the economic one, because they give voice [... ] to people who are in condition of poverty or are more vulnerable»[35]. This is necessary to foster the full development of social welfare.

### 3. The principle of "horizontal subsidiarity", or "sharing" as the cornerstone of a new urban welfare

Then, among "freedom of other kind" you also must include those that prepare citizens for sharing and reinforcing ties in the civic care of common goods. If these are impoverished, they impoverish everybody and if they are enriched, they enrich everybody[36]. But you must be aware that most disadvantaged lower classes in the immediate future suffer the effects of the dissipation of common goods. Common goods and social cooperation ties reinforce the commons, and they represent for the weakest and poorest people one essential base of support. Consequently, their eventual destruction or degradation can mark the transition from a situation of poverty to no survival conditions. So, even with the same income, citizens living in an area lacking in common goods are poorer than citizens living in an area rich with common goods. Now, the adoption of this perspective in relation to the urban welfare must aim at enhancing the close relationship that can exist between quality

[32] A. Sen, *The Idea of Justice* (2009), I-27.
[33] A. Sen, *The Idea of Justice*, cit. at 32, 253-60
[34] N. Urbinati, *Liberi e uguali*, cit at. 31, 35.
[35] A. Sen, *The Idea of Justice*, cit. at 32, 253-60348.
[36] G. Arena, *Cittadini e capitale sociale*, Labsus.org (2007)

of the urban environment and everyday practices of use of its inhabitants and users. From this point of view, the community builds its "space of living " through its "use" of the territory that is a multiple and time-varying use.

According to Crosta, in fact,

> certainly we do not edify the territory [t]hrough the use we make of it, but we build our "space of living" continually redefining terms of our relationship of use with territory, with all those like us use territory, and with the institutions, rules and habits that regulate territory use. [...] If we think of [territory] as our space-of-living, then we are dealing [...] with a heterogeneous space, the composition of which varies over time, in relation to type, methods and time of our activities[37].

So the quality of the urban space

> does not depend only on the amount of equipment - infrastructure and services – present in an area and on the quality of projects and "objects" located on territory. It also and especially depends on relationships established between the material city and people who live the city and on concrete opportunities that city offers to the people about "living" the city. This refers to living the city well, daily, according to citizens possibilities and needs and making it their own, transforming and adapting it to their own conditions and tangible and intangible requirements. In this direction, you advance the idea and the possibility of an "urban welfare" which focuses on a wider conception of goods and conditions that support the capacity of communities and individuals to "feel good" in the city. This conception in particular includes spaces and practices of active citizenship, understood as activation and responsibility from citizens about forms of care and common goods treatment. In a more broad sense, it has to do with routine and daily behaviour, through which all subjects can more take part in the urban life and they can reach well-being generated by the city material, social, cultural "space"[38].

The "public care" of these goods, mainly left in the local public authorities' care, is revealing itself insufficient. This is for economic reasons, arising from both the progressive reduction of public financial resources and the poor ability of public administrations to diffuse collective intelligence. This means poor ability to systematize the legacy of knowledge and competences present in society and get the various civic energies to cooperate with each other for the care of these local common goods.

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[37] P. L. Crosta, *Di cosa parliamo quando parliamo di urbanistica*, in M.C. Tosi (ed.), *Di cosa parliamo quando parliamo di urbanistica?* (2006), at 93; Id., *Pratiche. Il territorio è "l'uso che se ne fa"* (2010).

[38] Bellaviti, *Disagio e benessere nella città contemporanea*, cit. at 19, 3.

Therefore it is necessary to mobilize further additional and not replacement resources beyond the public ones. According to the art. 118, last paragraph of the Italian Constitution[39], this "added value" research is addressed to society, organized or not. And this is possible within a projected and coordinated fight against the degradation of urban common goods and in favour of goods "civic care "[40]. It is equally essential to research the tools and facilities which can facilitate this change of philosophy centred on exchange, co-operation, systematization of all participants in the shared care of spaces and urban services of common interest. It has to do with the public ones, provided with powers, resources and necessary means for the proper care of common goods and the civic ones, available for implementing their energies, resources, knowledge and skills to take care of community goods.

## 4. The civic care of urban spaces

The civic care of urban spaces should be based on four lintels, which represent the action lines you have to undertake at the local level in support of redevelopment of such goods and to change route of de-gradation and civic disaffection. These actions are characterized by a different degree of practicality and they bear on sectors/different objects (training, communication, regulation, urban environment redevelopment).

### 4.1 The shared care of urban spaces

The first line of development recorded in these recent years involved the implementation of regulations for the so-called small-scale projects, concerning urban fabric or local interest[41] and the wide-scale diffusion of forms of urban green spaces civic adoption[42]. Lastly, there are various initiatives, developed at the

[39] «State, regions, metropolitan cities, provinces and municipalities promote the autonomous initiatives of citizens, both as individuals and as member of associations, relating to activities of general interest, on the basis of the principle of subsidiarity».

[40] G. Arena, G. Cotturri (eds.), *Il valore aggiunto. Come la sussidiarietà può salvare l'Italia* (2010).

[41] C. Iaione, *Microprogetti, storia di silenzi tra assensi e rigetti*, Labsus.org (2009).

[42] V. Taccone, *Quelli che il parco*, Labsus.org (2011) as well as M.C. Marchetti,

municipal level, to foster urban creativity through temporary custody of the so-called "legal walls" for young members of street art. Let us pause over the first proposed regulator schedule because it represents the only model has been entered in the state ordinary legislation. The small-scale projects are the directly enforceable administrative tool of the constitutional regulation contained in art. 118, last paragraph. They are also provided and regulated in the art. 23 D.L. November 29, 2008, n. 185 converted into law January 28, 2009, no. 2. According to this law, groups of "organized citizens" can formulate to the authorized territorial local authority operative proposals for the realization of local interest and easy practicable works, without any burdens for the authorized territorial local authority.

The costs necessary for the formulation of the proposals and realization of the works supported by proposers are allowed as an income tax deduction up to 36%. If this tax reduction is possible, it is valid to wait for the implementation of fiscal federalism, which will allow the deduction from tax of authorized authority[43]. The small-scale projects represent a model to start a civic regeneration of urban spaces because they allow citizens to directly take action to solve the problems of the local community or neighbourhood in which they live. Citizens can organize themselves into groups, temporary and without permanent organization too, to do care for local common goods. The positive effects of this tool are not limited to direct realization of the carried out small-scale project (e.g. redevelopment of a degraded urban space). First, they have pedagogical and ethical effects. In this kind of initiatives that applies the principle of "horizontal subsidiarity", he who takes part in this kind of initiative realizes he is not anymore a simple passive citizen who suffers from the obligations and prohibitions of administration. But he starts to become aware of his ability to be a citizen who is individually more responsible in his daily life (e.g. adopting lifestyles that minimize the cost for the community, such as shared mobility and waste separation). And then, he realizes he can be a citizen who can offer knowledge, skills, resources and solutions to the administration. So those who get involved in urban small-scale projects become better citizens because they become more caring towards their city's

*Nuovi spazi pubblici: il verde come bene comune*, Labsus.org (2012).

[43] S. De Santis, *La detassazione dei microprogetti di interesse locale*, (2009) 17.

problems and more willing to help the administration in the care of local common goods. Then, these initiatives propagate multiplier positive effects and imitation; participants are affected by the initiative through a fostered sense of community, and non-participants (i.e. other inhabitants of the neighbourhood and other citizens) are also encouraged to join. If municipality workers or employees constantly set right the urban decline situations, citizens are not inclined to protect the fruit of the municipal intervention, as it would happen just as easily if other citizens directly invested their time and resources.

Moreover seeing some people who take care of the local common goods can also induce other citizens to take initiative in protecting and caring for the same or other local common goods. In turn, the local authorities consider the citizens no longer bearers of problems and complaints, but allies willing to cooperate to solve general interest problems for the local community.

First, from a more strictly legal point of view, the authorizing mechanism and its possible limitations must be identified. The law creates a mechanism of tacit refusal, according to which after two months following a submission of the proposal from organized citizens «the proposal itself will be rejected. Within the same time-limit the local authority will be able to arrange the go-ahead of proposals made under the paragraph 1, by reasoned decision and also adjusting the essential stages of the implementation and the execution time process». In any case, the small-scale projects cannot repeal in part to planning instruments in force and safeguard clauses of adopted planning instruments. These projects are also subject to the consent of the authorities responsible for the protection of sensitive interests (e.g. art history, landscape and environmental conservation).

However, from the operational point of view the local authorities first "can" and actually "must" adopt a special regulation to regulate the activities and procedures relating to the realization of small-scale projects. This is necessary to implement the ordering of the small-scale projects. The adoption of the regulation is not compulsory. The regulation could be replaced by a framework act of the Municipal Council that regulates administrative procedures and structures for its implementation, playing directly on the national disposition. In single instances, the local authority provide for adopting an “approving reasoned decision” of proposals submitted

by citizens. This decision must regulate the essential stages of the implementation and the execution time process and, if necessary, it must involve other individuals, authorities and concerned offices, and in addition provide assistance and prescription. Anyway, for the success of this policy, both the work of organization and communication and training within the administrative structures of the local authority will be crucial. This is true because it has to do with a cross and innovative, strategic policy. It is cross because it puts itself at the crossroads of different local administrative functions and therefore it requires a unique flexible and lean control room, (out of department office, purpose temporary office etc.). This control room must be as much as possible in contact with the political and administrative leadership of the municipal administration and it must be able to communicate, interact and relate with the various departments and offices of local administration.

But, above all, its innovativeness requires administrative staff equipped to communicate with citizens in a collaborative, flexible and not formalist way. Therefore it must be able to give up the traditional scheme in which the administration interacts with citizens in an authoritative, hierarchical, rigid and formalist way. However, at the same time, the administrative staff must have appropriate qualities and capabilities to facilitate civic dialogue, leadership and authority. So, their aim is following and going through these projects and their promoters. This activity will require very careful selection and training of personnel who will be put at the head of the implementation of this policy. The Italian regional administration also can play an important role in encouraging the diffusion of this administrative tool. In fact, a major obstacle to the start-up of small-projects is the "brevity" of the law. At present, the Italian regional administration also can do nothing and lets the scope of application of the national law execute itself through mere local regulatory intervention. However, the Italian regional administration may "extend or reduce the scope", better defining the type of intervention you can propose, field and limit, and it can also clarify the nature of the private proponents, generically defined as "groups of organized citizens". It is not clear whether it can modify the procedural mechanism of rejection by silence. On the contrary, the principle of the deduction is mandatory. Finally, the Italian regional administration can approve,

by municipal resolution, guidelines broadly containing criteria for regulations that are semi-binding on the local authorities or a type regulation that local authorities can accept or adapt to their needs.

**4.2 Public-civic partnerships (PCP)**

The second line of intervention should aim at favouring the creation of forms of public-private non-profit partnerships for the protection and care of the local common goods. The reference model should be found in the American experience of Park Conservancies (from now on called "pc") or Business Improvement Districts (from now on called "BID"). It involves contractual or institutionalized forms of collaboration between different local stakeholders (i.e. individual or institutional philanthropists, associations, NGO, local businesses, citizens, residents, merchants, estate landowners etc.) and with local authorities. Pc must be created with donative NPO, that is, non-profit organizations originally established through the initiative of informal groups of citizens interested in taking care of a particular local common good - such as "friends of the xxx park". These organizations subsequently structure themselves in a formal way, creating a legally distinct subject with the aim of collecting donations in favour of the common good in question and systematically organizing the civic, voluntary initiatives for the management of the local common good. In this case, the responsibility of those who manage the NPO is primarily on active citizens and donors. In fact, if the common good management does not achieve significant results in terms of quality, the pc will suffer in reputation and therefore it will not be able to mobilize civic resources; in addition, it will not see renewed confidence in the "donations marketplace". In other words, poor quality of management automatically translates itself in a reduction of civic participation and an inevitable decrease of donations. For this reason and in favour of this model's success, it becomes critical for the pc to get full physical, management and financial availability with the local authority, through a management agreement. Above all, it is crucial to reassure that the current level of public financial resources intended to the considered common good will not be reduced. The public support reduction usually has negative consequences on those who become active to add time or economic

resources to public powers and not to substitute or relieve the public authorities from their duties and responsibilities. BID must be commercial NPOs, that is, non-profit subjects (generally through public law) originally established due to the will of a qualified majority of estate landowners in a given area to provide additional services to the neighbourhood. During the start-up, the BID activities are financed by an extra fee for all owners included in the BID. But their success in the long-term depends on their ability to generate income, through fees on consumption and proceeds deriving from rental of areas for events. Therefore, in this case, the primary responsibility is to the market. In fact, a poor management of the common good will lead to a reduced income capacity that would prejudice the funding of the activities necessary to ensure care, conservation and valorisation of the local common good.

According to a first approximation, the above-mentioned two forms of organization could be taken in Italy through the establishment of involvement foundations[44] with conditional gifts ex art. 793 c.c. The latter provide the opportunity to impress on the disposal of property a specific purpose by apposition of a burden, but they do not provide the property separation (see art. 2740, paragraph 1, c.c.), or by assigning to the foundation the trustee role, what would guarantee the property separation.

The New York Foundation may represent a useful model to experiment. But it involves the traditional model of community or allocation, being tested by some foundations (see Cariplo Foundation[45] and Foundation for the South) in the social services field. In this case, the foundation, created especially for the protection of the common good, would not directly manage the commons, but it would restrict itself to intermediating. So its aim will be to finance projects for the common good care by single citizens, groups, non-profit organizations present in the territory. This is possible through resources derived from the property income or from special funds containing movable and immovable property,

[44] See A. Police, *Le fondazioni di partecipazione*, in F. Mastragostino (ed.), *La collaborazione pubblico-privato e l'ordinamento amministrativo* (2011), at 39.

[45] The Cariplo foundation is an Italian foundation that promotes the activities of the "third sector"; NGO's, cultural association and so on. The Foundation for the South is an Italian foundation that funds projects promoted by association or other entities that aim at developing the socio-economical situation of Southern Italy.

objects of donation or other disposal of property.

### 4.3 Everyday subsidiarity: the control of individual behaviours, habits and urban civic duties

The third line of action should have object nudges (that is incentive administrative measures)[46] or, better still, policies to empower citizens in the care of the general interest and therefore of common goods. It has to do with what elsewhere is called the "everyday subsidiarity"[47]. It must be part of the so-called "communication of citizenship", that is an administrative strategy not based on the exercise of administrative authoritative powers, but on actions aimed to convince citizens to share the effort necessary for achieving targets of general interest through their behaviour or their resources[48].

In other words, can the citizen that saves energy, makes a sustainable use of water resources, follows the rules of waste separation, chooses public transport or shared mobility rather than private means, keeps his property in good condition (e.g. he restores the façade; he cleans or clears the sidewalk from waste, debris or snow; he prunes trees that threaten to damage public roads; he disposes of dead leaves that could cause a fire or that obstruct rainwater drainage channels; etc.), be considered a citizen who plays "activities of general interest, on the basis of the principle of subsidiarity"?

Consider the citizen who in his private life or in the private goods management has a good behaviour directed at reducing or even eliminating the "collective problems" (or rather, for the community) and consequently contributes to reduce/eliminate the need for organizing a public response. Can he be considered an active citizen who must be "facilitated" by the authorities? Or, looking at the phenomenon from an opposite and inverse point of view, can you speak of real civic obligations of the owner or the "private citizen"?

You can argue that in some cases it has to do with

[46] R.H. Thaler, C. R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2008).
[47] C. Iaione, *La sussidiarietà quotidiana*, Labsus.org (2010).
[48] G. Arena *La funzione pubblica di comunicazione*, in G. Arena (ed.), *La funzione di comunicazione nelle pubbliche amministrazioni* (2004), 69.

behaviours already required by law, but in other they are irrelevant conduct by law and it would be good that they remain in that way. Someone else could argue that there is any subsidiarity in the action. It is valid at least until the public authorities do not really try to establish an alliance with the citizens in order to protect the public interest through better governance of private property or individual conduct.

Some of the cases shown could fall under the civic principle of *neminem laedere* (ex art. 2043 c.c.). After all, you can speak of non-contractual liability if you do not shovel the snow on the sidewalk in front of your house. In some cases or ordinances, these could be considered as fixtures and there could be negligence if someone slips on the sidewalk (see the case *Soederberg* vs. *Concord Greene condominium Association*[49]).

You could say the same thing if you were a farmer and you do not engage in proper "maintenance" of irrigation systems, which then leads to a train crash (see the case of the apple orchard of Merano[50]). Similarly, if you were a landowner and you do not periodically clean the rainwater and spring water channels (see the landslide of Montaguto[51] which for several months has blocked Puglia's rail links with the rest of Italy, or flooding of Sarno caused by the lack of cleaning of the channel system Regi Lagni by the reclamation consortium, however commissioned by the Italian region of agro-nocerino-sarnese[52]). Here I am referring to the numerous hydro geological instability phenomena caused, as appropriate, by the lack of involvement or malfunction of those which at least in theory are cooperatives between the owners of areas that require coordination of public and private interventions for the soil defence, water regulation, irrigation and environmental protection— the reclamation and irrigation cooperatives[53]. On the contrary, other cases, such as the failure to paint a facade or the state of decline and abandonment in which you leave your property, could fall within the Anglo-Saxon concept of nuisance. This refers to limitations on the use of your property (that is also in the Italian

[49] See http://www.socialaw.com/slip.htm?cid=19699&sid=119

[50] See http://www.libero-news.it/news/389717/Merano__agricoltura_troppo_spinta_tra_le_cause_del_disastro_.html

[51] See http://www.montaguto.com/modules.php?name=News&file=article&sid=724.

[52] Cfr. http://www.cittattiva.net/?p=132

[53] I. Salvemme, *La sussidiarietà nei consorzi di bonifica*, Labsus.org (2008).

Civic Code with illegal entries and the alleged damage). A very recent Freyfogle essay[54] is quite enlightening with regard to this subject. And this doctrine would be in correspondence with the art. 42 of the Italian Constitution, which establishes that private property meets its limits in order to ensure its social function. From point of view more oriented to subsidiarity, in my opinion, there is also a different possible configuration of cases in question. They could be incorporated as part of what I have initially defined "subsidiarity in small daily choices"[55]. You think of the sustainable use of natural resources or energy, waste separation, urban mobility regulation that incentivizes collective or shared transport and disincentives private or individual mobility.

This last sector has also been the subject of a case study[56] around which you have tried to build an individual-based regulatory scheme. It is centred on individual behaviour to combat climate change with a grassroots strategy[57], without waiting for the leaders of the earth to agree on regulatory frameworks motivated by strong economic and national interests. Actually it has been shown that it is a paradigm concretely applicable also to other sectors[58]. The simple rediscovery of bicycle, public transport, shared mobility and then sustainable mobility[59] or development of tourism spread in hospitable communities[60], renewable energy, local biological products, waste separation and more sustainable lifestyles valorisation, and so on, are all examples of how you can contribute to protect the general interest, by making small adjustments to daily life[61]. You can say the same if, in their everyday lives citizens, care about managing their private assets like their car, or the backyard better, to

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[54] E.T. Freyfogle, *Property and Liberty*, *Harvard Environmental Law Review* 75 (2010) 95 and 107.

[55] C. Iaione, *Progetto "cambieresti?"* Labsus.org (2008)

[56] C. Iaione, *The Tragedy of Urban Roads: Saving Cities from Choking, Calling on Citizens to Combat Climate Change*, Fordham Urban Law Journal (2010) 889.

[57] F. Spano, *Cosa puoi fare tu per l'ambiente?* Labsus.org (2009)

[58] Under the label "Sustainability", sections "Beni comuni" and "Società" of www.labsus.org categorize cases and materials that show the possibility of life in a sustainable manner in harmony with the nature and her community.

[59] S. Chiaramonte, *Una giornata con la famiglia Attiva* Labsus.org (2010) *available at* www.labsus.org.

[60] V. Taccone, *Albergo diffuso: la vacanza è sostenibile* Labsus.org (2011).

[61] M. Pistilli, *Un anno di greenMe*, Labsus.org (2010).

improve them or correctly preserve them, so that they give a benefit or do not cause damage to the community and therefore to the general benefit.

Ultimately, each of us, in obedience to the rules of good civic behaviour in their private life, both with regard to the use of private property and to the use of public goods, can make its contribution to protect the "general interest, or better, using more common terminology, the common goods[62]. Citizens can become the best allies of the government.

But the alliance only can exist where there is "individual social responsibility". In fact, all of these behaviours are based on the assumption of responsibility towards others and towards the common goods[63]. These citizens feel that they are responsible people, not in the punitive sense of the word, but in the accountable sense. It has to do with citizens who feel invested with power. This power will provide answers to collective problems with individual behaviour in everyday life and is mostly borne out of the private sphere. Gregorio Arena has shown how the subsidiarity also implies a social individual responsibility, because it is based «on the assumption of responsibility by citizens towards the common goods, of which they autonomously decide to take care with the administration. In other words, it can be said that active citizenship is the assumption by individuals, alone or together with others, of social responsibilities, that is responsibilities towards the community»[64]. In this case the responsibility is confirmed day by day, and it is implemented in the private sphere even if it bears on the community to some extent.

Also in the case that an alliance between public authorities and citizens is realized and, in our view, is implied by art. 118, last paragraph. In fact, according to the paradigm of everyday subsidiarity, citizens decide to take care of the common goods through everyday behaviours directed at minimizing collective problems or the costs reduction for the community that generates a need to organize a public response. But the public authorities do not suddenly stop taking care of such common goods. Indeed, the

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[62] See G. Arena, *Beni comuni*, cit. at 12; C. Donolo, *I beni comuni presi sul serio*, Labsus.org ( 2010); C. Iaione, *L'acqua bene comune*, Labsus.org (2010).

[63] M.C. Marchetti, *Sviluppo sostenibile? Dipende da noi*, Labsus.org (2009).

[64] G. Arena, *Responsabilità sociale individuale*, (10 March 2007), *available at* www.labsus.org..

public authorities find unexpected allies in the citizens who decide to embrace the everyday subsidiarity. If you want, it is a form of spontaneous and informal alliance.

It is possible and desirable that real civic duties arise from the introduction of responsibility policies based on the everyday subsidiarity. On the contrary, these policies should be aimed just to become a source of legal production/protection of incumbent behaviours for the care of the common goods.

But how do you authenticate and thus promote the surfacing of an individual social responsibility in the everyday life? Sure, you might appeal to legal principles, more or less vague, more or less formalized in laws regulations.

For example, Fabrizio Fracchia has explained that a solid normative basis for the sustainability policies could be found in the principle enshrined in art. 3-*quarter* of D.L. no. 3 April 2006, n. 152. According to this article «all human activity legally relevant in accordance with this code must comply with the principle of the sustainable development»[65], in order to ensure that satisfaction of needs of current generations cannot compromise the quality of life and possibilities of future generations.

If we remember behaviour types exemplified at the beginning, we realize that it has to do with rules of behaviour that are the object of already existing habits. For example there are "decorations", that is, the improvements the owners have completed on their properties like painting of the facades for celebrations of the twentieth anniversary of the parish. The rules of conduct can be the object of "civic habits" whose training and implementation can also be "favoured". Therefore, the public authorities can induce them with formal regulatory frameworks (such as in the case of waste separation or public regulation of private mobility).

The habit is the source par excellence of "everyday subsidiarity" and so the "subsidiary right".

In my opinion, this type of subsidiarity predominantly must live in their customary laws. It is about individual behaviours that can be object of habits or social norms, as they call them in the USA[66].

In Italy, Fabio Merusi, already after the constitutional

[65] F. Fracchia, *Sviluppo sostenibile, dalla teoria alla pratica quotidiana*, in (10 August 2009), *available at* www.labsus.org; as well as Id., *Sviluppo sostenibile e diritti delle generazioni future* (2010).

[66] C.R. Sunstein, *Social Norms and Social Roles*, Columbia L. Rev. (1996) 903.

reform of Title V has caught the bond between subsidiarity and habits. In fact he points out how «recognizing the citizens autonomous initiatives, the principle of subsidiarity also recognizes a source of normative production from civil society and so a non-state source, therefore not connected to the codification logic». Merusi also has said that "[r]ecognizing that associated citizens can carry out general interest activities according to the principle of subsidiarity means recognizing the existence of a right alternative to the state one. As in this case, if it is favoured it means establishing that if there is a right produced by individuals, it cannot be replaced by the public one, unless it affirms its own exclusive jurisdiction»[67].

At this time, in the United States too, the social norms are the object of renewed interest by the law and economics and sociological doctrine. But the novelty of this approach is its connection with another line of research now in vogue, behavioural law and economics. In fact, the customary cases we are talking about (whether positive law or law in development phase) have a common feature, the effect of internalizing negative externalities. In other words, the economic costs produced by individual behaviour or general lifestyles generate a cost for the community and produce a general reduction in the collective welfare. Think of the increased quality of life (in economic terms too) and a more attractive local community where people adopt behaviours and lifestyles that lead them to take much better care of spaces, local public goods and private goods (as immediately repairing a broken window or immediately cancelling the graffiti on the building facade to avoid giving the impression that the breaking windows or doing other graffiti represent socially accepted behaviours and, therefore, not "expensive"). The reference to the broken windows theory of Wilson and Kelling is immediate[68]. Another important aspect is the effect of greater social control that this regulatory framework involves. And, in fact, the field in which this theory has already given a good account of itself is just the community policing that has allowed the redevelopment of different American cities[69]. This approach has been

[67] F. Merusi, *Il diritto "sussidiario" dei domini collettivi,* in RTDP 1 (2003) 77.

[68] G. L. Kelling, J. Q. Wilson, *Broken Windows. The Police and Neighborhood Safety*, Atlantic Magazine (1982) 29-38, which develop the intuition of J. Jacobs, *Death and Life of Great American Cities*, (1961).

[69] R.C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (1991); Id.,

able to change attitudes and the role of the administration (in one specific case, the local police) as the citizens' administration[70]. Exactly as Gregorio Arena hopes[71].

Finally, a warning methodology follows. You must build the subsidiarity daily. Generally, the social norms prosper in "homogeneous communities" (close-knit). In order to build good civic habits in heterogeneous communities, like almost all communities in western and industrialized countries have become, you must necessarily resort to the "common good" methodology. This is not a fixed and unchangeable object or objective. Instead it is a dialogue and deliberative process in a dynamic and constant way that builds and rebuilds values and object-goods (tangible or intangible) really unifying the heterogeneous community. It has to do with the unifying values that may vary over time and space. From here, we need to investigate and delve into the institutions from which deliberative democracy originates[72].

### 4.4 The public communication and the creation of local network via 2.0. The wiki-subsidiarity

The fourth and final course of action in the field of urban spaces could consist in public communication initiatives (advertising campaigns, promotional activities about events/fairs and reward tools) primarily directed to new generations of educators, public officials and citizens. Mounting stands at fairs could be part of this line of action, as Exposcuola, ForumPA, CompA[73] and other local or sectional fairs that include object professions and training of new generations (e.g. Young-Future

*Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, Yale L. J. (1996) 1165.

[70] N. S. Garnett, *Private Norms and Public Spaces*, in "William & Mary Bill of Rights Journal" (2009-10), 183.

[71] G. Arena, *Cittadini attivi. Un altro modo di pensare all'Italia* (2006)

[72] G. Arena, F. Cortese (eds.), *Per governare insieme: il federalismo come metodo. Verso nuove forme della democrazia* (2011).

[73] Exposcuola, to foster the relationship between Expo Milan 2015 and the Italian schools, available at: http://www.exposcuola.org; ForumPA is an Italian consulting firm in the field of public administration, in particular: communication, innovation and change in the public administration.

for you[74]). Moreover, reward tools could be also activated as the prize for the subsidiarity. Labsus has carried this out in collaboration with the Foundation for Subsidiarity and ForumPA.

Part of the instruments could include incentives and initiatives directed to solicit citizens' groups, associations, informal groups, cooperatives, schools and sports clubs to submit proposals in order to promote the leading role of civil society and citizens' involvement in the care of local common goods (e.g. "Reggianiperesempio"[75]; "RAEEporter"[76]). But this communication strategy primarily should aim at the implementation of all these logistics, communications and institutional tools, for the creation of local networks of citizens considered individually or jointly, committed to or interested in the protection of local common goods. This networking action heavily should invest in new technologies and social networks.

One possibility is to create maps of common goods (similar to the ones available at http://www.use-it.be/europe/; www.partecipedia.org) or platforms for sharing initiatives aimed at taking care of the local common goods (e.g. http://my.barackobama.com; http://seedspeak.com/) or, finally, systems that involve citizens in monitoring the state and protecting the local common goods (e.g. http:// www.everyblock.com/). Finally, the map could be translated into the creation of structures, research centers or local laboratories in order to facilitate and mobilize civic resources, as well as disseminate techniques/methods of public deliberation, participation and collaborative governance for the treatment of local common goods (e.g. Placemaking; Minneapolis Neighborhood Re-vitalization Program). In this regard, you have talked of "wiki-subsidiarity"[77]. Always more frequently, you wonder

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[74] See YOUNG, fair about orientation in the world of school and work, *available at* http://www.udinefiere.it/099/youNG+2011.

[75] "I reggiani, per esempio" ("The Reggio Emilia people, for example") is a project promoted by the Municipality of Reggio Emilia, which was founded in 2008 with the idea of discovering and bringing out the rich capital of the local community through a collection of stories and good practices of active citizenship and social responsibility. See. http://www.comune.re.it/reggianiperesempio

[76] Foto RAEEporter (RAEEporter, in the edition 2010) is a campaign to increase awareness about the environmental importance of proper recycling of RAEE promoted by ECODOM in co-operation with Legambiente. See http://www.raeeporter.it/premiazione.aspx.

[77] See C. Iaione, *La wiki-sussidiarietà* Labsus.org (2011).

about how new technologies and Web 2.0 can improve transparency, efficiency and democracy of the "public governance" of general interests.

There are minted evocative and fascinating linguistic forms such as "open government", "wiki-government", "wiki-cracy", "we-gov". The Obama administration in the USA[78] and the Cameron administration in the United Kingdom have made of them a workhorse to gain and maintain the confidence of citizens. The Ministry for Public Administration and Innovation tried to chase it but it did not go beyond the Italian traditional solutions. There have been only many beautiful words in a legislative corpus that largely remained unrealized in? a new bureaucracy. But none has yet asked how the "civic government" of general interests may be encouraged by the introduction of Web 2.0 tools. Therefore, in order to promote subsidiarity you must begin to think about using Web 2.0 tools. Moreover, there exist numerous contact points between subsidiarity correctly understood and Web 2.0. Both have the same morphology: they live if there is a network of individuals who do not only link the passive nodes, but also provide themselves tools to create a productive and active constant interaction. So it must be about active and not passive nodes. Both of them appeal to collective intelligence, that is that heritage of knowledge, learning, skills, and abilities widespread in society as in the Web and that are willing to join without a strictly individual profit. This is more evident for the Web 2.0 (you think of tools like blogs, forums, chat, and systems like Wikipedia, YouTube, Facebook, My-Space, Twitter, Gmail, WordPress, TripAdvisor) as for subsidiarity. We never cannot tire of telling this. The subsidiarity we speak about is based on supportive and responsible freedom of active citizens who decide to make their time and capabilities available to taking care of the general interest. These citizens decide to share with public authorities the responsibility for governing, by giving answers to community problems through small daily gestures, as well as through real systematic measures of civic care of the common goods. Therefore cooperation becomes an archetype of subsidiarity. In fact, the basic feature that subsidiarity and Web 2.0 share is the fact that

[78] On the mechanics of open government see http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/.

cooperation between the various network nodes is incorporated in their DNA. Both of them live if network nodes cooperate, share, put together, collaborate, dialogue, face and act together. A common goal is established through a constructive and moderate comparison, the necessary resources are shared and the responsibilities are allocated in view of the common action. And, conversely, success as failure is shared in the resolution of community problems.

Cooperation from the bottom is increasingly necessary to solve problems and govern processes that public authorities are no longer able to face and solve. This often happens because of guilty inertia, sometimes because of evident inability or lack of resources, but more often because the problems are so complex, branched and rapidly evolving to prevent the public traditional administration from gaining any more skills, resources, knowledge or speed to provide an adequate response to the needs of an ever-changing society. It is the syndrome of the Red Queen: you have to leg it to stand still in the same place and you have to run very fast just to move.

Now, you cannot care about the reasons of this failure. Instead you must take up this challenge and opportunity. Citizens must do it, and there are many of them who are tired of seeing their city and their country languish and who think they have ideas, imagination and feeling for work directed towards the common goods. Moreover, many of them are not content with delegating the task of intermediating with the public administration to their representative for 4-5 years. This must be done by those politicians and those administrators who really want to work with a spirit of service to the citizen and develop innovative solutions to provide answers to the community problems and keep up with the speed of a society 2.0.

This will involve politics and public administration in urgently rethinking their role. They should turn from monopolists of care power for the community interests into managers of a "PA-platform" capable of supporting the shared, civic solution that contributes to general interest issues. Of course we speak about most of them and not all of them. The public monopoly of the public interest care is an atavistic tare that public authorities will have difficulty in shaking off. But you have to start trying, if necessary alone, even from the bottom. Web 2.0 can represent the way that citizens and local administrators can try to wake up even those who

now have the highest public responsibilities.

After all Web 2.0 is a formidable instrument of cooperation. In fact, it facilitates and simplifies the surfacing and organization of this feeling of shared care of the common goods. Web 2.0 may allow citizens and innovative public administrators to channel these civic energies, to direct them towards the right goals, to equip them with the necessary resources so that they can successfully complete episodes of common goods civic care. There are several tools that seem appropriate to support the aspirations of someone who wants to be an active citizen. These are tools that help you to associate temporarily or team up with other active citizens in order to offer a contribution to the community.

These tools allow citizens to return part of their time and resources, especially the intangible assets, to the community in which they live. They are also aware that individual success can never be completely separated from the context in which you live, grow and operate. The common goods that we have and the community that welcomes us, puts us up, cares for us, that is the land and people who allow us to lead a civil, healthy, prosperous life, full of those privileges that many communities in developing countries yearn for. It is a wealth that we take for granted and that we do not become aware of and take care of anymore. But if we do not change route, we will soon dissipate this wealth of common goods.

Then Internet 2.0 can substantially help citizens who want to spend their time to return anything to their communities. You range from sites which allow the sharing of good practice (Participedia; Civic Commons), knowledge (Code for America; Procivibus) or time and energy for the public interest (The Good Gym), to useful platforms to raise problems for the local community (ePart; Fixmystreet; Decor urban no; Police.uk), tools for geo-referencing of general interest activities or information (Ushahidi; Seedspeak; Fontanelle, C-Tag; Crowdmap; OpenStreetMap; Openforesteitaliane; Dating the change), sites for fundraising that can be used to provide means to take care of common goods (Eppela, Kiva, JustGiving, Kickstarter, Schoolraising; Zopa), up to real online communities designed to put in contact those who want to change things (Shinynote; Jumo; Developmentcrossing). There are also sites that promote the everyday subsidiarity (Zipcar, Velib, Snapgoods; Sharesomesugar; Neighborgoods; Tourboarding).

Therefore, you need a platform for subsidiarity 2.0. This is all the more true when you consider that real platforms for civic action are still rare, at least in the present state of our knowledge. You intend for these Web 2.0 tools that have been designed and engineered with the primary purpose of protecting citizens to cooperate for solving a well-defined collective problem or developing a particular common good, local or national. This is possible under the aegis of a public administration that wants to "help" the autonomous initiative of citizens to carry out general interest activities, through a Web 2.0 tool accompanied by online support tools in material reality, as required by art. 118, last paragraph.

Most likely Critical City approaches this type of instrument. This is a role-playing game designed to encourage young people to leave home, explore their own city territory, develop and implement small-scale projects of urban spaces care, learn and identify other citizens willing to work on the same project and thus also improve the social cohesion of the reference community. But in this case, the coordination with public authorities is lacking. Instead, Change by us NYC is the tool developed by the City of New York to allow citizens to share their ideas to improve the city and it prepares them to transform their projects into concrete actions with help of other citizens. Also Seedspeak seems to uphold the same philosophy.

In Italy, an experiment with characteristics close to our ideal has not yet been set up. It would be an institutional tool to allow civic meet up. Many people are already working on a web platform conception that aspires to offer a complete and unique answer to the needs and challenges posed by the wiki-subsidiarity. But will the institutions be able to take the opportunities that can further the general interest and the care of the common goods?

## 5. The services of common interest

The services that are of "special significance" for the local community can be considered real common goods[79]. For example,

[79] In this vein, F. Trimarchi Banfi, *Considerazioni sui "nuovi" servizi pubblici*, Riv. It. Dir. Pubbl. Com. 5 (2002), 594, argues that "in art. 43 of the Italian Constitution the relevance of the activity as a service to the public come before the possible service assumption by the State of public authorities or users community' and she mentions D. Sorace, *Pubblico e privato nella gestione dei servizi pubblici locali*,

urban mobility, especially if it relies on public transport and sustainable mobility forms, such as cycling, is an instrument that improves the individual and collective well being of community's members, as well as a strong tool in the fight against inequality. But the same could be said for the shared management of other local public services such as water service or electricity distribution. The referendum battle on local public services management (from now on called SPL), ended with the net victory of "yes" in June of 2011, was played on the contrast between people in favour of municipality at all costs and those confirmed for privatization of services of general economic interest, that easily could be defined "services of common interest." Yet, the meaning of the first question was essentially to restore the liberty of local communities self-organization that has never been questioned by the European Union[80]. Now, this freedom of choice has been restored also into the Italian legal system and you must begin to consider a "third way" with respect to the two types of management so far contemplated from national law and practice. In fact, between municipal socialism and town liberalism it is possible for a third way to develop the principle of "economic democracy".

### 5.1 The third way of non-profit utilities

The non-profit alternative is not unrealistic at all. Instead it is an operative solution practiced in many industrialized countries. For example, the majority of local public services in the United States are managed by this type of organization. And in Europe too, it is not rare that typically public local services, such as water, are managed by non-profit organizational models.

But what is a non-profit utility (NPU)? It is an organizational model, usually developed in private law, that: a) involves all stakeholders and, therefore, first of all the citizens, in the property or, at least, in the ownership of a SPL; b) does not provide an entire distribution of useful earnings to several members, but their almost exclusive reuse for the

Riv. It. Dir. Pubbl. Com. (1997) 52, who speaks about public services "in the metajuridical sense". See also F. Merusi, *Servizio pubblico*, in Novissimo Digesto Italiano, vol. XVII (1970) 219.

[80] See C. Iaione, *Le società in house. Contributo allo studio dei principi di auto-produzione degli enti locali* (2007).

strengthening/modernization of infrastructures and/or for the improvement of the service quality. According to the first point, it has to do with management forms in which citizens are no longer mere users because they are, although with different degrees, involved in the services management. You range from co-ownership of the infrastructures or individual who supplies the service, to collaboration in strategy and the evaluation of services, going through forms of direct or indirect representation, in the organs of government. In fact, where citizens do not own the NPU they are still the owners, in the sense that they are able to control and direct management decisions through the user community representatives or independent experts who sit in the NPU organs of government. Under the second aspect, in an NPU, rate receipts primarily are used to cover operational costs and debt financings costs (that is, payment of interests on financing for investments in network or service development). Instead, business net profit is not addressed to the dividend distribution except through a discount on the rates applied to citizens. In fact, in principle, profit is ploughed-back into the NPU to ensure the strengthening of the infrastructure, its modernization and thus its efficiency. On the contrary, if you analyze the budgets of of the big companies that manage networks for general interest services, such as highways, electricity and gas, in the last five years, you will realize that there is an almost total alignment between business net profit and dividend. This means that almost all the profit is allocated to shareholders' remuneration and almost nothing to network strengthening. This would not happen with an NPU. In the event that the profit exceeds what is required for these interventions' financing, it can be set aside as capital buffer to insure against the risk of unexpected costs, to keep down the cost of debt financing or for future development needs. The profit can be redistributed among users in the form of a rate discount (usually for weaker sections of the society only), or, finally, it can be used as aid for other general interest services, however characterized by a lower profitability. Ultimately, the reinvestment of profits clause for infrastructures' strengthening and modernization or for service in favour of users' improvement, along with governance mechanisms that ensure the representation of citizen-users in the SPL company, are the two load-bearing axes of a NPU.

### 5.2 The cooperation of users and communities

The NPUs have a theoretical framework that includes different organizational models. The examples and organization modalities can be classified into two big categories: users cooperatives/associations and foundations for SPL management. The first model was tested in Melpignano, in the province of Lecce (Region Puglia), where there is a community cooperative for the production of energy from renewable sources where partners are both the City and the citizens. These citizens contribute to the project by providing their houses for the installation of solar panels and they receive in exchange the produced energy at zero cost. The profits generated by the sale of surplus energy are reinvested in infrastructures and services for the local community.

In Italy there are also some examples in the water service management. Above all they are realities in mountain areas where the aqueducts were built and continue to be managed by a citizens' consortium. One of these cases is the Mezzana Montaldo Consortium in the area of Biella city (Region Piemonte), where there is the "Consorzio Acqua Potabile" (Drinking Water Consortium) that manages the aqueduct in a non-profit organization.[81]

### 5.3 Foundations as municipal utilities

But, looking at larger NPU, the organizational model changes and it is very close to the foundations' one. The best-known example is that of Glas Cymru in Wales, which governs a water supply network that works for more than three million people. It is a company limited by guarantee, that is, a corporate company that does not have shareholders and that allocates each financial surplus for the consumers' benefit. In place of members looking for compensation of their holdings, there are "members" selected depending on skills, experiences and interests that allow them to perform effectively their role within the NPU. And the main task of the guarantee company members is to check the work of

[81] In the German model, for instance, a foundation (*Stiftung*), can be directly created through a juridical act, the *Stiftungsgeschäft*; the personal will of the main founder is sufficient, while for instance in the French system, the will of the founder is not enough, there is the need to the public recognition of the public utility of the foundation. M. Sabbioneti, *Democrazia sociale e diritto privato* (2010) 545.

management is carried out in accordance with the highest corporate governance standards (it is precisely the "UK Corporate Governance Code" to which all listed companies must conform themselves). This happens in order to ensure the NPU a commercial performance, in terms of service quality and cost efficiency that is comparable to, and better than, those of other water utilities with shareholders. A panel composed of independent personalities from the NPU manages the members' selection process in such a way to ensure that the structure reflects as closely as possible the range of consumers and bearers of interests served by the NPU. Members have the power to appoint and revoke three executive directors and six non-executive independent directors provided by statute. In the United States, the NPU system is even more consolidated. Many cities and states administer local services, such as the aqueducts and public transport. This is possible not by corporations (i.e. our Italian SPA), but by public authorities. They are nothing other than trusts, so very similar to our Italian foundations that do not provide for dividends. In New York, a trust of this kind is the Metropolitan Transportation Authority (MTA), the entity that manages public transport.

Trusts are private law instruments and the choice falls on them because the public organizational model does not favour funding through the debt financing. In fact, markets have difficulties in trusting opaque instruments such as public law companies. Therefore the NPU organizes itself according to the private law model, but has the sole objective of qualitative and efficient management of service and not of risk capital remuneration in the short term, through the sharing of dividends with shareholders, public or private.

### 5.4 Investing in NPUs

The repeal of a provision that has allowed the return of the invested capital in the water services management may discourage traditional private investors, who pursue an "adequate" financial return by the invested risk capital in the short-term logic. It is said in the absence of an adequate remuneration the risk is that you cannot attract the private capital necessary for infrastructure financing, while the lack of funds is just the problem of local services management in Italy. First, in many cases, individuals do not bear

their economic resources at all, but come into these management companies "in debit". In many cases the private managers resort to complex financial engineering operations to find the resources necessary for the modernization of infrastructures. They do that by loading down newly-acquired utility with the debt and, in the worst cases, they are forced to squeeze the utility with the distribution of very high dividends in order to repay the debt incurred with banks to acquire it. And, then, there is no reason that a NPU is unable to seek out the capitals market to ask for the funding of its infrastructure development plan through a credible project. Indeed, the International case study just shows that NPUs have big recourse to debt financing. Moreover, a non-profit organization can achieve better conditions just because it must reinvest all earnings by statute in the effective and efficient service management, not having immediate obligations of remuneration. However, there are investors interested in intervening in sectors or operations functional to create "positive externalities", such as transport infrastructures, production of energy from renewable sources, water, water and urban health infrastructures. They are, for example, sovereign wealth funds, pension funds, insurance companies or European banks, that is the so-called "long-term investors" (ILT). They do not invest in these sectors only for the social responsibility that in many cases is embedded in their mission. They do this because the sectors have huge development potential and because the risk is lower. However these individuals look for remuneration of the invested capital, and as a corresponding for lower risk they accept the prospect of long-term return. In short, the long-term investors do not pursue immediate and full remuneration of shares participation. In this case, the profit logic is consistent with the general interest mission. So you should see that at least in the case of ILT involvement the minimum remuneration of the invested capitals these individuals require to make available their capitals of long-term projects is possible. Alternatively, you should facilitate the meeting of NPU and ILT through the arrangement of financial instruments designed just for the infrastructure financing at the service of local communities. UE and ILT efforts go in this direction for creating project bonds[82].

[82] On 19 October 2011 the UE Commission adopted a legislative proposal to launch a pilot phase of the "Europe 2020 Project Bond Initiative". The initiative aims to

### 5.5 Freedom of self-organization of local authorities

The legislation on the public services management, repealed by referendum (article 23-bis of D.L. 25 June 2008 no.), did not prevent by itself the recourse to the NPU. As we said the Community legislation is less restrictive than the referendum object and now it expands again all its enforcement importance (cf. the Italian Constitutional Court., 2011, no. 24) and it does not interpose any obstacle to this type of management. In fact, the introduction of the NPU could have been theoretically pursuable according to the pre-existing legislative framework and it could be so depending on the European Community regulatory framework in force. You could and you can establish that individuals who participate in tender for the service award or the private associate selection of a mixed-activity holding company are also or even only non-profit. Moreover you can assign a higher score in the notice for competitions for a non-profit management structure. As a last resort, you could try to argue that the NPU is a form of management assimilated to in-house providing, because at the origin it shares the nature of the hypothesis alternative of "effective and useful recourse to the market."

It is important to remember that there is not a valid solution in all circumstances. The type of management to be taken greatly varies depending on the contexts and you must think about the type and size of the service. In this sense, abrogation of art. 23-bis[83] Is very important just because it brings again the freedom of choice into the local services organization. Therefore, it also brings the possibility to assess which administration modality of SPL is more functional to needs of different local communities and different geographical, social, cultural contexts. Why change

revitalize and expand the capital markets in order to finance European infrastructure big projects in the fields of transport, energy and information technology. The advances of the initiative are published in http://ec.europa.eu/economy_finance/financial_operations/investment/europe_2020/index_en.htm

[83] The article 23 bis of the law n. 112/2008 is devoted to the local public services of economic relevance and is been declared illegitimate by the Italian constitutional court after the referendum of June 12 and 13, 2011. According to the second paragraph of the article, the management of local public services of economic interest could be assigned to private entities, to be selected through public contest or public/private company, with a private partner to be identified through public evidence competition.

where the public administration or the private administration have given a good account of themselves? After the abrogation of art. 23-bis a national legislative initiative had to follow. It had to be an initiative able to reconcile the different needs and motions, to stabilize the normative framework and, in particular, to introduce an independent authority for regulation and control of performances of various public, private, or non-profit administrators. In fact, the autonomy always must be accompanied by the responsibility. And then the goal of regaining freedom of choice for local communities must be balanced by direct regulatory instruments aimed at giving local public decision makers and service managers a sense of responsibility. In fact, freedom encroaches into arbitrariness and embezzlement if it has no limits and balances. Instead, a law has followed; it essentially confirms the previously in force regime and it reproduces the dichotomy municipalizing-privatization undamaged, with the exception of the integrated water service. But the referendum has had subject all the integrated water service.

## 6. The Collaborative City

The CO-City, a mechanism of commons-based collaborative/polycentric governance, has been put in place in cities throughout Italy. In a CO-city, collaboration is the central tenet of governance, and the commons are managed by the following groups acting in collaboration through an institutionalized partnership between the public, private, and the community: social innovators (i.e. active citizens, makers, digital innovators, urban regenerators, urban innovators, etc.); public authorities; businesses; civil society organizations; and knowledge institutions (e.g. schools, universities, cultural institutions). Such collaboration aims to foster a physical, digital, and institutional peer-to-peer (p2p) platform that has three main aims: living together (collaborative services), growing together (co-ventures) and making together (co-production). Notably, each field experiment must be molded to the unique needs and conditions of a particular city. The collaborative city was inspired by the experience of sharing cities, which have spread throughout the

world[84]: San Francisco, Barcelona, Amsterdam among the others. The most famous and developed sharing city is Seoul, Korea, which has set up an infrastructure to encourage and facilitate sharing through its "Sharing City, Seoul Project". From a regulatory and legislative perspective, the city has instituted the "Seoul Metropolitan Government Act for Promoting Sharing"[85]. The act defines "sharing" as "the shared use of space, objects, or information to enhance their social, economic, or environmental values and to enhance the citizens' benefits or conveniences" and provided incentives for sharing resources. It should be noted that there is a division between the sharing city and the collaborative city. The collaborative city is unique because of its fundamental underlying principle, that of public collaboration, whereby public institutions foster collaboration among citizens and between citizens and public administrations. An impact is expected on increase of social capital, satisfaction with democracy, sense of belonging to the community, and trust in institutions. Further, like with a sharing city, collaboration can be a tool to improve urban quality of life and access to the urban commons

The seminal example of the CO-cities project is CO-Bologna, wherein the City of Bologna developed "The Regulation on the Urban Commons"[86] for the shared management and development of Bologna's "urban commons." The regulation reinforces the significance of ensuring that (a) there is sustenance of and access to common resources, (b) there is proportionality in protecting the public interest, (c) the "differentiated" public can use common resources, and (d) urban creativity can grow by encouraging urban and street art and the digital infrastructure. The regulation specifically seeks to empower social innovation and promote the collaborative/sharing economy. The City of Bologna has recently begun to implement these regulations, as evidenced by a series of pacts of collaboration. According to the regulation, these "urban commons" include public spaces, urban green areas, abandoned buildings, etc.[87] Though, the "commons"

[84] Fifty cities around the world are members of the Sharing Cities Network. Additional information is available at http://www.shareable.net/sharing-cities.

[85] Seoul Metropolitan Government Act No. 5396 (31 December 2012)

[86] In full disclosure, this regulation was drafted by the author.

[87] "Real estate in the City, the buildings of which are in a state of partial or total

reach further in scope:

> Urban commons are the goods, tangible, intangible and digital, that citizens and the Administration, also through participative and deliberative procedures, recognize to be *functional to the individual and collective wellbeing*, activating consequently towards them, pursuant to article 118, par. 4, of the Italian Constitution, to share the responsibility with the Administration of their care or regeneration *in order to improve the collective enjoyment*.

The regulation, signed by both citizens and the city, aims to accomplish these tasks through collaboration between citizens and local administration and sets out specific standards for collaboration, regardless of its length, among citizens or between citizens and other actors, including local government. Further, the local government is required to provide technical support and other assistance in order to accomplish the development and management tasks. The regulation, ultimately, is a critical tool of legal experimentation in polycentric governance, using the urban commons as a starting point in the commons transition plan for Italian cities, in which collaboration is a central tenet of governance.[88] First, it allows citizens, social innovators, entrepreneurs, civil society organizations, and knowledge institutions to co-design along with the city in the care and development of the urban commons. Second, it aims to foster a burgeoning sharing/collaborative as it relates to the urban commons.[89] The structure of this system, that of polycentric governance of the commons, can create a culture of collaboration and foster creativity, create a more effective means of conflict resolution, regulate urban development, and reduce gentrification. This can be accomplished through the establishment of an "agency for urban communing" in individual neighborhoods. The city of Rome will likely experiment with this shortly.[90]

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disuse or decay…suitable for care and regeneration interventions." Regulation Section 16.

[88] The commons transition plan was developed by the Ecuadorian Flock project, commissioned by three governmental institutions to transition Ecuador to a 'social knowledge' economy and society. http://p2pfoundation.net/Commons_Transition_Plan.

[89] The regulation itself has sections on "social innovation and collaborative services," "urban creativity" and "digital innovation."

[90] This is inspired by the experience of the temporary uses

### 6.1 An agency for a transition to a sharing/collaborative commons – based economy: CO-Mantova

CO-Mantova has also begun to develop a co-city mechanism to run the city of Mantova as a collaborative commons, made possible with the support of the city's Chamber of Commerce, the City, local NGOs, and knowledge institutions including the Mantova University Foundation and local schools. The city took its first step in the co-cities protocol by initiating a seeding call for social innovation titled "Culture as a Commons," which seeks proposals for the commons from social innovators. Its second step of the protocol involved a co-design laboratory, "Enterprises for the Commons." This laboratory developed seven projects and identified potential synergies for said projects. Third, it engaged in a governance camp to draft a pact for collaborative governance, a toolkit for collaboration, and a plan for sustainability. Finally, it has begun the final phase of the co-cities protocol, prototyping, by initiating a public consultation on these texts. It has also created a roadshow to publicize the CO-Mantova process throughout the city and, ideally, find support from signatories within each of the categories for collaborative governance actors. CO-Mantova developed a prototype for a community interest company, whose governance and principles are outlined in the pact for collaborative governance and the toolkit for collaboration. These include rules for collaboration among social innovators (e.g., meetings with creative and the community, citizen involvement, engaging new members, etc.); using CO-Mantova to foster physical and economic collaborative services, and collaboration between partners and external entities.

### 6.2 The trilateral collaborative urban plan: public, private and civic collaboration as a strategic innovation in urban development through CO-Battipaglia

The city of Battipaglia, in the Salerno province of Italy, has begun an collaborative process to innovate on urban governance through urban development and urban planning. This prototypes a collaborative urban development plan and the first Italian community land trust. The goal, therefore, involves a cultural

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ZwischenZeitZentrale model of Brema. http://www.zzz-bremen.de/projekte/

transformation to encourage bridging the gap between individual and physical land ownership or territory. CO-Battipaglia aims to create a synergistic alliance between the state as the public sector and the state as a community, the public as a subject and the public as the collectivity. This urban governance strategy will substitute the current system of top-down regulation with one focused on urban planning, collaboration, and consultation with stakeholders. It aims to solve urban development issues through collaborative governance of the Battipaglia territory, seeking results that are agreed upon by all relevant stakeholders. Co-Battipaglia also aims to introduce the first Italian community land trust. Henry George is often seen as the father of the community land trust. George, a prominent economist and philosopher in the nineteenth century, influenced economic reform during his time. Specifically, in his book *Progress and Poverty*, George criticized the fact that landowners become wealthy purely through land ownership (i.e., charging rent to the poor), without undertaking specific activities on the land that benefit the community in any way.[91] The wealthy accumulate land, while the poor must pay rent in order to occupy land. He proposed the idea of a single tax on underlying land value, that is, the value of the land without any additional improvements taken into consideration. This, in effect, George argued, would redistribute land to all.

George is often seen as deeply connected to the concept of community land trusts because he recognized that land is a basic necessity for every individual, and argued that private land ownership promotes suffering. Community land trusts, therefore, are "an attempt to reclaim collective ownership of the soil, and in so doing, reduce the unfair, artificially inflated cost of accessing land for basic needs."[92]

A community land trust[93] can be seen as a governance arrangement able to foster the introduction of a new conceptualization of urban development. The community land trust is a "social invention"; mainly, the initiative comes from neighborhood/community development organizations, designed

[91] Henry George, *Progress and Poverty* (1879).

[92] UN Habitat for a Better Future, The Community Land Trusts: Affordable Access to Land and Housing (2012).

[93] J. Meehan, *Reinventing Real Estate: The Community Land Trust As a Social Invention* Affordable Housing Journal of Applied Social Science 8 (2014) 2.

to solve problems with land ownership[94] . The community land trust, created as the governance output of a process that introduces collaborative devices in the urban plan, can be a structure able to promote collaboration between the five actors of collaborative governance. The community land trust has a proud history of involvement of the community in urban planning strategies including less tangible results such as leadership development[95]. The idea behind this is that the community land trust should be able to ensure successful affordable homeownership goals and, more importantly, contribute to other neighborhood improvements. The community land trust, in almost all cases, has influenced positive community change[96].

### 6.3 Collaborative urban mobility ecosystem: CO-Palermo

CO-Palermo, in Palermo, Sicily, has chosen urban mobility as a mechanism of introducing collaborative urban commons governance in the city and developing urban services of common interest. Services of common interest include urban mobility, insofar as it utilizes public transportation and instruments of mobility (e.g. bicycles). They are of "special significance" for the community—real common goods, and work to improve the individual and collective wellbeing. In 2011, the city of Palermo saw a battle over a referendum on the management of public services, pitting those in favor of municipality against those in favor of privatization of general interest services, or services of common interest. Ultimately, in June of that year, the referendum succeeded.

### 6.4 The CO-city protocol and the urban commons transition plan

CO-cities are differentiated from CO-Cities also through the methodological approach: the co-city protocol. The seeding phase

[94] J. Meehan, 113, *Reinventing Real Estate: The Community Land Trust As a Social Invention* cit. at 99.
[95] Karen A. Gray and Mugdha Galande *Keeping "Community" in a Community Land Trust* in *Social Work Research* 4 (2011).
[96] Karen A. Gray and Mugdha *Galande Keeping "Community" in a Community Land Trust*, cit. at 95, 4.

involves research and investigation into the socio-economic and legal conditions of a particular city. It also involves encouraging the development of social innovation and the urban commons in that city. Second, the co-design phase involves co-working sessions analyze the potential for alliances between projects for the city and actors in the city. This phase is a "collaborative governance camp" that ends in a "collaboration day."[97] The collaboration involved here could involve civic festivals and other events that temporarily use abandoned buildings or spaces as a vehicle to experiment and collaborate on ideas. Finally, the prototyping phase leads to the development of governance tools given the city's particular needs and characteristics. A governance tool used in one city can be used as a template in another city, but it should be molded to be a perfect fit for that city's conditions. After the prototyping phase, an amplification phase is necessary, to spread the governance output and generate interest in the process among possible signatories belonging to the five categories of collaborative governance actors. In conclusion, the governance testing and modeling. These phases combine to create the CO-city protocol, which is built to foster innovation, sharing, collaboration, polycentrism, and the urban commons. The protocol requires experimentation, whereby the city is a laboratory of democratic governance that outputs innovative regulatory mechanisms. This can reduce citizens' indifference and encourage active participation and satisfaction; in turn, the result of active citizen engagement, is increasingly effective policies[98]. The protocol would help in implementing an "urban commons transition plan"[99]. Such a transition is not immediate and requires a mental and cultural change of attitude, in addition to specific training. The shift could involve (1) a regulation or entity focused on encouraging the urban commons; (2) a sharing or collaborative economy via complementary currency systems, community

[97] "Collaboration day" is modeled off of "deliberation day." B. Ackerman and J. Fishkin, *Deliberation day,* (2004)

[98] B. Geissel, *Improving the quality of democracy at the local level: German experiences,* Paper for the Conference "Quality of Democracy, Participation and Governance: The Local Perspective"– Castello del Buonconsiglio – Trento (2008).

[99] This idea was inspired by the Commons transition plan: http://commonstransition.org/.

interest companies and local development agencies; (3) social innovation to drive the city away from a system of traditional urban welfare to one of collaborative welfare; and (4) collaborative mobility and collaborative land use. Through these means, the CO-city can foster just the setting required for iterating on the collaborative/polycentric urban governance scheme—a "collaborative ecosystem," or "wind gallery"[100]. Experimentation itself is key to develop urban governance and its juridical structure, as well as a citizen's right to his city[101]. The importance of flexibility must be stressed; experimentalism cannot involve rigid applications of models[102]. The governance structure must be able to simultaneously foster sharing, collaboration, and polycentricity, and adapt to the constantly evolving relationships among various groups in the city.

## 7. Conclusions: need for direction for the social innovation and the urban regeneration.

The ambitious project outlined here inevitably requires the identification of an individual who facilitates this organic program of urban welfare regeneration by civic maintenance of the local common goods. The search for a subject-pivot able to undertake the change here proposed, focusing on the exchange, collaboration and systematization of all participants heads in two directions. The participants are the public ones with power, means and resources necessary for good care of common goods and the social ones available to field their energies, resources, knowledge, skills to take care of the community goods.

On the one hand, you need to concentrate on observing the local public administrations that in recent years have innovated or are innovating their organizational structures in order to govern with the network. In this respect it is important to set up organizational units dedicated to the function of facilitation. It has to do with an organization of listening and dialogue in the same

[100] The "wind gallery" was the innovative solution introduced by the Wright brothers, that allowed them to successfully experiment the first controlled flight.

[101] G.B. Auby, *Droit de la ville : Du fonctionnement juridique des villes au droit à la Ville*, (2013).

[102] Arnold, C.A., *Resilient cities and adaptive law*, in 50 Idaho L. Rev. (2014).

local administrative machinery among its different aspects and above all with the outside world. It is important to set up organizational units dedicated to the structuring of stable alliances between these aspects and community, through its active or even latent resources.

First, you need a government control room in the network placed as close as possible to the apical functions of the local authority and, if it is possible, relating to interdepartmental coordination. It would be transverse to the typical functions for homogeneous sectors of the administration organized in view of the features and services offered rather than the demands of these functions and services, according to topic, rather than needs. And then it takes a structure dedicated to the institutional communication of this deep organizational innovation and administrative action. You think of a "URP (Italian Office for Relations with the Public) of the government with the network," a public relations office that wants to activate itself for the public interest, a structure that facilitates meetings between administration and active strong-willed, citizens. You need a structure that brings the distant and inattentive citizens to the shared administration, leading them up to the gates of "one-stop-shop for active citizenship" and does not discourage or frighten citizens and loads on their shoulders the task of simplifying the inevitable administrative complexity that the general model of care brings with it. Control room, URP and one-stop-shop of active citizenship are the three elements of organizational innovation that a local administration needs in order to be able to administer with citizens and not only for the citizens. It is no longer enough to organize venues for listening and for co-determination of public administration decisions. Although under this aspect you record interesting innovations, you are still under the old bipolar paradigm. Maybe it has to do with a more open administration, but it still has to do with an administration that aims to preserve the monopoly of the general interest care and to interpret the last will of people.

Otherwise, you must look outside of the institutional circuit. Under this second profile, it is reasonable to imagine that a very important role can be played by the disbursement foundations or communities and by foundations of banking origin. These social institutions have already effectively

interpreted in several instances the role of "subjects of social freedom organization" (cf. the Italian Constitutional Court, 2003, no. 300) and they have covered the responsibility for institutional investors in the social innovation at the local level.

Therefore foundations should become promoters of civic maintenance local plans of local common goods. For example, foundations could provide support for civic small-scale projects like street furniture in the context of their activities for the benefit of local communities. In particular, they could facilitate the implementation of the provision on small-scale projects in two directions. The main action might be to launch local notice of competitions for selection of some proposals about small-scale projects that have to be supported economically and administratively. In this way, citizens could also be relieved from the immediate outlay of the "expenses for the proposals formulation and works implementation " and moreover they could benefit from the tax breaks. As an alternative, foundations could avail themselves of the related tax break. Of course it has to do with verifying the feasibility of either solution under tax profile.

In a second direction, foundations could carry out an action of moral suasion toward the local public decision maker in order to approve the implementing regulations necessary to give effective and immediate operation to the model of urban governance shown here. Reputedly, you might also imagine creation of institutionalized partnership forms between the local authority and the local foundations, to put at citizens' disposal the administrative and economic reforms necessary for the implementation of urban design small-scale projects.

The national character does not conflict with the necessary development of local level actions that should implement it. It comes from two needs. The first is that you establish nationwide a pattern of action through definition of general guidelines and, therefore, there must be a minimum level of uniformity in the activities of different foundations. This is necessary both for subsuming the good local practices (today already existing in this sector), within a basic model built on the virtues and defects noticed at the local level, and preventing escape by single foundations which may expose the entire plan to responsibilities, claims, and expectations that would prejudice the plan's success.

Therefore it has to do with foundations as subjects of social innovation. The second requirement is to maintain at a central level monitoring and evaluation on possible inequalities that the implementation of a plan of this type could generate among different communities or territorial areas. The consideration of these inequalities could lead to the adoption of adjustment measures such as the creation of a "national fund for the civic maintenance of community goods", with the financial support of the central institutions. All this cannot mean at all that you should do without of the public authorities' intervention or their administrative and economic resources. Nor this can legitimize their retraction. In fact, the disappearance of the "public" would prejudice the ability to mobilize these additional civic resources you want to motivate for the care of the local common goods, with this action. A large part of society rightly does not intend at all to act in substitution of public authorities to facilitate their institutional tasks neglect.

In conclusion, is possible to outline a research agenda with one core hypothesis: we are undergoing a transition from a subjecting or competitive state to a sharing, collaborative, and coordinating state—the Ubuntu state. Once, the Leviathan, subjecting state governed over subjects with a clear divide between the government and the people. The competitive state outsourced services in a way that placed these services in opposition to one another. Now, there is a new morphology of the state rising. Both the subjecting state and the competitive state allocated and divided people, subjects, and interests. It is one in which citizens and government share a collaborative relationship and experiment and iterate in order to develop solutions for the common good. Sharing, collaborating, cooperating, and coordinating have become recurring themes of the Ubuntu state. Many may argue that the state's malaises are the result of decentralization or economic crises. However, I argue that problems with the state are fundamentally a question of the distribution of power. As a consequence, the research question that is behind the agenda is the following: can urban assets and resources or the city as a whole be transformed into collaborative ecosystems that enable collective action for the commons? The main question that the line of reasoning exposed in this paper try to address is if the State is changing its morphology and

transforming itself into a commoning/collaboration enabling platform. Thus, I argue that the driving factors in facilitating the rise of a new "Ubuntu state" can be pinpointed to three key variables: (1) knowledge; level of public investment on knowledge and education in the City, (2) willingness to collaborate, that is to say the attitude to common and collaborate measured through the existence of co-working/collaborative spaces or other collaborative projects or initiatives in the City, level of trust towards the city government and urban peers. and (3) technology, conceptualized as the access to technology infrastructure. Social capital, the existence of collaborative public policies and institutional capacity might also be variables that should be taken into account in order to understand if a process of State transformation is ongoing.

# THE ITALIAN WAY TO THE "POLITICAL QUESTION"

Paolo Zicchittu*

*Abstract:*

Is there a political question doctrine in Italy? Following an historical-empirical perspective, the essay analyses how and when the Italian Constitutional Court deals with controversies featuring issues of a political nature. The article investigates the crucial relationship between constitutional review and democratic processes, underlining the political nature of constitutional justice. The decisions of the Italian Constitutional Court concerning "political questions" are here studied in order to reflect on the constant connection between law and politics and to show what role is truly played by the Constitutional Court in the Italian legal system. The final objective is to identify certain matters that are primarily political in nature and best resolved by the politically accountable branches of government.

TABLE OF CONTENTS:



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### 1. Introduction: Constitutional Courts and politics

The relationship between Constitutional Courts and politics has always been problematic. The existence of the Courts themselves is justified within those political systems centered on the liberal conception of authority and protection of fundamental rights as they ensure overall respect of the legal system, including the natural law principles adopted by it[1]. The relationship between the constitutional review and democratic processes represents a crucial problem of every modern legal system[2]. The delicate relation between the Constitutional Courts and Parliament clearly reveals the political nature of constitutional justice into the mechanism of every contemporary form of State[3].

The development of the Courts' role accelerates the maturing process of the legal system by ensuring respect for the constitutional basis of State bodies and rights[4]. Simultaneously, they find themselves compelled to review the acts of authorities representing the will of the people raising questions on their legitimacy. Therefore, when tension between political subjects rises, the Court judgment will inevitably generate complaints that overrun the field of another body and accusations on whether they are usurping a function that does not pertain to constitutional justice[5].

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[1] See for example R. George, *Natural law*, in 1 Harv. J. L. & Pub. Pol. 165 (2008); A. Catelani, *Indirizzo politico e giusnaturalismo nelle interpretazioni della Corte costituzionale*, in 2/3 Perc. Cost. 92 (2010); J. Stout, *Truth, Natural Law, and ethical theory*, in R. George (ed.), *Natural law theory: contemporary essays* (1992).

[2] Cf. E. Rostow, *The Democratic Character of Judicial Review*, in 2 Harv. L. Rev. 158 (1952); G. Zagrebelsky, *Il diritto mite. Legge, diritti, giustizia* (1997); N. Olivetti-Rason, *La dinamica costituzionale negli Stati Uniti d'America* (1984).

[3] A. Chen, *The Global Expansion of Constitutional Judicial Review: Some Historical and Comparative Perspectives*, in 1 U.H.K. Fac. L. Leg. St. Res. P. Ser. 211 (2013), A. Stone-Sweet, *Governing with Judges: Constitutional Politics in Europe* (2000); G. de Vergottini & T.E. Frosini, *On the myth of the Constitutional Court in politics*, in 2/3 Perc. Cost. 17 (2010).

[4] Cf. P. Sagues, *El Consejo de la magistratura en Argentina. Ilusiones constitucionales y las ecuaciones de poder entre el consejo, la Corte Suprema y la clase política*, in 2/3 Perc. Cost. 212 (2010). G. Vanberg. *Legislative-Judicial relations. A game-theoretic approach to constitutional review*, in 3 Am. J. Pol. Sc. 346 (2001)

[5] Compare to S. Freeman, *Constitutional democracy and the legitimacy of judicial review*, in 4 L. & Phil. 327 (1990); T. Groppi, *La legittimazione della giustizia costituzionale. Una prospettiva comparata*, in 2/3 Perc. Cost. 121 (2010)

For these reasons, most of the democratic legal systems that are governed by the rule of law, have always tried to separate these two spheres. The provision for a body vested of the power to review legislation delineates a form of control that on the one hand, is substantively political as it aims at eliminating decisions taken by political authorities, such as law. On the other hand, it is formally judicial in that it is exerted in the manner of a trial before an impartial Court[6]. As a result, the ruling of unconstitutionality very seldom (never) resolves the problem but leads to a dialogue with Parliament, that is called to change its previous measure in cooperation with the Constitutional Court[7].

Within this context, the term "political question" commonly indicates a set of problems concerning the freedom of assessment and discretionary power of public authorities in the discharge of their public duties[8]. This means that a "political question" is a dialectically constructed resolution that weighs on the public sphere[9]. It generally corresponds to a legislative decision that coordinates different parliamentary positions, in order to select and regulate democratic values[10].

In dealing with the "political question", the decisions of the Italian Constitutional Court deserve to be carefully analyzed for more than one reason. Firstly, they allow to reflect on the constant relationship between law and politics. Secondly, they show what role is truly played by the Constitutional Court in the Italian legal

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[6] A. Brewer-Carias, *Judicial review in comparative law*, Cambridge, 1989; E. Cheli, *Il ruolo politico della Corte costituzionale nella prospettiva comparatistica*, in *Percorsi costituzionali*, n. 2/3 2010, p. 31 ss. V. Ferreres-Comella, *Constitutional courts and democratic values: a European perspective*, (2009).

[7] See especially P. Hogg & A. Bushell, *The charter dialogue between Courts and Legislatures (or perhaps the charter of rights isn't such a bad thing after all)*, in 35 Osgoode Hall L. J. 76 (1997). The preventive action of the French *Conseil Constitutionnel* may be read in this light, which obliges the French Parliament to comply with its decision, ensuring that the two bodies – Constitutional Council and Legislative Assembly – end up cooperating in the final enactment of a law that in this way should be devoid of elements of unconstitutionality. See G. Guidi, La divisione dei poteri nelle grandi decisioni del *Conseil Constitutionnel*, in 2/3 Perc. Cost. 185 (2010).

[8] See A. Cerri, *Inammissibilità assoluta e infondatezza*, in 5 Giur. Cost. 1219 (1983).

[9] Compare to L. Pesole, *L'inammissibilità per discrezionalità legislativa di una questione fondata*, in 1 Giur. Cost. 406 (1994).

[10] Nevertheless, not every "political question" involves choices strictly assigned to parliamentary discretion R. Gatti, *Politica*, in 9 Enc. Fil. 8760 (2006).

system. Finally, they raise the problem of the legitimacy of the constitutional justice[11].

The scientific debate on this dilemma initiated particularly in the United States, where scholars and judges coined the notion of "political question", above all, to face the so-called counter-majoritarian difficulties[12]. In the American legal system, the "political question doctrine" refers to certain matters that are primarily political in nature and best resolved by the politically accountable branches of government. Although a constitutional violation is asserted, political questions are inappropriate for judicial consideration and immune from judicial review[13]. This doctrine provides the judiciary with means of avoiding controversial constitutional question[14] by allocating decision to the branches with the most appropriate expertise[15]. It keeps the Court from reviewing the constitutional amendment process because of possible conflict of interest if the amendment is to overturn the Court's decision[16] and it should also minimize Constitutional Court intrusion into operational issues of other branches of government[17].

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[11] L. Favoreu, *Constitutional review in Europe*, in L. Henkin & A. Rosenthal (eds.), *Constitutionalism and rights: The Influence of the United States Constitution abroad*, (1990). Cf. E. Cheli, *Atto politico e funzione d'indirizzo politico* (1961) and C. Dell'Acqua, *Atto politico ed esercizio di poteri sovrani* (1983).

[12] For a widespread analysis see for example O. Field, *The doctrine of political question in the Federal Courts*, in 8 Minn L. Rev. 485 (1924); M. Finkelstein, *Judicial self-limitation*, in 37 Harv. L. Rev. 338 (1924); H. Wechsler, *Toward neutral principles of Constitutional law*, in 73 Harv. L. Rev. 1 (1959); R. Fallon, *Of justiciability remedies and public law litigation: notes on the jurisprudence of Lyons*, in 59 N.Y.U. L. Rev. 1 (1984); M. Redish, *Abstension, separation of powers and the limits of the judicial junctions*, in 94 Yale L. J. 94/1984, p. 71; F. Weston, *Political questions*, in 38 Harv. L. Rev. 296 (1959). See also *Luther v. Borden*; *Pacific Tel. & Tel. Co. v. Oregon*; *Coleman v. Miller*, *Baker v. Carr*.

[13] F. Scharpf, *Judicial review and the political question: a functional analysis*, in 4 Yale L. J. 75 (1960).

[14] A. Bickel, *The least dangerous branch: The Supreme Court at the bar of politics*, (1986).

[15] See especially L. Tribe, *Constitutional choices* (1985).

[16] *Gilligan v. Morgan*. See also R. Jackson, *The Supreme Court in the American system* (1955).

[17] *Colegrove v. Green*. Cf. C. Warren, *The Supreme Court in the United States history*, (1932).

**2. "Political question" and "constitutional tone"**

In the Italian legal system, something similar to the notion of "political question" may be found in Article 28, Law 87/1953[18]. The latter attempts to reconcile the apparent contradiction inherent in constitutional review by balancing the respective role of the legislative power and the Court.

According to this provision the constitutional review must observe two limits. Article 28 forbids the Italian Constitutional Court from both carrying out any political assessment and controlling the exercise of parliamentary discretion[19]. Regarding these aspects, it is necessary to examine if – as it happens in North American legal system – "political question" actually indicates a "non-justiciable area"[20] that prevents the Court from deciding on the substance of the case, when the question of unconstitutionality concerns aspects entrusted to political bodies[21]. In order to do so, it is important to retrace the notion of "political question" in the Italian legal system, lingering on the role of procedural decisions in the Italian constitutional review.

In particular, the first limit precludes the Italian Constitutional Court from making a political consideration in its judicial assess but it merely appears to reaffirm the nature of constitutional review as a legal proceeding. It calls to mind the famous statement by Hans Kelsen who identified the

[18] According to art. 28, Law 87/1953: "*The constitutional review on a law or on enactments having the force of law excludes any assessment of political character and any judicature of parliamentary discretion*".

[19] See, for example, A. Tesauro, *La Corte costituzionale*, in 2 Rass. Dir. Pubbl. 205 (1950) and G. Guarino, *Abrogazione e disapplicazione delle leggi illegittime*, in 2 Jus 356 (1951), L. Favoreau, *American and European model of constitutionalism*, in D. Clark (ed.), *Comparative and private constitutional law. Essays in honor of John Henry Merryman* (1990).

[20] G. Zagrebelsky & V. Marcenò, *La giustizia costituzionale* (2012); M. Cappelletti, *The judicial process in comparative perspective*, (1989). For a comparison with the Canadian legal system see G. Cowper & L. Sossin, *Does Canada need a "political questions doctrine"?*, in 4 Sup. Ct. L. Rev. 321 (2002); P. Monahan, *Politics and the Constitution. The Charter, Federalism and the Supreme Court of Canada* (1987); B. Flemming, *Tournament of Appeals: Granting Judicial Review in Canada*, (2004). Cf. also *Penikett v. R.*; *Native Women's Assn. of Canada v. Canada*; *Schachter v. Canada*

[21] See A. Ruggeri & A. Spadaro, *Lineamenti di giustizia costituzionale* (2013).

Constitutional Court simply as a "*negative law-maker*"[22]. However, this prohibition can be inferred from constitutional provisions, thus, Article 28 does not seem to add any new interdiction to the Court[23]. This indicates that the rule in Article 28 does not carefully define the area of "political question". Furthermore, while deciding disputes concerning the constitutional legitimacy of laws and enactments having the force of law, the Court always looks at the political effects connected to its judgments[24]. Consequently, when reviewing the constitutionality of a contested measure, the Italian Court is forbidden from making a political assessment concerning the merits of a statute law[25].

The second limit codified in Article 28 excludes any kind of judicial control over parliamentary discretion. Seemingly, drawing from administrative law the origin of the concept of discretion, the earliest legal doctrine interpreted this provision to restrict the application of Article 134 of the Italian Constitution[26] preventing the Constitutional Court from judging on "legislative misuse of power"[27]. On the other hand, current legal doctrine interprets this rule as prohibiting the Court from reviewing the merits of a statute, effectively ignoring the theory of the "abuse of legislative power" and restricting constitutional jurisdiction[28]. Hence, Article 28 only precludes the Court from scrutinizing appropriateness or substantive issues of political choices and from enquiring into the objectives pursued by the Parliament in carrying out its legislative functions[29]. This scrutiny could transform constitutional review into political control, which evaluates in the abstract the

[22] Compare to H. Kelsen, *La giustizia costituzionale* (1928). See also H. Hausmaninger, *Judicial referral of constitutional question in Austria, Germany and Russia*, in 12 Tulane Eur. & Civ. L. Forum 25 (1997).
[23] G. Zagrebelsky, *La giustizia costituzionale* (1977).
[24] Cf. F. Pierandrei, *Corte costituzionale*, in 10 Enc. Dir. 906 (1962).
[25] Compare to C. Mortati, *Le leggi provvedimento* (1968).
[26] Article 134 of the Italian Constitution statutes that: "*The Constitutional Court shall pass judgement on: controversies on the constitutional legitimacy of laws and enactments having the force of law issued by the State and the Regions. Conflicts arising from allocation of powers of the State and those powers allocated to State and Regions, and between Regions. Accusations made against the President of the Republic and the Ministers, according to the provisions of the Constitution*".
[27] See G. Guarino, *Abrogazione e disapplicazione delle leggi illegittime*, cit. at 19
[28] Cf. A. Ruggeri & A. Spadaro, *Lineamenti di giustizia costituzionale,* cit. at 21
[29] Compare to L. Paladin, *Osservazioni sulla discrezionalità e sull'eccesso di potere del legislatore ordinario*, in *Rivista trimestrale di diritto pubblico*, 1956, p. 993.

correspondence between the contested measure and its main objective established by the Constitution[30]. In practical terms it is however possible to test its reasonableness[31].

When the Court judges on a question concerning legislative discretion, it will not rule on the controversy. In such cases, the question of unconstitutionality in order to be eligible must not only be relevant to the case ("*rilevante*") and show no signs of being groundless ("*non manifestamente infondata*"), but it will also require another requirement conventionally named "constitutional tone" ("*tono costituzionale*")[32]. A concrete case will therefore have a "constitutional tone" only if it does not entail political assessments. Should any political evaluations be involved, the Constitutional Court must declare the question inadmissible for it lacks "constitutional tone" [33].

Notwithstanding, every Constitution has a political content and therefore every "political question", by nature, has some constitutional relevance[34]. The absence of "constitutional tone" means that the constitutional review cannot provide a solution to a concrete case and it may not be solved through a constitutional proceeding. Hence, it will require other branches of government to make the necessary political decisions. In this strict sense, Article 28, Law 87/1953 directly evokes the notion of "political question" adopted in the North-American legal systems, because it highlights the requirement issued by the Constitution to find a

[30] Cf. *ex plurimis* L. Pegoraro, *Le sentenze-indirizzo della Corte costituzionale italiana*, Padova, 1984, p. 90.

[31] See P. Costanzo, *Legislatore e Corte costituzionale. Uno sguardo d'insieme sulla giurisprudenza costituzionale in materia di discrezionalità legislativa dopo cinquant'anni di attività*, in www.giurcost.org

[32] This notion was coined by the scholars, especially to define a particular aspect of the conflicts between branches of government, but nowadays the Italian Constitutional Court does not commonly use it. See F. D'Onofrio, *L'oggetto dei giudizi sui conflitti costituzionali di attribuzione*, in 5 Rass. Dir. Pubbl. 812 (1963).

[33] See for example A. Pisaneschi, *I conflitti di attribuzione tra i poteri dello Stato* (1992); R. Bin, *L'ultima fortezza (teoria della costituzione e conflitti di attribuzione* (1996); M. Mazziotti, *I conflitti di attribuzione fra i poteri dello Stato* (1972); L. Elia, *Dal conflitto di attribuzione al conflitto di norme*, in 1 Giur. Cost. 263 (1965); F. Sorrentino, *I conflitti di attribuzione tra i poteri dello Stato*, in 2 Riv. Trim. Dir. Pubbl. 472 (1967).

[34] F. Pierandrei, *L'interpretazione della Costituzione* (1952).

political settlement to the specific case[35]. This peculiar mechanism of justiciability should reinforce the separation of power prescribed by the Constitution, preventing the Courts from interfering with the competences assigned to the other branches of government. By judging on the justiciability of cases and controversies with a political trait, the Courts necessarily deliver their jurisdiction and this inevitably redefines the principle of the separation of powers[36].

As previously mentioned, the non-justiciability of a "political question" is not measureable in abstract terms[37], given that it is influenced by political choices and by the Courts' self-restraint. In other words, it is unrealistic to identify *a priori* selection criteria for every single "political question". The notion of a "political question" is extremely variable and it is connected to the historical, social and economic background. Therefore, it could happen that a particular case initially distinguished by political aspects, might not be political and *vice-versa*[38]. In this perspective, the "political question doctrine" appears as an interpretation of the constitutional provisions that are relevant for

[35] R. Fallon, *Of justiciability remedies and public law litigation: notes on the jurisprudence of Lyons,* cit. at 12; M. Redish, *Abstension, separation of powers and the limits of the judicial junctions,* cit. at 12; H.S. Reinhardt, *Limiting the access to the Federal Courts: round up the usual victims*, in 6 Whittier L. Rev. 967 (1984). Compare also to K. Swinton, *The Supreme Court and the Canadian Federalism* (1990); L. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (1999); J. Cameron, *The Written Word and The Constitution's Vital Unstated Assumptions*, in P. Thibault, B. Pelletier & L. Perret (eds.), *Essays in Honour of Gérald A. Beaudoin* (2002). See also *Sibbeston v. Canada*; New *Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*; *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*

[36] See L. Brilmayer, *The jurisprudence of article III: perspective on the case or controversy requirements*, in 93 Harv. L. Rev. 297 (1979); M. Tushnet, *The sociology of article III: a response to Professor Brilmayer*, in 93 Harv. L. Rev. 1698 (1980).

[37] See G. Zagrebelsky & V. Marcenò, *La giustizia costituzionale*, *cit.* at 20, 67. Compare to E. Chermeninsky, *Constitutional law, principles and politics* (1997); I. Unah, *The Supreme Court in American politics* (2009).

[38] Compare to A. Sperti, *Corti supreme e conflitti tra poteri* (2002); W. Dellinger, *The legitimacy of constitutional change: rethinking the amendment process*, in 75 Harv. L. Rev. 386 (1985).

the solution of that concrete case and useful to determine the competence of each branches of government[39].

In practice, the notion of "constitutional tone" linked with "political question" defines when and how the Court can decide a question of unconstitutionality, because its existence makes it admissible and it allows the Constitutional Court to decide on the substance of the case. On the contrary, if a question concerns political discretion, it will never be justiciable and its settlement will involve other institutions. In these situations, the legal system itself needs a political solution and consequently the Court is excluded from passing judgment. When a "political question" arises, the Italian Constitution Court is forced to adopt a procedural decision to certify the absence of the "constitutional tone" and to refuse to make decisions on the substance of the case. Unfortunately, this is a self-referential concept because it relies, above all, on a Court decision that defines a "non-justiciable area" in the specific case[40]. This means that a question of unconstitutionality is only considered political if the Constitutional Court decides it is so in concrete terms[41]. The Court may therefore decline its jurisdiction when its judgments are counter-productive, for example, due to its interference with Parliamentary discretion. The presence of a "non-justiciable area" – concurring approximately with legislative discretion – represents a constitutional value that, as such, must be balanced with every other constitutional principle[42].

In this sense, the "political question doctrine" establishes one of the main criteria for the case selection. If the Court qualifies a controversial matter as political, it should decline its jurisdiction, referring the solution of that specific case to the Parliament. On the contrary, if the case is qualified as non-political the Court

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[39] G. Hughes, *Civil disobedience and the political question*, in 1 N.Y.U. L. Rev. 43 (1968). See also *Dames & Moore v. Reagan*; *Goldwater v. Carter*; *United States v. Belmont* and *Lamont v. Woods*

[40] See C. Mezzanotte, *Le nozioni di potere e di conflitto nella giurisprudenza della Corte costituzionale*, in 1 Giur. Cost. 110 (1979) and A. Bickel, *Foreword the passive virtues. The Supreme Court 1960 term*, in 40 Harv. L. Rev. 54 (1961).

[41] R. Bin, *L'ultima fortezza,* cit. at 33, 125; L. Henkin, *Is there a "political question" doctrine?*, in 5 Yale L. J. 597 (1976).

[42] Cf. L. D'andrea, *Ragionevolezza e legittimazione del sistema* (2005); H. Wechsler, *Toward neutral principles of Constitutional law,* cit. at 12; L. Hand, *The bill of rights* (1958)

should decide on it. This manoeuvring is closely related to the legitimacy of every Constitutional Court and to the obligation to state the reasons on which the decision is grounded[43].

### 3. An historical perspective

These are the reasons why the Italian Constitutional Court has never defined the limit between political power and constitutional review in positive terms. This trait becomes more evident when the procedural decisions through which the Court declares the "non-justiciability" of a "political question" are taken into account[44].

From 1956 – the inaugural year of the Italian Constitutional Court – to 1988, constitutional jurisprudence highlighted the existence of parliamentary discretional power mainly by taking decisions of inadmissibility ("*decisioni di inammissibilità*"). In these three decades, the existence of a "political question" determined the Court's lack of competence as the provisions concerned choices strictly reserved to the national Parliament[45]. In this way, the "political questions doctrine" expressed the need, bound by the Constitution, to find a political settlement for a legal dispute [46]. As it still occurs in the United States[47], the "political questions" pinpoints a limit to constitutional review, reinforces the separation of powers and prevents judiciary from assuming competences entitled to other branches of government[48]. In these cases, the "political question doctrine" constitutes the main expression of

[43] See C. Douglas-Floyd, *The justiciability decision of the Burger Court*, in 60 Notre Dame L. Rev. 862 (1984).

[44] A. Ruggeri, *La discrezionalità del legislatore tra teoria e prassi*, in 1 Dir. e Soc. 1 (2007)

[45] Compare to A. Anzon, *Nuove tecniche decisorie della Corte costituzionale*, in 6 Giur. Cost. 3199 (1992) and R. Romboli, *Il giudizio di legittimità delle leggi in via incidentale*, in R. Romboli (ed.), *Il giudizio in via incidentale. Aggiornamenti in tema di processo costituzionale 1990-1992* (1993); V. Gunther, *The subtle vices of the passive virtues. A comment on principle and expediency in judicial review*, in 1 Colum. L. Rev. 64 (1964).

[46] A. Bickel, *The least dangerous branch,* cit. at 14

[47] Compare to D. Laycock, *Notes on the role of judicial review, the expansion of federal power and the structure of constitutional rights*, in 97 Yale L. J. 1711 (1990).

[48] See *ex multis* D. Shapiro, *Jurisdiction and discretion*, in 3 N.Y.U. L. Rev. 342 (1985) and O. Field, *The doctrine of political question in the Federal Courts,* cit..at 12

those "passive virtues", which should influence every Constitutional Court in its relation with the legislative power[49].

Initially, the Italian Constitutional Court made decisions on the substance of the case ("*decisioni di infondatezza*"), however, by stating reasons in a rapid manner and at times disregarding the question so much so the specific case was not analyzed in depth[50]. These judgments were soon replaced by decisions of inadmissibility, which despite being procedural in nature, often indicated the unconstitutionality of the challenged measure[51]. During the Seventies, decisions of inadmissibility increased, especially when the question forced the Court to adopt judgments in subject matters strictly reserved to parliamentary discretion. Therefore, the question did not challenge provisions concerning matters reserved to Parliament by constitutional rules[52]. In the Eighties, with respect to the "political question", the difficulties in differentiating between the adoption of procedural decisions ("*decisioni di inammissibilità*") and decisions on the substance of the case ("*decisioni di infondatezza*") became even more evident. In this period, the legislative discretion clause was used broadly in order to reduce the backlog stockpiled in the *Lockheed* proceeding[53]. The Court adopted these decisions, in an interchangeable way, often

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[49] Cf. A. Bickel, *Foreword the passive virtues,* cit. at 40 and J. Choper, *The Political Question Doctrine: Suggested Criteria*, in 65 Duke L. J. 1466 (2005).

[50] See for example C. cost. sent. 111/1968 annotated by L. Elia, *La guerra di Spagna come "fatto ideologico": un caso di political question?* (1968).

[51] C. cost. sent. 102/1977 and C. cost. sent. 137/1981. Cf. also L. Carlassare, *Le decisioni d'inammissibilità e di manifesta infondatezza della Corte costituzionale*, in Aa. Vv. *Strumenti e tecniche di giudizio della Corte costituzionale. Atti del convegno svoltosi a Trieste, 26-28 maggio 1986* (1988).

[52] A. Pizzorusso, *Nota a Corte costituzionale sentenza 1977, n. 102*, in 5 Foro It. 1607 (1977).

[53] Compare to F. Bonini, *Storia della Corte costituzionale* (1996); C. Rodotà, *Storia della Corte costituzionale*, (1990) and F. Sacco, *L'impatto della giurisprudenza costituzionale nella tutela dei diritti fondamentali: una prospettiva storica*, in R. Bin, G. Brunelli, A. Pugiotto & P. Veronesi (eds.), *Effettività e seguito delle tecniche decisorie della Corte costituzionale*, (2006). Similarly see F. Saja, *La giustizia costituzionale nel 1987. Conferenza stampa del 8 febbraio 1988*, in www.cortecostituzionale.it and E. Cheli, *Il giudice delle leggi. La Corte costituzionale nella dinamica dei poteri* (1996). For further information on the backlog see especially R. Romboli, *Il processo costituzionale dopo l'eliminazione dell'arretrato*, in 3 Quad. Cost. 592 (1991).

considering them equivalent and motivating them in the same way[54].

Nevertheless, in the Nineties, the Italian Constitutional Court dealt with "political question" along with decisions of inadmissibility ("*decisioni di inammissibilità*") and with decisions that declared the question unfounded ("*decisioni di infondatezza*"). Through these judgments, the Court dismissed the question, but, at the same time, it decided also on the substance of the case, concluding that the discipline challenged by the lower Court was constitutional; the subject matter was up to parliamentary discretion and it could not be reviewed[55]. At the same time, the Court made decisions of inadmissibility ("*decisioni di inammissibilità*") and it established legislative authority to regulate that particular sector, resolving that the lawmaker had made a reasonable choice. Through this reasonableness test, the Italian Constitutional Court indeed opts for the merits of the case[56]. In other particular cases, it emphasizes the limits of legislative discretion, declaring doubts over constitutionality as manifestly unfounded ("*decisioni di manifesta infondatezza*")[57]. These decisions were often justified in an uneven and tautological way and the Court declared the question unfounded, simply by asserting that the challenged provision was reasonable and that Parliament used its discretion in conformity with the Constitution[58].

It can be stated in general, that the Italian Court appears to use decisions of inadmissibility ("*decisioni di inammissibilità*"), when judging on matters traditionally covered by legislative discretion (i.e. substantive criminal law; immigration law; scientific basic; tax law and procedural law). It declares unfounded any doubts over constitutionality ("*decisioni di infondatezza*")., if parliamentary options do not appear irrational or arbitrary after a reasonableness check on concrete use of

[54] A. Cerri, *Corso di giustizia costituzionale globale* (2012)

[55] F. Felicetti, *Discrezionalità legislativa e giudizio di costituzionalità*, in 5 Foro It. 22 (1986) and A. Cerri, *Inammissibilità assoluta ed infondatezza*, in 5 Giur. Cost. 1219 (1983).

[56] For example, see C. cost. ord. 262/2005 and C. cost. ord. 401/2005.

[57] This concerns sectors in which the Court has always shown particular deference towards the political choices exercised by the legislator. Amongst these questions must be included criminal law, the discipline of the court institutions and basic tax law.

[58] Compare also to C. cost. ord. 215/2005.

legislative discretion[59]. Nonetheless, this is a tendential difference given those cases where the Court by making decisions of inadmissibility, examines also the reasonableness of the challenged rule[60]. Depending on the specific case, the Court indifferently uses both decisions of inadmissibility and decisions on the substance of the case by declaring doubts over constitutionality unfounded. The only difference lies in the effects that they produce on the other branches of government[61].

Decisions by which the Court declares unfounded doubts over constitutionality ("*decisioni di infondatezza*").produce legal effects on the referring judge ("*giudice a quo*"), because they do not prevent him from raising a new question grounded on different constitutional principles[62]. This particular opportunity to raise the question again allows the Constitutional Court to make another decision depending on new or changed circumstances[63]. On the other hand, decisions of inadmissibility ("*decisioni di inammissibilità*") produce substantive effects also on the legislative power and civil society, because they trigger a public debate on constitutional judgment and its grounds for the decision[64]. Bearing in mind the concrete case and its relationship with the other branches of government, the terms of the decision should be adopted only when the Court cannot declare unfounded the question of unconstitutionality through a decision on the substance of the case[65]. We should also consider that although decisions of inadmissibility can avoid an institutional conflict between the Court and Parliament, they frequently deny

[59] See L. Pesole, *L'inammissibilità per discrezionalità legislativa di una questione fondata,* cit. at 9.

[60] M. Luciani, *Le decisioni processuali e la logica del giudizio costituzionale incidentale* (1984).

[61] A. Cerri, *Inammissibilità «assoluta» e infondatezza*, in 5 Giur. Cost. 1223 (1983).

[62] See A. Pizzorusso, *Il controllo dell'uso della discrezionalità legislativa*, in Aa. Vv. *Strumenti e tecniche di giudizio della Corte costituzionale. Atti del convegno svoltosi a Trieste, 26-28 maggio 1986* (1988).

[63] C. Capolupo & C. Rastelli, *Le decisioni di infondatezza*, in M. Scudiero & S. Staiano (eds.), *La discrezionalità del legislatore nella giurisprudenza della Corte costituzionale (1988-1998)* (1999).

[64] Compare to P. Carrozza, *L'inammissibilità per discrezionalità del legislatore. Spunti per un dibattito sui rischi di una categoria "a rischio"*, in 5 Reg. 1703 (1994).

[65] Cf. L. Carlassare, *Le "questioni inammissibili" e la loro riproposizione*, in Aa. Vv., *Scritti su la giustizia costituzionale in onore di Vezio Crisafulli* (1985).

constitutional justice in main proceedings because they do not decide on the merits of the case. Therefore, the Italian Court prefers to include the referring judge, declaring unfounded the question of unconstitutionality or making an inadmissibility decision. This could suggest an interpretation in conformity with the Constitution ("*interpretazione costituzionalmente conforme*") or, possibly, adopting an additive judgment, indicating the principle that should be followed by Parliament in integrating statute law ("*sentenza additiva di principio*")[66].

This constant fluctuation between procedural decisions ("*decisioni di inammissibilità*") and decisions on the merits of the case ("*decisioni di infondatezza*") also indicates that the Italian Constitutional Court does not permanently decline its jurisdiction. Through these decisions, the Court does not affirm its lack of competence, but rather recognizes that the decisions and instruments in its hands cannot adequately solve the concrete question[67]. Indeed, parliamentary discretion is not the one and only principle that the Constitutional Court must consider in its judgment. This must be balanced with other interests protected by the Constitution, such as the fundamental rights of the parties involved in the main proceeding[68].

### 4. A "skeleton key" for constitutional review

In accordance with this brief review, it seems that in the Italian legal system the presence of a "political question" generally represents a procedural ground for making a decision on the

[66] L. Carlassare, *Le decisioni d'inammissibilità e di manifesta infondatezza*, cit. at 51.

[67] Cf. G. Silvestri, *La Corte costituzionale nella svolta di fine secolo*, in L. Violante & L. Minervini (eds.), *Storia d'Italia. Annali XIV. Legge, diritto, giustizia* (1998) and R. Romboli, *Ragionevolezza, motivazione delle decisioni ed ampliamento del contraddittorio nei giudizi costituzionali*, in Aa. Vv., *Il principio di ragionevolezza nella giurisprudenza della Corte costituzionale, Atti del Seminario svoltosi presso la Corte costituzionale nei giorni 13 e 14 ottobre 1992* (1994).

[68] C. Capolupo, *Le decisioni di inammissibilità*, in M. Scudiero & S. Staiano (eds.), *La discrezionalità del legislatore nella giurisprudenza della Corte costituzionale (1988-1998)*, (1999) and G. Silvestri, *Le sentenze normative della Corte costituzionale*, in Aa. Vv., *Scritti sulla giustizia costituzionale in onore di Vezio Crisafulli* (1985). Compare to A. Bonfield, *The guaranty clause of article IV, par. 4. A study of Congressional desuetude*, in 46 Minn. L. Rev. 513 (1962); L. Pollak, *Judicial power and the politics of the people*, in 81 Yale L. J. 72 (1962).

substance of the case. The absence of matters covered by legislative discretion constitutes a necessary requirement for the question of unconstitutionality or a logic premise for analyzing the merits of the case[69]. A procedural decision is necessary as it states the lack of constitutional jurisdiction, due to the need to avoid an assessment on parliamentary freedom of choice[70]. It seems to be the only way of complying with regulations prescribed by Article 28, l. 87/1953 and Article 134 of the Constitution, preventing the Court from exercising powers belonging to political institutions[71].

So much so that, in order to respect parliamentary discretion, decisions of inadmissibility are more frequent in particular cases. We must recognize that a constitutional decision is eventually oriented by specific cases and by questions of unconstitutionality concretely raised by the referring judge[72]. Such decisions allow the Court to choose between different terms, depending on the case and the matters entrusted to political discretion[73]. For this reason, the same Constitutional Court does not identify exactly a "non-justiciable area" totally covered by legislative power, but in these circumstances, it reserves itself the right to carry out a "reasonableness test" on the challenged provision[74].

This type of decisions is therefore used as a sort of "skeleton key", allowing the Italian Constitutional Court to set

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[69] G.P. Dolso, *Le decisioni di inammissibilità nella recente giurisprudenza della Corte*, in A. Barbera & T.F. Giupponi (eds.), *La prassi degli organi costituzionali* (2008); C.R. Sunstein, *One case at a time. Judicial minimalism in the Supreme Court* (1997).

[70] G. Silvestri, *Legge (controllo di costituzionalità)*, in 11 Dig. Disc. Pubbl. 354 (1994).

[71] See M. Carducci, *Impostazione del petitum e inammissibilità della questione*, in 4 Giur. Cost. 1090 (1992). Cf. also L. Pesole, *Sull'inammissibilità delle questioni di legittimità costituzionale sollevate in via incidentale: i più recenti indirizzi giurisprudenziali*, in 5 Giur. Cost. 1566 (1992).

[72] Compare to M. Montella, *La tipologia delle sentenze della Corte costituzionale*, (1992); E. Cohen, *The American perspective on the interface between Politics and the Court*, in 2/3 Perc. Cost. 163 (2010).

[73] See R. Pinardi, *Osservazioni a margine di inammissibilità (ovvero quando la Corte utilizza la necessita di rispettare la discrezionalità legislativa quale argomento non pertinente*), in 6 Giur. Cost. 3559 (1993).

[74] A. Ruggeri, *La discrezionalità del legislatore tra teoria e prassi*, in 1 Dir. & Soc. 49 (2007). Compare to C. Knechtle, *Isn't every case political? Political questions on the Russian, German, and American high courts*, in 26 Rev. Cent'l & East Eur. L. 134 (2000)

aside legislative provisions[75] especially when it makes a "reasonableness check" over the contested measure and the related parliamentary/political decision[76]. In order to justify its unlimited jurisdiction, the Court clarifies that in such circumstances its legal assessment is not well founded and it only concerns the manifestly reasonable aspects of the challenged rule[77]. When taken as a syllogistic comparison between similar circumstances, often, this use of the "rule of reason" is not a simple test on the equality of different situations. The reason being, that by using this particular yardstick, the Italian Court frequently judges the suitability, proportionality and logic coherence of the contested measure. The constitutional assessment concerning the adequacy of a statute law corresponds to a test of the balance between all constitutionally involved values[78]. The Court decides whether legal restraint of a fundamental right should be considered reasonable to protect another constitutional principle. The result of this "reasonableness test" depends primarily on concrete cases.

It must be excluded that the lawmaker distinguishes between the inalienable conditions of every human being. On the contrary, it must be accepted that, theoretically speaking, Parliament makes every other distinction, because this possibility falls within legislative discretion[79]. Firstly, the Constitutional Court should verify if the different regulations adopted by Parliament to approve the statute challenged by the lower Court

[75] See F. Felicetti, *Discrezionalità legislativa e giudizio di costituzionalità*, in 5 Foro It. 23 (1986), T. Martines, *Motivazione delle sentenze costituzionali e crisi della certezza del diritto*, in T. Martines (ed.), *Opere, Fonti del diritto e giustizia costituzionale* (2000) and R. Romboli, *La mancanza o l'insufficienza della motivazione come criterio di selezione,* in A. Ruggeri (ed.), *La motivazione delle decisioni della Corte costituzionale* (1994).

[76] See for example M. Giampieretti, *Tre tecniche di giudizio in una decisione di ragionevolezza*, in 1 Giur. Cost. 173 (1998) or C. cost. sent. 28/1998.

[77] C. cost. sent. 273/2010.

[78] Cf. V. Onida, *Giudizio di costituzionalità delle leggi e responsabilità finanziaria del Parlamento*, in Aa. Vv., *Le sentenze della Corte costituzionale e l'art. 81 comma ult. Cost. Atti del seminario svoltosi in Roma, Palazzo della Consulta, nei giorni 8 e 9 novembre 1991* (1993). See also above all A. Morrone, *Il custode della* ragionevolezza (2001); C. Colapietro, *La giurisprudenza costituzionale nella crisi dello Stato sociale* (1996).

[79] T. Ancora, *La Corte costituzionale e il potere legislativo*, in 6 Giur. Cost. 3826 (1981).

represent the better way of honoring another constitutional principle. Secondly, it is necessary to consider if a restriction upon one right challenged in the main proceeding is proportionate to the protection of another fundamental right[80]. Only in this way, according to a comparative judgment reviewed on the grounds of Article 3, paragraph 1, of the Italian Constitution, a constitutional defect may be considered a limit to legislative discretion[81].

**4.1. Some paradigmatic cases.**

Decisions of inadmissibility grounded on legislative discretion are not so numerous[82], they concern above all regulations wherein every legal option needs also a political assessment that necessarily falls into Parliament[83]. In general, such

[80] L. Carlassare, *Le decisioni di inammissibilità e di manifesta infondatezza della Corte costituzionale*, in 5 Foro It. 293 (1985); G. Scaccia, *Gli "strumenti" della ragionevolezza nel giudizio costituzionale* (2000) and L. Paladin, *Corte costituzionale principio generale di uguaglianza: aprile 1979-dicembre 1983*, in Aa. Vv., *Scritti in onore di Vezio Crisafulli* (1985).

[81] Article 3, paragraph 1, of the Italian Constitution statutes that: "*All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions*". See especially F. Modugno, *Ancora sui controversi rapporti tra corte costituzionale e potere legislativo*, in 1 Giur. Cost. 19 (1988) and A. D'Andrea, *Ragionevolezza e legittimazione del sistema* (2005). Compare *ex plurimis* to C. cost. sent. 282/2010; C. cost. sent. 161/2009; C. cost. ord. 41/2009; C. cost. sent. 324/2008; C. cost. ord. 71/2007; C. cost. ord. 30/2007; C. cost. sent. 22/2007; C. cost. sent. 394/2006; C. cost. sent. 110/2002; C. cost. sent. 144/2001; C. cost. sent. 313/1995.

[82] R. Basile, *Le decisioni di manifesta inammissibilità e infondatezza per rispetto della discrezionalità del legislatore*, in A. Ruggeri (ed.), *La ridefinizione della forma di governo attraverso la giurisprudenza costituzionale* (2006). After an increase of 20% in the inadmissibility rulings in 1992, we can observe a progressive reduction equal to 6/7% during 2000, and settling in 2006 at 12%.

[83] C. cost. ord. 119/2009; C. cost. ordd. 4/2011; 274/2011; 336/2011; C. cost. ord. 138/2012; C. cost. sentt. 202/2008; 240/2008; 251/2008; 325/2008; 376/2008 and 431/2008; C. cost. sent. 257/2010, C. cost. sent. 117/2011; C. cost. sent. 274/2011; C. cost. sent. 36/2012 and C. cost. sent. 134/2012.". C. cost. sent. 109/2005, C. cost. sent. 163/2005C. cost. sent. 125/1992, annotated by R. Pinardi, *Discrezionalità legislativa ed efficacia temporale delle dichiarazioni di incostituzionalità: la sent. 125 del 1992 come decisione di incostituzionalità accertata ma non dichiarata*, in 4 Giur. Cost. 1083 (1992); C. cost. sent. 431/1993, C. cost. sent. 72/1997; C. cost. sent. 332/2003; C. cost. sent. 175/ 2004; C. cost. sent. 109/2005; C. cost. sent. 61/2006 and C. cost. sent. 22/2007 C. cost. sent. 202/2008; C. cost. sent. 325/2008; C. cost. sent. 376/2008 e C. cost. ord.

decisions involve all those cases where the Court is not able to review the substance of the case, because, by its nature, the matter must be regulated by another branch of government[84]. In this case, a judicial declaration exhibiting a "political question" reflects those constitutional provisions, which the Court and ordinary judges cannot freely interpret as they assign explicit duties to political bodies, using their political discretion[85]. These provisions determine a "non-justiciable area", which changes according to the rights protected and to the specific case. Consequently, the Court will prefer interpretations that uphold legislative power and political institutions[86]. In this perspective, the "political question doctrine" represents a particular technique of interpretation[87] that allows the Court to define the competences of each constitutional body[88].

When considering for example criminal law, legislative discretion determines respectively *quid* and *quomodo* for choices regarding criminal policy. On the one hand, Parliament discretionally individuates punishable acts and criminal offences[89]. On the other hand, it identifies the quality and degree of punishment to be inflicted for unlawful acts[90]. As a result, the

369/2006. See also L. Elia, *La guerra di Spagna come "fatto ideologico": un caso di* "political question", *cit.* at 50, 1749; C. cost. ord. 346/2006; C. cost. ord. 233/2007; C. cost. ordd. 31/2008; 58/2008; 116/2008; 177/2008; 186/2008; 270/2008; 293/2008; 299/2008; 316/2008; 333/2008; 379/2008; 406/2008; 421/2008

[84] C. Mortati, *Istituzioni di diritto pubblico* (1991).

[85] See N. Olivetti-Rason, *La dinamica costituzionale*, cit. at 2.

[86] Compare especially to P. Dionisopoulos, *A commentary on the constitutional issues in the Powell and related cases*, in 17 A. J. P. L. 103 (1968).

[87] Cf. M. Redish, *Judicial review and the "political question"*, in 79 N.Y.U. L. Rev. 1031 (1984) and L. Seidman, *The secret life of the political question doctrine*, in 37 John Marshall L. Rev. 441 (2004).

[88] See G. Hughes, *Civil disobedience and the political question*, cit. at 39

[89] Cf. *ex plurimis* C. cost. sent. 57/2013; C. cost. sent. 175/2012; C. cost. ord. 125/2012; C. cost. sent. 31/2012; C. cost. sent. 289/2011; C. cost. ord. 72/2011; C. cost. sent. 355/2010; C. cost. sent. 273/2010; C. cost. sent. 47/2010; C. cost. ord. 23/2009; C. cost. ord. 270/2008; C. cost. ord. 264/2007; C. cost. ord. 501/2002 and C. cost. ord. 140/2002.

[90] See for example C. cost. sent. 23/2013; C. cost. sent. 134/2012; C. cost. sent. 286/2011; C. cost. sent. 183/2011; C. cost. ord. 196/2008; C. cost. ord. 245/2003; C. cost. ord. 234/2003; C. cost. ord. 172/2003 and C. cost. ord. 254/2005 and C. cost. sent. 394/2006. Compare also to C. cost. sent. 68/2012; C. cost. ord. 336/2011; C. cost. sent. 84/2011; C. cost. ord. 32/2011; C. cost. sent. 294/2010; C.

Constitutional Court seems to be extremely cautious and sometimes even reluctant to intervene in an issue which, by definition, is completely covered by Parliament[91]. Only in a few cases may it assign some operative duties to the legislative power. However, it usually considers the Chambers as the only institutions entitled to make assessments about criminal policy[92]. The only limit the lawmaker has in this subjective matter is to link every criminal offence to a real danger to society. Otherwise, Parliament is completely free, especially when identifying legal goods to protect with criminal penalties[93]. Namely, Parliament is not bound by the Constitution to pursue particular interests[94], having, therefore, a wide margin of discretion to define a criminal offence[95].

In the same way, the Constitutional Court makes decisions of inadmissibility when questions raised by the lower Court call for "manipulative judgments" ("*sentenze manipolative*"), called *in malam partem*[96]. The statutory reserve prescribed by Article 25, paragraph 2, of the Constitution prevents the Italian Court from creating or extending offence, because only Parliament can make assessments concerning punishment and criminality[97].

Another aspect related to the fragile relation between constitutional review and legislative discretion in criminal law

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cost. sent. 250/2010; C. cost. sent. 161/2009; C. cost. ord. 424/2008; C. cost. sent. 145/2002; C. cost. ord. 262/2005 and C. cost. sent. 225/2008.

[91] Compare to A. Ruggeri, *Introduzione ai lavori*, in E. D'Orlando & L. Montanari (eds.), *Il diritto penale nella giurisprudenza costituzionale*, *Atti del seminario di studio del Gruppo di Pisa. Udine 7 novembre 2008* (2009) and G. Vassalli, *Diritto penale e giurisprudenza costituzionale,* in 1 Riv. It. Dir. Proc. Pen. 3 (2008) p. 3.

[92] C. cost. sent. 409/1989; C. cost., sent. 225/2008.

[93] A. Bonomi, *La discrezionalità assoluta del legislatore,* in E. D'orlando & L. Montanari (eds.), *Il diritto penale nella giurisprudenza costituzionale. Atti del seminario di studio del Gruppo di Pisa. Udine 7 novembre 2008* (2009).

[94] Cf. C. cost. sent. 71/1978.

[95] C. cost. sent. 225 /2008.

[96] Compare to C. Cost. ord. 187/2005; C. Cost. ord. 164/2007 and C. Cost. ord. 407/2007.

[97] See C. Cost. ord. 164/2007; C. cost. sent. 183/2000; C. cost. sent. 49/2002 and C. cost. sent. 61/2004. Article 25 of the Italian Constitution statues that: "*No one may be withheld from the jurisdiction of the judge previously ascertained by law. No one may be punished except on the basis of a law in force prior to the time when the offence was committed. No one may be subjected to restrictive measures except in those cases provided for by the law*".

pertains to the connection between criminal provision and the "rule of offensiveness" (so called "*principio di offensività*")[98]. This principle had always represented a constitutional limit to parliamentary discretion in substantive criminal law[99]. Nevertheless, constitutional decisions related to "rule of offensiveness" do not go through the substance of the case, and this provision is not a trenchant parameter in constitutional proceedings concerning the merits of substantive criminal law. The Court very rarely used this rule as a unique or autonomous parameter to strike down contested measures[100] and habitually prefers to use it together with other more specific constitutional principles[101]. In this way, the Court avoids interfering directly with parliamentary discretion in criminal policy, involves ordinary judges, develops the doctrine of interpretation in conformity with the Constitution, and asks them to interpret, as far as possible, criminal provisions in conformity with the "rule of offensiveness"[102].

In all cases regulating substantive criminal law, the sole limit to a free use of legislative discretion is due to strict observance of the "rule of reasonableness"[103]. In fact, the adoption of an unreasonable criminal provision represents a symptomatic example of misuse of discretionary power constitutionally given to Parliament[104].

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[98] M. Donini, *Teoria del reato*, in 16 Dig. Disc. Pen. 267 (1999). See also F. Palazzo, *Offensività e ragionevolezza nel controllo di costituzionalità sul contenuto delle leggi penali*, in G. Giostra & G. Insolera (eds.), *Costituzione, diritto e processo penale. I quarant'anni della Corte costituzionale* (1998).

[99] C. cost., sent. n. 360 del 1995, punto 7 del considerato in diritto.

[100] See C. cost. sent. 354/2002 and C. cost. sent. 263/2000.

[101] *Ex multis* cf. C. cost. sent. 370/1996.

[102] See A. Morrone, *Il custode della ragionevolezza*, Milano, cit. at 71, 229.

[103] Cf.. C. cost. sent. 291/2010; C. cost. sent. 250/2010; C. cost. sent. 324/2008; C. cost. sent. 74/2008; C. cost. sent. 22/2007; C. cost. sent. 361/2007; C. cost. ord. 394/2006; C. cost. sent. 206/2006; C. cost. ord. 212/2004; C. cost. ord. 262/2005; C. cost. ord. 234/2003; C. cost. sent. 206/2003; C. cost. sent. 313/1995; C. cost. sent. 144/2001; C. cost. sent. 409/1989 and C. cost. sent. 144/1970. See also A. Bevere, *Ragionevolezza del trattamento sanzionatorio penale nella legislazione e nella giurisprudenza*, in A. Cerri (ed.), *La ragionevolezza nella ricerca scientifica ed il suo ruolo specifico nel sapere giuridico. Atti del convegno di studi Roma, 2-4 ottobre 2006* (2007).

[104]. C. cost. sent. 161/2009; C. cost. sent. 234/2007; C. cost. sent. 224/2006; C. cost. sent. 364/2004; C. cost. sent. 117/2003; C. cost. sent. 287/2000; C. cost. sent.

In many respects, immigration law is fairly similar to substantive criminal law. In this subject matter the Italian Constitutional Court, at least formally, gives Parliament a wide margin of discretion[105]. According to the Court, entry and residence regulations governing a foreign citizen in national territory must be balanced with several general interests, i.e. public security, public health, public policy and international obligations, which above all imply a political assessment[106]. Those considerations lie exclusively with Parliament that is free to regulate this specific subject matter. The one and only limit fixed by the Constitution is that discretionary political choices must not be manifestly unreasonable or arbitrary[107].

When a decision on the substance of the case entails scientific and technical evaluations, the Constitutional Court declines its jurisdiction to preserve legislative discretion[108]. These are sector-based assessments which go beyond constitutional jurisdiction and which are usually regulated by specialized auxiliary parliamentary bodies. Therefore, the Constitutional Court considers that this need to make technical evaluations prevents it from deciding the merits of the case[109]. Even in these

58/1999 and C. cost. sent. 104/1969. Compare also to C. cost. sent. 148/2008; C. cost. sent. 394/2006; C. cost. ord. 234/2003; C. cost. ord. 144/2001; C. cost. ord. 297/1998 and C. cost. sent. 133/1995.

105 C. cost. sent. 148/2008. See also C. cost. sent. 172/2012; C. cost. sent. 245/2011; C. cost. sent. 64/2011; C. cost. sent. 299/2010; C. cost. sent. 249/2010; C. cost. ord. 218/2007; C. cost. sent. 206/2006; C. cost. ord. 44/2006 and C. cost. sent. 62/1994.

106 C. cost. sent. 202/2013; C. Cost. sent. 110/2012; C. cost. sent. 307/2011; C. cost. sent. 144/2011; C. cost. ord. 32/2011; C. cost. sent. 250/2010; C. cost. 139/2010: C. cost. sent. 148/2008; C. cost. sent. 206/2007; C. cost. ord. 126/2005 and C. cost. sent. 5/2004.

107 See C. cost. sent. 250/2010. *Ex multis* cf. also C. cost. sent. 57/2013; C. cost. sent. 172/2012; C. cost. sent. 299/2010; C. cost. sent. 245/2011; C. cost. sent. 231/2011; C. cost. sent. 265/2011; C. cost. sent. 164/2010; C. cost. sent. 249/2010; C. cost. sent. 148/2008; C. cost. ord. 218/2007; C. cost. ord. 44/2007; C. cost. sent. 206/2006; C. cost. sent. 62/1994; C. cost. sent. 144/1970 and C. cost. sent. 104/1969,

108 Cf., for example, C. cost. sent. 20/2012; C. cost. sent. 323/2008; C. cost. sent. 342/2006;C. cost. ord. 246/2003; C. cost. sent. 282/2002; C. cost. sent. 185/1998; C. cost. ord. 300/2001 and C. cost. sent. 139/1982;.

109 Compare to C. cost. sent. 271/2008; C. cost. sent. 338/2003; C. cost. sent. 226/2000; C. cost. sent. 372/1998; C. cost. sent. 258/1994; C. cost., sent.

circumstances parliamentary discretion could be reviewed through a "reasonableness check"[110]. Questions of unconstitutionality that present both scientific evaluations and ethical aspects are more problematic. In these particular cases, decisions of inadmissibility constitute a special "technique of avoidance", through which the Court chooses to decline jurisdiction in order to prevent rifts in its relationships with all political bodies. This is particularly manifest when scientific evidence is controversial and ideological views are much divided[111].

Finally, the Constitutional Court grants Parliament a wide margin of discretion in procedural law[112]. According to constitutional jurisprudence, the Italian Constitution does not provide a binding model for trials[113], so Parliament is free to define procedural rules. Procedural guarantees given by the

170/1982 and C. cost., sent. 22/1967 e.. See *passim* G. D'amico, *Scienza e diritto nella prospettiva del giudice delle leggi* (2008).

[110] Cf. C. cost. sent. 273/2011; C. cost. sent. 151/2009; C. cost. sent. 333/1991; C. cost. sent. 87/1989; C. cost. ord. 386/1987 and C. cost. sent. 180/1982.

[111] For example, regarding assisted reproductive technology, see C. cost. ord. 369/2006. L. Trucco, *La procreazione medicalmente assistita al vaglio della Corte costituzionale*, in www.giurcost.org; A. Morelli, *Quando la Corte decide di non decidere. Mancato ricorso all'illegittimità consequenziale e selezione discrezionale dei casi*, in www.forumcostituzionale.it and A. Celotto, *La Corte costituzionale "decide di non decidere" sulla procreazione medicalmente assistita*, in 6 Giur. Cost. 3846 (2006). In general compare to V. Barsotti, *L'arte di tacere strumenti e tecniche di non decisione della Corte suprema degli Stati Uniti* (1999).

[112] *Ex multis* see C. cost. sent. 119/2013; C. cost. ord. 276/2012; C. cost. ord. 270/2012; C. cost. sent. 304/2011; C. cost. ord. 31/2011; C. cost. sent.216/2011; C. cost. sent. 17/2011; C. cost. sent. 329/2009; C. cost. sent. 266/2009; C. cost. sent. 240/2008; C. cost. sent. 237/2007 and C. cost. ord. 305/2001. Especially through decisions which declare unfounded doubts over constitutionality, compare to C. cost. ord. 286/2012; C. cost. sent. 237/2012; C. cost. sent. 117/2012; C. cost. sent. 254/2011; C. cost. ord. 141/2011; C. cost. ord. 74/2011; C. cost. sent. 230/2010; C. cost. sent. 50/2010; C. cost. ord. 446/2007; C. cost. ord. 67/2007; C. cost. ord. 389/2005; C. cost. sent. 379/2005 and C. cost. sent. 427/1999

[113] C. cost., sent. 341/2006, Cf. also C. cost. ord. 88/2013; C. cost. ord. 26/2012; C. cost. ord. 290/2011; C. cost. sent. 220/2011; C. cost. sent. 130/2011; C. cost. ord. 343/2010; C. cost. sent. 221/2008; C. cost. sent. 417/2007 and C. cost. ord. 101/2006.

lawmaker must only be reasonable and must ensure the right to a fair hearing and equality of arms[114].

**5. Decisions of inadmissibility and their dual nature.**

The Italian Constitutional Court makes decisions of inadmissibility grounded on the respect of legislative discretion also when the case in question should be resolved by a plurality of legal assessments, all in conformity with the Constitution. The selection between all those solutions falls into Parliament.

These decisions justify better than others the adoption of a verdict of inadmissibility. The presence of subject matter covered by legislative discretion, regarding which there is no binding solution under the Constitution, ensures that Parliament is the unique institution, which is able to balance all the constitutional interests involved. Therefore, the Court declines its jurisdiction because it cannot stay within the "prescribed verses" (or the so called "*rime obbligate*")[115]. As emphasized by eminent scholars, the Constitutional Court, especially in judgments based on Article 3 of the Constitution, may add only those clauses that the Constitution requires. When the choice amongst a variety of solutions depends on a discretionary balancing of values, the Court stated that it may not try to establish the law[116].

Focusing on latest constitutional jurisprudence[117], it is worth mentioning the decision 138/2010. This judgment hereby

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[114] C. cost. sent. 295/1995 and C. cost. sent. 180/2004, See also C. cost. ord. 240/2012; C. cost. ord. 194/2012; C. cost. ord. 290/2011; C. cost. sent. 17/2011; C. cost. sent. 229/2010; C. cost. sent. 52/2010; C. cost. sent. 50/2010; C. cost. ord. 162/2009; C. cost. ord. 134/2009; C. cost. sent. 221/2008; C. cost. sent. 237/2007; C. cost. sent. 341/2006; C. cost. sent. 116/2006 and C. cost. sent. 376/2001.

[115] Cf. C. cost. sent. 134/2013; C. cost. sent. 301/2012; C. cost. ord. 138/2012; C. cost. sent. 134/2012; C. cost. ord. 113/2012; C. cost. sent. 36/2012; C. cost. sent. 274/2011; C. cost. sent. 271/2010; C. cost. ord. 77/2010; C. cost. ord. 182/2009 and C. cost. ord. 83/2007

[116] V. Crisafulli, *Lezioni di diritto costituzionale* (1974). Compare to D. Schkade, L. Ellman, A. Sawicki & R. Sunstein (eds.), *Are judges political? An Empirical Analysis of the Federal Judiciary* (2006).

[117] See C. cost. ord. 287/2009. Compare also to C. cost. sentt. 58, 103, 138, 250, 256, 257, 271, 294/2010; C. cost. sent. 274/2011; C. cost. sent. 36/2012; C. cost. sent. 134/2012 and. C. cost. ordd. 22, 105, 164, 276, 318, 321, 322, 336 e 335/2010; C. cost. ord. 44/2011 and C. cost. ord. 336/2011.

stands out not so much for the case in question, but for the procedural choices made by the Constitutional Court. It made a decision of inadmissibility, by individuating a discretionary power covered by Parliament. Starting from a comparative analysis of legislation about the legal recognition of same-sex marriages in the EU countries, the Italian Court highlights a variety of solutions, which depend on a discretionary balance between values, all of which are theoretically in conformity with the Constitution. Therefore, the choice among those legal solutions is left to parliamentary discretion, while the Constitutional Court can only intervene in order to protect particular cases[118]. Considering the topical and sensitive issue, it can be affirmed that the Court avoided a decision on the substance of the case and thus made a procedural decision, representing a compromise between all the ideological positions involved[119].

In this case, the "political question doctrine" seems to be a particular "technique of avoidance" that allows the Court to define constitutional problems, which, by their nature, are not justiciable because they involve specific subject matters covered by Parliament, departments of Government or voters[120].

The Italian Constitutional Court makes decisions of inadmissibility grounded on observance of legislative discretion, also when it is not able to adopt a "manipulative judgment" ("*sentenza manipolativa*"). On the one hand, the Court usually declares a law to be violating the Constitution to the extent that it lacks a norm that is constitutionally necessary and then it adds the missing rule to the statute ("*sentenze additive*"). On the other hand, it could also happen that instead of simply striking down the law,

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[118] Cf. for example R. Romboli, *Il diritto "consentito" al matrimonio ed il diritto "garantito" alla vita familiare per le coppie omosessuali in una pronuncia in cui la Corte dice "troppo" e "troppo poco"*, in *Giur. cost.*, 2010, p. 1629; A. Pugiotto, *Una lettura non reticente della sent. n. 138/2010: il monopolio eterosessuale del matrimonio*, in Aa.Vv., *Scritti in onore di Franco Modugno* (2011); I. Massa Pinto & C. Tripodina, *Le unioni omosessuali non possono essere ritenute omogenee al matrimonio. Tecniche argomentative impiegate dalla Corte costituzionale per motivare la sentenza n. 138 del 2010*, in 2 Dir. Pubbl. 471 (2010) and B. Pezzini, *Il matrimonio same-sex si potrà fare. La qualificazione della discrezionalità del legislatore nella sent. n. 138 del 2010 della Corte costituzionale*, in 4 Giur. Cost. 2715 (2010).

[119] C. cost. sent. 138/2010.

[120] See M. Finkelstein, *Judicial self-limitation,* cit. at 12; L. Henkin, *Is there a "political question" doctrine?,* cit. at. 41 and G. Zagrebelsky, *Il diritto mite*, cit. at 7.

the Constitutional Court carries out the substitution itself and fills a legal *vacuum* that would be created if the Court simply issues a judgment of acceptance ("*sentenze sostitutive*")[121]. It is clear that when there are a variety of legal solutions, each one being in conformity with the Constitution, a "manipulative judgment" could never be made and only Parliament is able to find a legal solution[122]. In this perspective, the question could be considered political because it concerns an assessment covered by legislative power and the pre-emptive analysis of the political aspect represents a necessary requirement[123]. In these situations, political decision-makers must resolve the case[124].

Through these decisions, the Italian Constitutional Court acknowledges the inadequacy of its traditional judgment in order to resolve the particular case[125]. This element stresses the dual nature of decisions of inadmissibility. They represent a safe and simple mechanism of avoiding a decision on the substance of the case, especially when concrete cases are controversial and, by delivering these decisions, the Court testifies to its inability to protect fundamental rights in the concrete situation. A decision of inadmissibility represents a sort of *extrema ratio* adopted by the Court when it cannot make a decision on the substance of the case[126]. When the Constitutional Court is not able to guarantee a reasonable balance between legislative discretion, constitutional review and concrete case solutions, it will probably adopt decisions of inadmissibility**,** underlining the defect of its legal instruments to deal with "political question"[127].

### 6. "Political question" and concrete case resolution

Decisions through which the Court decides on a "political question" are very flexible and allow it to measure the impact of

[121] Compare to V. Crisafulli, *Lezioni,* cit. at 116.
[122] P.A. Capotosti, *Matrimonio tra persone dello stesso sesso: infondatezza vs. inammissibilità nella sentenza n. 138 del 2010*, in 3 Quad. Cost. 361 (2010).
[123] Cf. C. cost. sent. 256/2010 and C. cost., sent. 109/1986.
[124] See C. Piperno, *La Corte costituzionale e il limite della* political question (1991).
[125] Compare to L. Paladin, *La giustizia costituzionale nel 1985. Conferenza stampa del 23 gennaio 1986*.
[126] Cf. A. Ruggeri & A. Spadaro, *Lineamenti di giustizia costituzionale*, cit. at 21, 168.
[127] R. Romboli, E. Malfatti & S. Panizza, *Giustizia costituzionale* (2011).

its judgments when these concern its relationships with Parliament[128]. They represent an interest in the resolution of the concrete case precisely because they confirm the substantial insufficiency of the ordinary regulatory instruments available to the Court in satisfying the applications put forward by the parties in the main proceeding[129]. For these reasons, the Court often decides on the way in which its own decisions affect concretely on the contested measure, especially in cases where it considers that a completely automatic application of its judgment could be excessively serious for the intervener's interest.

From this point of view, the development of the Italian constitutional jurisprudence and the judicial creation of new types of judgments could be reconnected to the provisions adopted in several legal systems – for instance, Germany or Austria – that allows the Constitutional Courts to modulate the consequences of their assessment[130]. This approach gives to Parliament the opportunity to better-regulate the contested measure, it protects the legislative discretion, and it also makes acceptable to politics the decision through which the Court declares the challenged provision to be unconstitutional.

This new trend increased in Italy during the Nineties, when the bipolarization of national parties forced the Court to decide on the constitutionality of recent and politically controversial statute law, or on proceedings concerning a jurisdictional dispute between branches of state highly characterized by a particular political tone, or finally on ethically sensitive issues[131]. The Court has thus progressively identified both technical means that would allow it to limit the retroactivity of its judgments and means,

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[128] M. Luciani, *Le decisioni processuali e la logica del giudizio costituzionale incidentale*, cit. at 60, 209.

[129] See for example C. Mezzanotte, *Il contenimento della retroattività degli effetti delle sentenze di accoglimento come questione di diritto costituzionale sostanziale*, in Aa. Vv., *Effetti temporali delle sentenze della Corte costituzionale anche con riferimento alle esperienze straniere, Atti del seminario di studi tenuto al palazzo della consulta il 23 e 24 novembre 1988* (1988).

[130] Especially distinguishing between the time when a provision is ruled unconstitutional and when the ruling becomes effective, See H. Schwartz, *The new East-European Constitutional Courts*, in A. Howard (ed.*), Constitution making in Eastern Europe* (1993) and C. Landfried, *Constitutional review and legislation. An international comparison* (1988).

[131] T. Groppi, *La legittimazione della giustizia costituzionale,* cit. at 5.

which project its effects largely into the future, delaying the consequences of the judgments of acceptance ("*sentenze di accoglimento*"). In this way, the Constitutional Court allows the Parliament to intervene and rule on the matter in accordance with its own political timings and its own discretionary options[132].

A particular nuance of the latter decision-making technique is certainly represented by the so-called judgments of "*incostituzionalità accertata ma non dichiarata*" or "*inammissibilità con dichiarazione di incostituzionalità*" (i.e. "confirmed but not declared unconstitutionality" or by "inadmissibility with a declaration of unconstitutionality"), by which the Court underlines the unconstitutionality of a challenged provision but, at the same time, it dismisses the claim proposed by the referring judge, in order to preserve parliamentary discretion[133], retaining in the legal system a rule which is surely unconstitutional[134]. Hence, by using these decisions the Italian Court, on the one hand, prevents the possibility of creating a lack of legislation and respects parliamentary discretion, preferring to keep, at least temporarily, the unconstitutional provision to enable the Parliament to adhere to the judgement rules[135], but, on the other hand, it would appear to contradict its own function. Indeed, the constitutional review of a legal provision cannot be excluded because of the simple fact that a judgment of acceptance needs a further legislative

[132] A. Ruggeri & A. Spadaro, *Lineamenti di giustizia costituzionale*, cit. at 21.

[133] Compare for example to C. cost. sent. 466/2002; C. cost. sent. 18/2003; C. cost. sent. 467/1991; C. cost. sent. 125/1992 and C. cost. sent. 256/1992. V. Onida, *Giudizio di costituzionalità delle leggi e responsabilità finanziaria del Parlamento*, cit. at 78, 36. Cf. to A. Stone, *Abstract constitutional review and policy making in Western Europe*, in D. Jackson & N. Tate (eds.), *Comparative judicial review and public policy* (1992).

[134] E. Rossi, *Corte costituzionale e discrezionalità del legislatore*, in R. Balduzzi, M. Cavino & J. Luther (eds.), *La giustizia costituzionale vent'anni dopo la svolta. Atti del Seminario svoltosi a Stresa il 12 novembre 2010* (2011); L. Carlassare, *Un inquietante esempio di «inammissibilità» a proposito dell'imputato infermo di mente*, in 3 Giur. Cost. 1314 (1981). See also V. Ferreres-Comella, *Constitutional courts and democratic values: a European perspective* (2009).

[135] See R. Pinardi, *L'*horror vacui *nel giudizio sulle leggi. Prassi e tecniche decisionali utilizzate dalla Corte costituzionale allo scopo di ovviare all'inerzia del legislatore* (2007).

intervention or because there is the potential risk, that the political debate does not start quickly[136].

In order to preserve the overall coherence of the legal system, the Court has developed new decision-making techniques allowing it to intervene again, especially in cases of parliamentary inaction. In this case, the unconstitutionality of a challenged rule induces the Court to accompany the decision of inadmissibility by an exhortation to Parliament[137], to intervene to adequate the law to constitutional precepts[138]. The consistency of the exhortation is determined by both the degree of actual discomfort perceived regarding the failure of a specific regulation to conform to the principles of the Constitution and the results of the legal prognosis concerning the jurisdictional remedies, which can possibly be effected in concrete terms in the case of prolonged inactivity by the lawmaker[139]. The exhortation can represent either the harbinger of a future declaration of unconstitutionality or a useful mechanism to plead to Parliament to find a remedy to a situation regarding which the Court cannot respond in appropriate terms[140]. Concerning future legislative options, the so-called "*moniti*" (or "exhortative judgments") respect parliamentary prerogatives, leaving to the representative bodies the right to comply with the requests contained in the judgment. This type of judgments seems to represent the most useful option to safeguard political discretion. Given that, it openly institutes a collaboration between the Constitutional Court and Parliament, indicating to the legislative power the problematic aspects of a particular rule, leaving to the political process the possibility of defining the most appropriate solutions to remove the situation of

136 L. Elia, *Le sentenze additive e la più recente giurisprudenza della Corte costituzionale (ottobre '81-luglio '85)*, in Aa. Vv., *Scritti in onore di Vezio Crisafulli* (1985); G. D'Orazio, *Le sentenze costituzionali additive tra esaltazione e contestazione*, in 3 Riv. Trim. Dir. Pubbl. 82 (1993); G.P. Dolso, *Le sentenze additive di principio: profili ricostruttivi e prospettive*, in 6 Giur. Cost. 4111 (1999).

137 G. Zagrebelsky & V. Marcenò, *La giustizia costituzionale*, cit. at 20, 305. See for example C. Cost. sent. 230/1987 and C. cost. sent. 266/1988.

138 Cf. C. cost. sent. 22/2007.

139 Compare to V. Marcenò, *La Corte costituzionale e le omissioni incostituzionali del legislatore: verso nuove tecniche decisorie*, in 4 Giur. Cost. 1985 (2000).

140 L. Elia, *Il potere creativo delle Corti costituzionali*, in Aa. Vv., *Le sentenze in Europa. Metodo tecniche e stile* (1988).

unconstitutionality underlined by the Court[141]. On the contrary, these verdicts temporarily privilege the timings and the methods of the political process regarding the demand for constitutional justice lodged by the parties in the concrete case[142].

For this reason, the Constitutional Court often prefers to adopt decisions, which manage at the same time to protect legislative discretion and a settlement in the concrete case, without having to apply a rule, which is clearly in contrast with the constitution. In this sense, the Constitutional Court developed a new type of judgments that declare provisions unconstitutional because of an omission, but instead of adding the rule that is missing, as it would with a conventional additive judgment, it simply indicates the principle that should be followed by Parliament in integrating the statute law (so-called "*sentenze additive di principio*")[143]. In these cases, the object of the justiciable act moves from the law to the exercising or failure to exercise of legislative power[144].

A cooperative relationship is thus established between the Constitutional Court, Parliament and ordinary judges, according to which, while the first abstains from effecting "manipulative judgments" ("*sentenze manipolative*") directly on the challenged

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[141] Cf. C. cost. sent. 179/1976, C. cost. sent. 148/1981, C. cost. sent. 212/1986, C. cost. sent. 215/1987, C. cost. ord. 176/1988, C. cost. ord. 586/1988, C. cost. sent. 826/1988, C. cost. sent. 202/1991, C. cost. sent. 284/1995, C. cost. sent. 436/1999, C. cost. sent. 526/2000, C. cost. sent. 310/2003, C. cost. sent. 32/2004, C. cost. sent. 155/2004, C. cost. sent. 61/2006. Among the scholars see L. Carlassare, *Le decisioni d'inammissibilità e di manifesta infondatezza della Corte costituzionale*, cit. at 51

[142] A. Ruggeri, Vacatio sententiae, "*retroattività parziale" e nuovi tipi di pronunzie della Corte costituzionale*, in Aa.Vv., *Effetti temporali delle sentenze della Corte costituzionale anche con riferimento alle esperienze straniere* (1989).

[143] R. Romboli, *Sull'esistenza di scelte riservate alla discrezionalità del legislatore*, in 2/3 Perc. Cost. 67 (2010).

[144] Compare to C. cost. sent. 215/1987, C. cost. sent. 560/1987, C. cost. sent. 406/1988, C. cost. sent. 497/1988, C. cost. sent. 277/1991, C. cost. sent. 88/1992, C. cost. sent. 204/1992, C. cost. sent. 232/1992, C. cost. sent. 109/1993, C. cost. sent. 243/1993, C. cost. sent. 455/1993, C. cost. sent. 218/1994, C. cost. sent. 284/1995, C. cost. sent. 171/1996, C. cost. sent. 52/1998, C. cost. sent. 417/1998, C. cost. sent. 26/1999, C. cost. sent. 61/1999, C. cost. sent. 270/1999; G. Salerno, *Una sentenza additiva di prestazione (rimessa al legislatore) in tema di indennità di disoccupazione involontaria*, in 2 Giur. It. 776 (1989); G. Parodi, *Le sentenze additive di principio*, in 5 Foro It. 160 (1998).

provision in observance of legislative discretion, the Parliament is openly exhorted to review the contested measure. In a contrary case, the ordinary judges can intervene promptly, by applying to concrete cases the principle indicated by the Court, without any need for further legislative intervention. In this way, the Parliament retains its own freedom of intervention unaltered. The lawmaker can freely choose the timing of the implementation of the principle indicated by the Court, because of the various requirements of a political nature, which arise in a specific situation. Parliament can legitimately decide from a ruling on that particular matter, without fear of leaving the protection of the different positions involved devoid of protection, given the self-applicative character of the principle set out. Again, the Chambers can decide on the methods of effecting the principle. Finally, Parliament can act freely also in relation to the amount, especially in a case where it a question not so much of redefining the matter of a specific right, but establishing the degree, when the constitutional provision is breached by an incongruous or disproportionate ruling[145].

Obviously, the presumption for similar decisions rests on a declaration of unconstitutionality accompanied by the identification of a plurality of possible remedies likely to solve the issue. The restoration of a situation of constitutionality requires therefore the precise identification of a solution that, because of the changing nature of the criteria used and the means adopted to reconcile opposing interests, must necessary be submitted to political evaluation[146]. In this way, the Constitutional Court and the Parliament are able to each exercise their own roles: the former by making the necessary judgment of acceptance; the latter through the addition of the statute law, confirming the principle indicated by the Court and balancing the interests involved[147].

The judicial creation of all these new types of decisions tries to reconcile both the urgency to preserve legislative discretion, related to the legitimacy of the constitutional review, and the need

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145 See A. Guazzarotti, *L'auto-applicabilità delle sentenze additive di principio*, in 5 Giur. Cost. 3437 (2002) and A. Cerri, *Corso di giustizia costituzionale*, cit. at 54.

146 Cf. C. cost. sent. 215/1987 and C. cost. sent. 277/1991.

147 Compare to G. Silvestri, *Le sentenze normative della Corte costituzionale*, cit. at 68 and A. Anzon, *Modello ed effetti della sentenza costituzionale sul caso Di Bella. Nota a C. cost. sent. 185/1998*, in 3 Giur. Cost. 1510 (1998).

to safeguard the protection of rights in the specific case. From this point of view, this trend could be compared with the recent attempt made in the "*New Commonwealth Model of Constitutionalism*" that is to say in legal systems, which is intermediate between the "weak forms of judicial review" and the "strong form of judicial review"[148]. This phenomenon lately developed in some "common law" Countries, such as Canada, New Zealand, Australia and Israel – but also in the United Kingdom – after the adoption of their respective "Bill of rights". It gives to Parliament the opportunity to intervene in regulating the contested measure, according to their different ways. Along these lines, the Courts provide a resolution for the specific case, protecting the rights of the parties, but, at the same time, the lawmaker could easily reverse the decision, regulating differently the subject matter[149].

**7. Procedural decisions and case selection**

As mentioned above, the use of the decisions by which the Constitutional Court confirm the existence of a matter reserved for parliamentary discretion, also constitutes a particular "technique of avoidance" regarding extremely delicate questions on the socio-political level[150]. Usually case selection refers to those operations that enable a judge to choose between several pending proceedings, to be able to concentrate its attention on those cases and controversies most suitable for a judicial review[151]. Such a similar power does not seem, at least on the surface, to be assigned to the Italian Constitutional Court[152].

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148 S. Garbaum, *The new Commonwealth model of constitutionalism*, in 34 Am. J. Comp. L. 707 (2001).

149 See R. Hirschl, *Towards juristocracy. The origins and consequences of new constitutionalism* (2004)

150 Cf. P. Calamandrei, *La illegittimità costituzionale delle leggi nel processo civile* (1950). Compare to R. Hirschl, *The question of case selection in comparative constitutional law*, in 4 Am. J. Comp. L. 125 (2005) T. Koopmans, *Courts and political institutions. A comparative view* (2003).

151 Compare to P. Bianchi, *Le tecniche di giudizio e la selezione dei casi*, in Aa.Vv., *L'accesso alla giustizia costituzionale: caratteri, limiti, prospettive di un modello* (2006).

152 F. Tirio, *Il* writ of certiorari *davanti alla Corte Suprema* (2000).

Article 1, paragraph 1, of the Constitutional Law 1/1948[153] seems to institute a real obligation for the Italian Court, setting out that the question of unconstitutionality must be referred to the Court for its decision. The aim of the constitutional proceeding is to lead to a ruling on the constitutional consistency of laws and enactments having the force of law. Therefore, the natural conclusion of the constitutional review must always coincide with a decision of the Court. In addition, Article 18 of the so-called "*Norme Integrative*" provides that the suspension, interruption or time limitation in the main proceeding do not have effects on the constitutional proceeding. This fact emphasizes the fundamentally *ex officio* nature of the *incidenter* proceeding and the associated requirement that once started should lead to a final and conclusive judgment[154]. In the same way, Article 27 of Law 87/1953[155], stating the perfect correspondence between the question of unconstitutionality put to the Court and the answer it gives in its judgment, leaves an obligation for the Court to respond to the doubts of constitutionality, which are, from time to time, submitted to it[156]. It follows that, not only there is no trace of a provision, which specifically expresses a "case selection", but also a systematic analysis of the statutes makes one incline towards the existence of an opposite rule, which also creates, *vis-a-vis* the Constitutional Court, a sort of obligation to provide an answer to all the questions submitted to it[157]. Given the above mentioned, it

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153 According to Art. 1, l. cost. 1/1948: "*The question of unconstitutionality regarding a law or enactments having the force of law referred ex officio or suggested to the Judge by one of the parties in the main proceedings and that is considered relevant to the case and show no signs of being groundless, has to be decided by the Constitutional Court for its decision*".

154 According to art. 18, Norme Integrative per i giudizi di fronte alla Corte costituzionale: "*The suspension, the interruption and the extintion of the main proceeding do not affect the constitutional review*".

155 According to art. 27, Law 87/1953 "*The Constitutional Court, when granting a referral order or a question regarding a law or enactments having the force of law states, according to the appeal, which are the provisions contrary to the Constitution. It also states which are the other legislative provisions whose illegitimacy derives from the main judgement of unconstitutionality*".

156 Compare to E. Catelani, *La determinazione della "questione di legittimità costituzionale" nel giudizio incidentale* (1993).

157 A positive case selection can be recognized in Article 37, par. 3, of Law 87/1953 concerning any conflict of responsibility between branches of the State, regarding which: "… The Court decides on the admissibility of the questions

appears useful to see if the Italian Constitutional Court retains further margins of manoeuvre that would permit it to indirectly proceed to a case selection using solutions derived from case law[158].

Evidently, this power could certainly emerge when dealing with "political question" which lead the Court to choose what would be the most suitable branch of government to resolve the controversy and the flexibility, which marks procedural decisions, enables in practice the adoption of real filtering mechanisms[159]. Therefore, even if the Constitutional Court does not systematically have the use of decisions, which would allow it to effect a case selection in the technical sense, it could still use its own range of decisions to select the cases to be decided on their substance[160]. In other words, even though none of the procedural decisions normally used by the Italian Court to effect case selection in the presence of one or more "political question" were to be created, several techniques effectively able to perform this function may be identified.

Firstly, decisions of inadmissibility that allow the Italian Constitutional Court to settle rapidly the question of unconstitutionality without having to examine the merits of the case must be considered. Nevertheless, it is rather complicated to identify with certainty those cases in which the Court uses a procedural decision, which considers it not appropriate to deal with a controversy featuring issues of a political nature. Only by closely examining the grounds can one obtain a more or less clear

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with order adopted in closed session on the *La Corte decide con ordinanza in Camera di consiglio sulla ammissibilità del ricorso …*".

158 A. Pizzorusso, *Verfassungsgerichtsbarkeit or Judicial Review of Legislation?*, in 5 Foro It. 1933 (1979).

159 Compare to D. Provine, *Case Selection in the United States Supreme Court* (1980); H. Abraham, *The judicial process: an introductory analysis of the courts of the United States, England, and France* (1980) and E. Mak, *Judicial decision making in a globalized world. A comparative analysis* (2013).

160 P. Bianchi, *La creazione giurisprudenziale delle tecniche di selezione dei* casi (1997). See also A. Hellman, *Case selection in the Burger Court: a preliminary inquiry*, in 37 Notre Dame L. Rev. 947 (1985); M. Cordray & R. Cordray, *Philosophy of certiorari: jurisprudential considerations in Supreme Court case selection*, in 2 Wash. Univ. L. Rev. 389 (2004).

legal assessment on the suitability of the challenged political choice[161].

Secondly, in order to avoid an examination of one or more cases considered politically controversial, the Court often argues a failure to state reason in the question of unconstitutionality. This expedient presents the undoubted advantage of assigning to the lower Court the formal reasons that are preventing an analysis of the substance of the case. It also allows the Constitutional Court to establish a dialogue with the judiciary that, following the indications of the Court, can reformulate its own question of unconstitutionality[162].

Moreover, the Constitutional Court seems to use, as a technique of indirect cases selection, those decisions which, when dealing with a matter falling within the discretion of the lawmaker, demur at an absent or inadequate attempt at interpretation in conformity with the Constitution[163]. This vague intention appears obvious especially in a case where the Court, by adopting a decision of inadmissibility, enables it to be over-ridden by an interpretation in conformity with the Constitution, which itself intends to indicate[164]. However, the situation can assume much more problematic overtones when it refers to a legislative omission regarding which the Constitutional Court prefers to assign the judiciary the task of balancing the individual principles involved in concrete terms. By refusing to identify the most suitable rule for resolving this specific dispute, the Court

[161] G.P. Dolso, *Giudici e Corte alle soglie del giudizio di costituzionalità* (2003).

[162] Compare to R. Romboli, *La mancanza o l'insufficienza della motivazione come criterio di selezione dei giudizi*, in A. Ruggeri (ed.), *La motivazione delle decisioni della Corte costituzionale* (1994).

[163] Cf. *ex plurimis* G. Sorrenti, *L'interpretazione conforme a Costituzione* (2006); G.U. Rescigno, *Quale criterio per scegliere una sentenza interpretativa di rigetto anziché una ordinanza di inammissibilità per mancato tentativo di interpretazione adeguatrice?*, in 6 Giur. Cost. 3362 (2008); V. Marcenò, *Le ordinanze di manifesta inammissibilità per insufficiente sforzo interpretativo: una tecnica che può coesistere con le decisioni manipolative (di norme) e con la dottrina del diritto vivente*, in 2 Giur. Cost. 785 (2005). See also C. cost. sent. 347/1998, C. cost. ord. 448/2007 and C. cost. ord. 205/2008.

[164] F. Tirio, *Selezione discrezionale dei casi davanti alla Corte Suprema federale statunitense*, in P. Costanzo (ed.), *L'organizzazione e il funzionamento della Corte costituzionale* (1996).

safeguards the legislative discretion, yet invites the judge to provide a settlement in the concrete case[165].

In practice, the procedural decisions enable the Constitutional Court to modify the response to give to a question, which touches upon political aspects according to the needs of the concrete case. This approach to practical effects of the decision can be presented differently according to specific requirements. On one side, there are decisions that vigorously argue for the effective presence of a political choice, which lies outside the proper duties of the Court. On the other, there are decisions, which use the discretionary clause in a merely rhetorical and assertive manner.

The Court will thus be able to filter the questions to be decided and to withdraw when it risks to clash with prerogatives of legislative power. The need not to interfere with the functioning of another institutional activity must be reconciled appropriately with the nature of the Court in the system. It does not lie to the Court to establish whether to decide, what to decide and when to decide, as any other political body should do[166].

Therefore, even when case selection takes place independently, the Italian Constitutional Court must in any event have in mind the task to administer constitutional justice in a concrete case, in cooperation with his own institutional interlocutors. This aspect is once again strictly linked to the problem of legitimacy and to the role of constitutional justice in modern societies. With this regard, a comparison with other legal systems could be useful to understand their substantial implications. By analysing foreign experiences, even if only apparently different from each other, it is possible to identify a common trait.

Managing political questions and selecting cases is generally easier in countries where Constitutional Courts enjoy particular legitimateness and thus have a strong power in the public opinion and in civil society (such as the US and in some cases also Germany whereby however there is no notion of "political question")[167]. From time to time Courts may therefore

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[165] See R. Bin, *Giudizio «in astratto» e delega di bilanciamento «in concreto» (nota a Corte cost. 419/1991)*, in 5 Giur. Cost. 3754 (1991).

[166] G. Silvestri, *La Corte costituzionale nella svolta di fine secolo*, cit. at 67

[167] Compare to D. Kommers, *Constitutional jurisprudence of the Federal Republic of Germany* (1999); T. Frank, *Political question/Judicial answer. Does the rule of law*

get involved in the judicial resolution of political questions or, alternatively, may decide to intervene in those topics particularly relevant without needing to provide specific arguments to support their choice[168]. On the contrary, in countries where Constitutional Law is particularly weak or not quite settled (such as the Russian Federation or more generally in Courts in Eastern Europe) it is highly likely they are involved in political disputes[169]. Very often in such countries, Courts cannot even choose cases where they may pronounce themselves, but having to second the contingent majorities' orientations, they ought to renounce to their traditional function as counter-majoritarian[170]. On the other hand, as it will be highlighted subsequently, the same Constitutional Courts are more willing to cover cases with particular political significance in countries where the political party system appears fragile or delegitimized [171]. At this juncture, Courts are triggered to balance the interests at stake and guarantee the respect of fundamental rights in place of political power and of an inert law-maker[172].

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*apply to foreign affair?*, (1992) and A. Brewer-Carias, *Judicial review in comparative law*, cit. at 6

[168] M. Cappelletti, *Judicial Review in the Contemporary World* (1970). See especially *Dames & Moore v. Reagan*; *United States v. Prink*; *United States v. Belmont*; *Missouri v. Holland*; *Holtzman v. Schlesinger*; *Lamont v. Woods*; *Nixon v. United States*;

[169] Cf. R. Sharlet, *The Russian Constitutional Court: The first term*, in 1 Post-Soviet Aff. 27 (1993); P. van den Berg, *Human rights in the legislation and the draft Constitution of the Russian Federation*, in 18 Rev. Cent'l & East Eur. L. 207 (1992) and A. Blankenagel, *Towards constitutionalism in Russia*, in 2 Rev. Cent'l & East Eur. L. n. 25 (1992).

[170] K. Lach & W. Sadurski, *Constitutional Courts of Central and Eastern Europe: Between Adolescence and Maturity*, in 3 J. Comp. L. 212 (2011); H. Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, (2000) and Z. Ovsepian, *Constitutional judicial review in the Russian Federation*, in *Russian Politics and Law*, 5/1996, p. 46 ss.

[171] Compare to J. Henderson, *The Constitutional Court of the Russian Federation. The Establishment and Evolution of Constitutional Supervision in Russia*, in *Journal of Comparative Law*, 3/2011, p. 138 ss. A. Trochev, *Implementing Russian Constitutional Court decisions*, in *East European Constitutional* Review, 11/2002, p. 95; S. Pashin, *A second edition of the Constitutional Court*, in *East European Constitutional Review* 4/1994 p. 82 ss.

[172] For widespread analysis of the constitutional jurisprudence in this particular context see C. Knechtle, *Isn't every case political? Political questions on the Russian, German, and American high courts,* cit. at 74.

**8. "Political question" and constitutional rights: the case of the Italian electoral law**

Assumed their extreme flexibility, judgments with which the Italian Constitutional Court faced parliamentary discretion recently enabled the same Court to openly decide on matters traditionally covered by legislative freedom of choice and of which the constitutional case law regarded them as such. The main reason for these interventions is twofold. On the one hand, given the pressing need to fill this systemic *vacuum* created by the prolonged parliamentary inactivity. On the other hand, given the need to guarantee the protection of fundamental rights[173].

A similar tendency may also be recognised in other European experiences (see for example the Austrian case)[174]. In such a hypothesis, the Constitutional Courts seem to exceed the limit of their powers to rectify the defect of the Parliament's failure to act or to minimize the consequences of a political decision on the individual rights. In the two cases under comparison, both the Italian and Austrian Constitutional Courts ought to force their contested decisions in such a way to commit an effective *overruling*. This was justified mainly by the need to guarantee the safeguarding of the fundamental rights and freedoms of the given matter. The outcome was the adoption of a political solution through legal means, as the Court believed it to be more relevant and sustainable for the entire legal system than the one prefigured by the lawmaker through the ordinary parliamentary discussion[175].

By its judgement of December 13th 2001, n. 404, the Austrian Constitutional Court repealed not only two administrative measures regulating toponymy in Carinthia, but also parts of the 1976 Federal Law on ethnic groups[176]. The original wording of the second paragraph of the law on ethnic groups provided that, in

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[173] See M. Tushnet, *Weak Courts strong rights. Judicial review and social welfare rights in comparative constitutional law* (2008); F. Weston, *Political questions*, cit. at 12; F. Scharpf, *Judicial review and the political question: a functional analysis*, cit. at 13

[174] Cf. A. Gamper & F. Palermo, *The Constitutional Court of Austria: Modern. Profiles of an Archetype of Constitutional Review*, in 3 J. Comp. L. 64 (2011).

[175] M. Redish, *Judicial review and the "political question"*, cit. at 71

[176] Compare to U. Haider-Quercia, *Oltre Kelsen: la Corte costituzionale austriaca come legislatore positivo*, in 2/3 Perc. Cost. 173 (2010).

order for the local toponymy to be translated for linguistic minorities, 25% of those living in "mixed populated" regions should belong to one of the territorial minorities allocated by that municipality[177].

Through a complex motivation, the Austrian Court declared the provision unconstitutional establishing that the translation into minor languages had as reference value 10% of those belonging to linguistic minorities. This, however, was made with neither legal nor constitutional reference, which prescribed it. Consequently, through this judgement the Court not only declares the norm unconstitutional, but also replaces itself completely with discretionary law by arbitrarily fixing the level of protection of the nationals' fundamental rights[178]. The choice to adjust the percentage value to safeguard the protection of linguistic minorities unequivocally belongs to the political realm and therefore its concrete assessment ought to belong to Parliament. The Court, however, by exploiting the presence of indefinite legal notions (i.e. the notion of "mixed population"), has taken on a political assessment which differs from that of the lawmaker[179].

Similarly, with judgment 1/2014, the Italian Constitutional Court essentially rewrote the national electoral law[180]. Not only, by openly discharging its previous jurisprudence on the matter, but also by replacing itself to the previous prescriptions adopted by a Parliament unable to find a political agreement in this subject[181]. Just as the Austrian Constitutional Court, also the

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[177] *Ibidem*.

[178] See G. Bongiovanni, *Rechtsstaat and Constitutional Justice in Austria: Hans Kelsen's Contribution*, in C. Costa – D. Zolo (eds.), *The Rule of Law. History. Theory and Criticism* (2007).

[179] H. Hausmaninger, *Judicial referral of constitutional question in Austria, Germany and Russia*, cit. at 22

[180] Law, December 21st, 2005, n. 270.

[181] See *ex multis* F. Sgrò, *Garanzie e preclusioni nei processi di riforma del sistema elettorale italiano*, in 3 Rass. Parl. (2013); B. Caravita, *La riforma elettorale alla luce della sent. 1/2014*, in www.federalismi.it; G. Guzzetta, *La sentenza n. 1 del 2014 sulla legge elettorale a una prima lettura*, in www.forumcostituzionale.it; I. Nicotra, *Proposte per una nuova legge elettorale alla luce delle motivazioni contenute nella sentenza della Corte costituzionale n. 1 del 2014*, in www.consultaonline.it; A. Poggi, *Politica "costituzionale" e legge elettorale: prime osservazioni alla sentenza n. 1 del 2014*, in www.confronticostituzionali.it and F. Dal Canto, *Corte costituzionale, diritto di voto e legge elettorale: non ci sono zone franche*, www.confronticostituzionali.it

Italian one justified its intervention on a political matter on the basis of both the Parliament's inertia and the need to guarantee the respect of fundamental rights.

Leaving aside the numerous faults of assignment of the case and the multiple possible solutions – all abstractly compatible with the Constitution – the Italian Court should have dismissed the question by declaring on the inadmissibility of the case[182]. Yet, in front of a legislative omission, the Court decided to intervene directly on the matter avoiding to leave the system with no instrument to exercise a fundamental right such as the right to vote[183].

The argumentative technique used is the reasonableness check. In particular, the Court believes the question concerning the fundamental right safeguarded by the Constitution, connected with the interest of the social body as a whole. The need to ensure constitutional principles is an indispensable justification for affirming the Court's power to review. The Court ought to include also laws, which would rarely be referred to it. The result would be the creation of a "free zone" in the constitutional legal system within a context strictly intertwined with the democratic order. Moreover, given the failure of Parliament to act, the Court often times renewed its call to the lawmaker to reconsider attentively the issues of national electoral provision[184]. It also repeatedly stressed the irrationality of allocating a majority premium with no minimum threshold[185].

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[182] Cf. A. Anzon, *Un tentativo coraggioso ma improprio di far valere l'incostituzionalità della legge per le elezioni politiche (e per coprire una "zona franca" del giudizio di costituzionalità)*, in 1 Nomos 21 (2013) and F. Conte, *Un ricorso (quasi) diretto a tutela dei diritti fondamentali? Brevi considerazioni sull'ordinanza 12060/2013 della Cassazione Civile*, in www.forumcostituzionale.it

[183] Compare for example to P. Carnevale, *La Cassazione all'attacco della legge elettorale. Riflessioni a prima lettura alla luce di una recente ordinanza di rimessione della Suprema Corte*, in 1 Nomos 43 (2013); R. Dickmann, *La Corte dichiara incostituzionale il premio di maggioranza e il voto di lista e introduce un sistema elettorale proporzionale puro fondato su una preferenza*, in www.federalismi.it; H. Schmit, *La sentenza 1/2014 e i diritti elettorali garantiti dalla Costituzione*, in www.forumcostituzionale.it; and G. Scaccia, *Riflessi ordinamentali dell'annullamento della legge n. 270 del 2005 e riforma della legge elettorale*, in www.confronticostituzionali.it

[184] C. cost. sent. 1/2014, 2 cons. dir.

[185] C. cost. sent. 1/2014, 3.1 cons. dir.

In areas characterized by a wide margin of appreciation, the judgment of constitutionality requires that the balance of interests in the relevant case does not excessively determine the reduction of either of them. This judgment must be undertaken by weighs that are proportionate to the instruments chosen by Parliament in its indisputable discretion with respect to the objective needs to satisfy or to the targets to pursue, taking into consideration the circumstances and the prevailing limits[186].

This test of proportionality requires to evaluate if the norm subject to scrutiny, by complying with measures and requirements laid down, is necessary and appropriate for the fulfilment of legitimate objectives. Moreover, this norm should prescribe the least restrictive of all measures in terms of rights and avoid disproportionate charges in compliance with the pursuit of those objectives. In the absence of this proportionality, the Court declares the unconstitutionality of the electoral law. It will thus insert in the legal system a totally new and different law from the original one pursuing diametrically opposed objectives.

**9. Some concluding remarks**

Despite the indirect instrument of procedural decisions, the "political question doctrine" seems to have been established also in the Italian legal system. As highlighted before, in the North-American legal systems the "political question doctrine" mainly acts as a privileged instrument to re-affirm the separation of powers. On the contrary, in the Italian system this canon is characterized mostly as a peculiar technique of constitutional interpretation, assigning relevance to the resolution of the concrete case and guaranteeing the maximum integration as possible of individual rights.

In the Italian constitutional jurisprudence the recognition of matters exclusively reserved to the legislator is not only a "technique of avoidance" but it also urges the Court to asses if, by considering the concrete case, the Parliament represents the main institutional body qualified to fulfil the interests of the legal system from the specific case. In order to scrutinize which state body is most suitable, the Court mainly uses the "skeleton key"

[186] C. cost. sent. 1/2014, 4 cons. dir.

represented by the "reasonableness check". It therefore evaluates the proportionality and adequacy of the instruments designed by the legislator. Should these turn out disproportioned or irrelevant, the Court will intervene in the specific matter despite being assigned to the legislative power until that moment so as to avoid any undefended protection of rights.

The Italian constitutional case law does not seem to have drawn a real and proper "non-justiciable area" which neatly marks the differences in competences between the Court and Parliament. This area changes given the decisions of the Constitutional Court according to the circumstances of the concrete case, of the socio-political context and of the lawmaker's attitude. This area will therefore expand or reduce based on the different systemic needs and on the competence of the various State bodies to cooperate in order to implement the Constitution. In order to avoid any impression of usurping powers or competences, which do not belong to its duties, the Court must convincingly motivate its interventions in particularly sensitive in political terms. This will highlight the "loyal cooperation" between the state bodies in the implementation of the Constitution and it will enable it to legitimize more and more itself vis-à-vis the society.

# BOOK REVIEW

CAROL HARLOW & RICHARD RAWLINGS,
PROCESS AND PROCEDURE IN EU ADMINISTRATION,
OXFORD, HART PUBLISHING, 1ST ED. 2014, 392 PP.

*Paola Chirulli**

1. The book gives a rich and critical insight into EU administration through the lens of procedure, which the authors define the "superglue" of the EU complex governance system, standing "at the heart of the European project grounding a substantial part of its legitimacy" (p. 8).

From the very start, the authors declare that they will follow the same functionalist approach adopted in their well-known book *Law and Administration*, and commit themselves to exploring the relationship between EU administration and law by focusing on procedures.

This statement, though, needs perhaps some clarifications.

First of all, the use of the terms "process" and "procedure", as the authors soon explain, is given a rather loose (and perhaps non-technical) meaning, which seems to embrace the whole dynamics of EU administration, from its structure to the implementation of policies and governance techniques, rather than to focus on the study of administrative decision-making patterns.

Hence, a more formalistic, rule-of-law-based approach is discarded as too imbued with values that do not (and should not, according to the authors) necessarily play a central role in the study. The authors argue that the emphasis on legal principles, especially those shaped by the Courts, might excessively narrow the focus of the analysis, which must include administrative practice and other values, thus following a more pluralistic approach.

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Second, the reach of the analysis is much wider that what one would assume: although it focuses on the different administrative techniques used in the implementation of policies, it does not overlook neither the structural aspects of EU administration nor an accurate insight into the different areas of policy. The authors' conviction that administrative law is policy-laden[1] is even more true for EU administrative law, where the policy dimension is almost everywhere.

The choice to employ a broad meaning of procedure allows for an in-depth study of the most important features and areas of EU administration, which adds to the merits of the book. However, while it certainly enriches the analysis, it sometimes makes it difficult for the reader to identify and follow a coherent thread throughout the book.

Although the volume is rich in connections among the different chapters, it is ideally divided into two parts. The first is aimed at studying horizontal and general features of EU administration. The second (from chapter 8 on) is devoted to the analysis of some sector-specific areas of EU administration which the authors deem particularly relevant as testing grounds of the more general trends and critical stances referred to in the first part.

Each chapter shares a common architecture, which includes an historical account of the development of each sector, aimed at giving the reader an idea of the evolving picture, and then focuses on the way the different administrative patterns and moulds were introduced and abandoned over the years, or gradually transformed by law and by practice. The tone is both informative and critical.

The rich account of both general and sector-specific EU administration depicts a "sprawling" system of growing complexity, fragmentation and contradictions, which is the result of an ever-increasing production of rules - which in turn are often the result of delegated rule-making functions or of soft law - and of instruments for implementing them.

What emerges from the detailed picture that the authors so vividly give us of EU administration is the difficulty to conceptualize it and the misleading character of the models that

[1] C. Harlow, R. Rawlings, *Law and Administration* (2009).

have so far been used to capture its features. One of the merits of the book is to show how every area of EU policy implementation presents a different mixture of the administrative techniques "horizontally" described in the first chapters. The pluralism of the system is visible in the structural fluidity of EU administration, which is ever less classifiable as simply "direct" or "indirect".

2. However, the authors believe that some instruments may help the system to progress towards a more principled, accountable and democratic governance.

The main ones are procedures, which stand as the "superglue" of EU administration, and the three Cs of Cooperation, Coordination and Communication.

The second chapter focuses on the way administrative procedure has changed over the years, because of the development of principles and standards, such as reasoned decision-making and the duty of sincere cooperation. Examples are given in order to show how principles and standards are often developed by the same EU administrative bodies through practice and rule-making functions.

However, throughout the book the authors seem to have mixed feelings on procedure, and sometimes express an open skepticism about its capacity to improve EU administrative techniques and in particular to drive them towards more principled and transparent dynamics.

On the one hand, as the same authors recognize, there is a close link between substance and procedure. Procedural rules serve the fundamental purpose of structuring administrative discretion and uniforming administrative behaviour, especially in the many fields where functions are still shared between national and EU administration and cooperation is needed most (such as cohesion policy, public procurement, and competition).

Conversely, as the authors duly show, the proliferation of procedures and procedural rules can be a source of opacity, lack of transparency and complication of EU administration, be it direct, indirect, shared or composite.

As the authors point out, the current regulatory framework is often contradictory, as in the public procurement field (which is

dealt with in the sixth chapter)[2]. Here, some given pathways, or procedural patterns, "steer" the Member States while still leaving them room for choice, whereas in other cases legislation strengthens formal procedural requirements to the extent of leaving virtually no discretion to national administrations. The authors also argue that the last wave of codification is aimed not only at coordinating national procedures but also at redesigning the whole regulatory framework according to the Union's industrial and economic policy. The picture, however, is not entirely coherent. The 2014 Directives, partly in an effort to address the requests for greater simplification emerged from the long consultation process, contain contradictory provisions. On the one hand, they provide a more loose and flexible regulation, but on the other hand tighten up mandatory requirements, with the predictable result of boosting the specialist legal advice market and leaving even more room for interpretation to the CoJ.

On the one hand, the authors think that procedure can help a pluralist and fragmented structure to find a common set of principles and standards, aimed at fostering its transparency, democracy and ultimately its legitimacy. They seem to acknowledge the importance of improving the quality of administrative procedures, especially in fields like competition or management of cohesion policy, or in the rule-making functions, where cooperation between European and national administration is strongly needed and networks operate.

On the other hand, they do not hide a certain disfavour towards the over–complexity that procedures may generate and warn against standardization and ossification that might ensue the proliferation of procedural codes (in the final words of the book, they suggest that the "superglue" of procedure be thinly applied).

In the last chapter, the authors address the call for a generalised Administrative Procedure Act and reaffirm what they have already had a chance to say, i.e. that what the EP has

[2] It actually seems that the public procurement sector – an area which the authors identify as one where "the rich interplay between domestic administrative process and EU law procedural requirements" could not be better illustrated – is not much about EU administration, but rather about Europeanisation of national procedures.

promoted so far is a rather minimalist legislation[3], which fills few gaps in the existing framework by mainly reasserting principles, therefore leaving unaddressed some of the existing problems, such as composite decision-making procedures. The authors' view is that a comprehensive codification of procedural rules would foster "eurolegalism" and would over-standardise the EU administrative process, thus seriously jeopardising the pluralism and the administrative richness of existing administrative practice.

The issue is complex and we cannot deal with it at length, but it seems that a certain degree of standardization in EU administrative procedures is currently needed, as the research conducted by ReNEual, followed by the draft of six Books of Model Rules, has recently shown[4]. As the authors argue, rule-making functions are currently kept outside the process of consultation and show a patchy presence of openness in procedures.

We are well aware that the presence of many areas where procedures are shared between EU and national administrations makes it difficult to think of a unitary set of procedure rules, horizontally applicable to every policy sector, but the experience of most European countries which long ago adopted general procedure acts is on the whole positive, and has shown a general improvement in participation, openness, reason-giving and overall consistence of administrative procedures.

The authors on the one hand seem to advocate the creation of more procedural rules which may favour transparency and participation, while on the other hand fear the proliferation of more red-tape and the creation of ever thicker and more impenetrable procedural nets.

The trade-off between the risks of over-proceduralization and the actual lack of transparency is not always clearly addressed, though, and the path towards the achievement of a right balance is only feebly traced, leaving room for further exploration.

[3] EP Resolution of 15 January 2013 with Recommendation to the Commission on a Law on Administrative Procedure of the European Union (2012/2024 (INI)).

[4] The research ended with the proposal of Six Books of Model Rules for EU Administrative Rules, available at www.reneual.eu/publications/ReNEUAL.

3. This leads us to our second point. One of the threats that the authors see in an increased formalization of procedures is the uncontrolled growth of litigation and the risk of a further spread of eurolegalism, which is often evocated throughout the book as a "spectre", and on which the authors (well-known advocates of green-light theories[5]) seem again to have somehow contradictory thoughts.

We know that, according to Kelemen[6], eurolegalism is "a mode of governance that emphasises detailed legal norms backed by the threat of public and private enforcement through the courts." According to our authors, a process in which "proceduralism sets the framework for law games and courts lay the groundwork for proceduralism."

The risk envisaged by Kelemen is the development of a right-based approach to policies and a drive to increase access to justice, which, in turn, would result in an over-juridification of administrative techniques and the proliferation of what Harlow and Rawlings often cite as the "law-games". While Kelemen does not entirely believe that eurolegalism has necessarily negative consequences[7], Harlow and Rawlings tend to see it as a threat to an effective progress of EU administrative law.

The role of the courts and the risk of over-judicialization of EU administrative law are often addressed by the authors.

Throughout the book examples are given of the wide use of private enforcement of EU law, as in competition or in the environmental field, but at the same time in other chapters the "soft-bite" of rights on administrative procedure is emphasized, such as in the executive law-making field or in the same competition sector, where a too deferent judicial approach is criticised by the authors, who wish that a more intense review were exercised by the courts.

The third chapter is entirely dedicated to the role of EU courts and Ombudsmen, which are in charge, respectively, of

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[5] As the authors highlight in their *Law and Administration*, cit. at 1, 38, whereas red light theories prioritise courts, green light theories prefer democratic or political forms of accountability.

[6] Especially in R.D. Kelemen, *Eurolegalism and Democracy*, in 50 J. of Comm. Mkt. Stud. 55 (2012).

[7] "The impact of the growing role of the courts, lawyers and litigation in Europe is multifaceted, with both negative and positive consequences."

"fire-fighting" and "fire-watching" functions, both vital for the accountability of EU institutions and administrative bodies and, especially the EO, for the progress of EU administration towards a more democratic and transparent model.

As the authors argue, European courts play a fundamental role as "gap-fillers" and actors of the consolidation of key principles such as proportionality, reason-giving, and due process rules, plus the duty of fidelity. However, according to the authors, courts exercise too much discretion, especially in modulating the intensity of their review, which often is too "light-touch", especially while dealing with economic regulation. Also, their discretion is too often coupled with a certain opacity in reason-giving.

Whilst the authors make a point of "not being understood to be dismissive of the judicial contribution" (7), they argue that the courts too often concentrate on formal aspects of procedures and especially on the compliance with formal procedural requirements and this can lead to the further spread of "Eurolegalism".

Alongside the Courts, which are focused on what the authors describe as fire-fighting, lies the European Ombudsman, who stands between administration and adjudication procedure and provides individuals with the possibility to complain against maladministration and to stimulate a change of behaviour in administrative bodies. We might well agree with the authors when they argue that the role of the Ombudsman is becoming ever more crucial, not only to prevent maladministration, but also to help spread principles and standards of good administration.

The complementary role of CoJ and EO are put to the test throughout the book, as in the chapter dedicated to the infringement procedure, as well as to the financial sanction procedure, where the authors argue that the courts have been crucial in setting the standard of a rigorous and bipolar framework, whilst being less determined in granting access to documents. Fundamental is also the EO's role in introducing guarantees in the infringement mechanisms and promoting openness and procedural fairness as well as greater political accountability.

What still needs to be done, according to the authors, is giving more impact to the values of good administration

embodied in the Charter of Fundamental Rights. Hence, the future challenge to the Court of Justice is its will to promote those values and protect procedural principles as human rights. Moreover, the authors advocate the "progression of good governance principles into a constitutionalised fundamental right" and the transformation of the right to good administration into a human right (89) and, in one of the concluding chapters, claim that EU courts have exceptionally played the role of creators of principles and procedural standards in the field of human rights, as the *Kadi* judgments clearly exemplify, with their full-review approach. Here the authors seem to advocate a stronger judicial intervention, regardless its eurolegalist implications.

Another aspect which the book touches upon time and again is the growth of an expert-based regulatory context, in which the role of the courts is presently too weak and nonetheless issues of justice may easily remain unaddressed.

The authors hint at the prospect of the development of judicial networks, as a complement to the C of cooperation, and at the creation of specialised courts, which might best tackle the growing technicalization of some administrative decisions. However, national procedural autonomy is still an obstacle to the creation of a formal court network.

On the whole, it cannot be denied that more procedural rules - whose adoption would certainly add to transparency, openness and reason-giving - could lead to an increase in litigation, but in our view the risk is worth being taken.

Having said this, one can certainly share the authors' view that a desirable objective is a mixture of complementary tools of accountability, of which the legal and judicial ones should be only a part.

The sector-specific analysis offers a clear example in the case of Europol (chapter ten), whose responsibilities as a "true regulatory agency", or a hub of law enforcement information gathering are likely to increase in the future. Whereas rule-making functions are growing, still uncertain is the prospect for greater democratic accountability, either through a parliamentary network, or through the development of a clearer relationship with the Council, the Commission, the EP and the national parliaments, as well as with the EO.

The central role of the Ombudsman, who can conduct enquiries on its own initiative as well as dealing with complaints, is therefore rightly emphasized throughout the book.

Other means of accountability, working inside or alongside the administrative decision-making process, ought perhaps to be more explored. Among these, it is worth mentioning the growing phenomenon of boards of appeal and review which have recently been established inside EU agencies and the new financial supervisory authorities (the provision of an administrative body of review by Regulation 1024/2013 is an example, but also the Board of Appeal of the Chemical agency or of the Plant Variety Office be mentioned).

More accountability of EU administration would also derive from the improvement of the existing internal reviews and other bottom-up instruments of administrative justice.

The blurring of the boundary between administration and adjudication, which is a feature of UK administrative law, might be welcome in the EU legal order as well, provided that appropriate measures of political, democratic and not only strictly legal accountability are put in place. To this aim, the authors contribution could be in the future extremely precious.

4. Another important theme, which the book often touches upon, is executive law-making and the expanding deployment of soft-law (3), particularly crucial since the EU administration is a fundamentally a "regulated, regulatory bureaucracy" (335).

The authors deal at some length with the foundations of executive law-making and in the first place with the Meroni doctrine, that still has an underpinning role, and with the dynamics of committee procedures, sparing no criticism on the lack of transparency that still characterizes them (101).

They further deal with the Lisbon provisions on delegated and implementing acts and again express serious doubts that the new procedure may enhance transparency, and promote input values such as participation and democracy in decision-making.

The chapter on executive law-making aims at discussing, or rather questioning, "the assumed progression from output values of efficiency and effectiveness to demonstrate values of openness and participation" (94).

The authors' conclusion on the point is that the Lisbon Treaty promised more than it could be afforded in terms of participation and open decision-making and argue that this is perhaps the field where the use of administrative procedure to channel civil society participation has resulted in the most ambiguous outcome.

The authors highlight the important provision of access to the law-making process but at the same time illustrate how the Courts took contradictory judgments, showing an all but liberal approach, as in the recent *Bavarian Lager* case.

If the Courts' role in promoting openness is still far from being settled, an important contribution is coming from the European Ombudsman, not only with reports following complaints and with own initiative inquiries, but also with the adoption of the Code of Good Administrative Behaviour, which has promoted the values of transparency and openness.

In the second part of the book, the authors offer a number of interesting examples of the expanding role of soft-law instruments. The analysis spans from the infringement process (chapter 7) to competition (chapter 8) and agencies' rule-making and supervisory activity (chapters 10 and 11). It interestingly shows how soft law, from a tool for furthering integration is turning into a new governance method in its own right, often used to bypass the official community method, and to disguise EU expansionism. Its proceduralization, though, is not always satisfactory and does not guarantee full accountability and transparency.

The authors spare no criticism towards the attraction of the EU legal order to what they often define as fashions, such as better regulation, Open Method of Coordination, new public management and soft law.

In the infringement process complex there is a combination of different techniques and compliance-promoting tools, often provided for by secondary legislation, such as guidelines.

The modernisation process in the competition sector has seen the Commission making frequent use of soft law. Enforcement is regulated by complex decision-making patterns, dominated partly by legislative procedural rules and partly by soft law in the form of guidance and best practice.

As for enforcement procedures, the proliferation of soft law and the centralization of decision-making powers on the college of Commissioners is likely to prompt growing litigation ("uniquely litigious environment" 220) and new challenges to the intensity of judicial review performed by EU Courts.

The field of financial services regulation (chapter eleven) after the recent crisis has been witnessing a significant extension of supervisory powers of bodies such as ESAs, the EBA and, lastly, the ECB, moving from a light-touch supervision to the exercise of strong regulatory and decision-making powers.

The more recent empowerment of the ECB with stronger supervisory and enforcement powers once more calls into question the fitness of accountability mechanisms.

The authors are well aware of the implications that opaque rule-making procedures and an uncontrolled use of soft-law may have on accountability, compliance with the rule of law and with the overall legitimacy of such important administrative techniques.

If perhaps a strictly "Eurolegalist" approach might seem inadequate, nonetheless this is an area where ensuring compliance with the rule of law keeps being of the highest importance and the reach of judicial review is fundamental, as the on-going debate on the role of the Courts towards soft law clearly shows[8]. Given the importance of the legal effects of the different sources of law in the Lisbon Treaty - and the absence of clear indications regarding soft law - the contribution that the Courts can give in this field cannot be overlooked[9]. Moreover, if the adoption of Codes of Behaviour and other Manuals of Procedures (i.e. in the competition field) may help to foster due process requirements, openness and

[8] An account of which can be found in O. Ştefan, *Helping Loose Ends Meet? The Judicial Acknowledgment of Soft Law as a Tool of Multi-Level Governance*, forthcoming in Maastricht J. of Eur. and Comp. L., electronic copy available at http://ssrn.com

[9] As testified for example by the Short selling case (C-270/12), in which the CoJ stated that ESMA can legitimately exercise regulatory decision-making powers which do not correspond to any of the situations described in articles 290 and 291 TFEU, therefore recognising the existence and the lawfulness of binding regulatory general measures, justified by the high degree of professional expertise that these bodies hold in the field, which in turn explains their delegation to intervene in the pursuit of the objective of the financial stability of the Union.

participation, more effort is needed - as the authors highlight - to steer procedural legislation towards the provision of a more democratic participation process, not limited to interested stakeholders, but open to third parties and civil society.

The initiative of the EP towards the codification of procedural rules and the introduction of other procedural reforms may seem limited, but it moves in the right direction and seems an important step towards the achievement of more democratic accountability in EU administration and the promotion of input values, such as citizen participation and openness to civil society instead of output values imbued with managerialism, as the authors advocate for example in the infringement field.

5. Our final remark regards the place of the three Cs - cooperation, coordination and communication - in the emerging architecture of EU administration. Are they really objectives, as the authors seem to argue, or rather tools finalised at improving the integration process and achieve a better governance of an ever-complex and fragmented evolving picture?

In the authors' view, the three Cs stand as the key principles, objectives and values of EU administration. However their strength and weight varies according to the different areas of EU administration and has been changing over the time.

The book shows how cooperation is ever more present in important policy areas, such as cohesion, competition, and even in the infringement process. Interesting examples are given in the latter, where a more proactive approach is currently being pursued, through the creation of multifunctional networks and the promotion of what is defined as the "cooperative enterprise" of infringement procedure, and negotiation plays a very important role, aimed at achieving voluntary compliance.

Again, cooperation is currently strongly emphasized in the competition sector, where the shift from the "direct administration model" to the decentralised one has given national systems a key role in the enforcement of EU law, at the same time empowering the European Competition Network. Networks are again the main actors in the spread of "soft harmonisation", such as the recent leniency programme.

Furthermore, the analysis shows how the three Cs operate unevenly throughout EU administrative procedure and sometimes are weaker where they would be needed most.

Cohesion policy, dealt with in chapter nine and defined as the flagship of European integration, is perhaps the area where the three Cs are more seriously put to the test, due to the complex share management implementation system, in its three components of programming, partnership and financial supervision. Programming is a key feature as it fosters integration through the principles of concentration and especially conditionality, which the authors define as a "tin opener" of national policies, for instance by linking funding to compliance with the demands of EU economic governance.

Partnership, management and financial supervision show a prescriptive approach, since they require the setting of requirements and codes of conduct. Even more prescriptive is management, where legal provisions abound through the enactment of delegated acts and the Commission is given extended implementing powers. The recent Regulation 1303/2013 on structural funds moves in the direction of increasing supervision powers through the provision, for instance, of the annual clearance of accounts. Here the authors register a tension between the will to cut red-tape and the demands for tighter financial supervision. As a result, the elegant models of shared administration give way to a "complicated and sometimes poorly coordinated web of managerial, administrative and supervisory arrangements", better defined as a "jungle of intersecting bodies, powers and procedures" (243), thus showing how the three Cs are sometimes wishful thinking rather than a realistic goal.

The improvement of procedure seems even more important for coordination, that is currently more stressed due to the Enlargement process and to the increasing need to 'steer' the Member States in different areas of policy, not least the financial one. The same is for communication, a C whose impact has been growing significantly in the last decade but still has a long way to go, especially with regard to transparency.

As it emerges from the book, the question of how to strengthen the three Cs while at the same imbuing them with the principles of good administration and democracy, is presently even more challenging given the prevailing current stress of EU

legislation and policies on coordination, testified by an increasing steering role of EU institutions, so visible in the financial field as well as in the economic governance or even in Europeanised areas of national administration like public procurement.

The authors do not have an answer for each of the issues they critically discuss, probably because they require sector-specific solutions, which are best left to more specialised studies. For these, however, as well as for any future analysis of European administrative law, the book is an essential starting point.