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EDITORIAL

FAKE NEWS, INTERNET AND METAPHORS (TO BE HANDLED CAREFULLY)

*Oreste Pollicino**

"The internet is a new free marketplace of ideas".

This is the preferred metaphor[1] of those who within scholarly and public debate take the view that the issue of fake news need not be addressed (and confronted) by public authorities (and public law). The main idea behind this thesis is that whereas in the world of atoms, as Justice Holmes wrote in 1919, the "best test of truth is the power of the thought to get itself accepted in the competition of the market"[2], this is even more true in the world of bits, as the internet is amplifying the free exchange of and competition between ideas and opinions. Consequently, according to the marketplace of ideas paradigm, if it is true that under the First Amendment there is "no such thing as a false idea"[3] in the material world, this is even truer in the digital word, thanks to the enhanced opportunity to express thoughts. In other words, public authorities should not have any role in dealing with the ever growing phenomena of fake news on the internet, because web users are (optimistically) supposed to have all the tools they need in order to select the most convincing ideas and true news, disregarding news that is not convincing or fake. This constitutes an expression of complete trust in the capacity for self-correction of the market for information.

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[1] US Supreme Court, *Reno* v. *American Civil Liberties Union*, 521 U.S. 844 (1997),

[2] *Dissenting opinion* Justice Holmes in the US Supreme Court case *Abrams v. United States, Abrams v. United States*, 250 U.S. 616 (1919).

[3] US Supreme Court, *Gertz v. Welch*, 418 U.S. 323 (1974).

Is there any alternative reading of the possible relationship between public powers, regulation, and truth on the internet? Or should public law decline to play any role in the matter?

In order to try to answer to the questions mentioned above, it is necessary to take a step back: what is hidden behind the label fake news?

A first tentative answer could include within the definition all information or news that shares a certain level of falsehood. Such information may be entirely made up or only partially false.

Obviously, as for the right to be forgotten saga and many other issues which are experiencing a second lease of life in the digital era, the debate surrounding fake news is not new to the age of the internet. It is "just" a question of the different degree of relevance and intrusiveness of this issue. It is evident that the global nature of the "new" technology, the fact that virtually every internet user is able to became an editor and to spread and (especially) share (even false) information and the corresponding much greater potential impact of falsehoods on the internet are exponentially amplifying the urgent need to verify the sources of information in the post-truth digital era.

The real challenge is how such a process of verification should be conducted

According to the champions of the free market of ideas metaphor, since by definition scarcity of resources is an analogue and not a digital limit, with the result that there is no need to protect pluralism of information on the internet, legal rules (and especially public law) should take a step back in the name of the alleged self-corrective capacity of the information market. Just as the economic market knows no test of product "validity" but allows demand to drive supply, relying on the market to distinguish between viable and shoddy products, the best way of dealing with the phenomenon of fake news in the information market is to secure the widest possible dissemination of all news, including news from contradictory and unreliable sources.

The thesis is not so convincing, in my opinion, for at least three reasons.

First of all, whilst it may be the case that the problem of scarcity of technical resources does not affect the internet, our attention and time continue to be scarce "products". In fact, while the amount of information available is growing, the 24 hours in

the day cannot be extended. Against this background, when faced with this information overload the temptation for users will be to search for news, information and ideas that enhance their previous thoughts and preferences, leading to the process of group polarisation succinctly described by Cass Sunstein[4]. Put it differently, in the world of bits, much more than in the word of atoms, deliberation tends to move groups, and the individuals comprising them, towards a more extreme point in the direction indicated by their own predeliberation judgments. The result seems to be that, quite paradoxically, despite (or perhaps better, precisely due to) the unlimited amount of information on the internet, there is a less pluralistic exchange of different opinions than in traditional media where the scarcity of sources is still an issue.

Secondly, it is reasonable to ask whether the marketplace of ideas metaphor is well suited to the scope (and limits) of protection for free speech under the European constitutionalism paradigm. First, as is well known, protection for freedom of expression in Europe is more limited than in the US. Regarding this issue it is sufficient to compare the wording of the First Amendment of the US Constitution with Article 10 of the European Convention on Human Rights. However, it is not simply a question of differences in scope, but also of difference in focus. Whilst the First Amendment addresses mainly the active dimension to the right to express freely one's own thoughts, Article 10 of the European Convention (but also Article 11 of the Charter of Fundamental Rights of the European Union) emphasises the passive dimension to the right to be pluralistically informed. In this respect, it could be argued that fake news is not constitutionally covered by the European vision of free speech. Or to put it differently, the European courts would find it very difficult to accept the view of the US Supreme Court according to which, as alluded to above, "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas"[5].

[4] C. Sunstein, *Republic.com* (2002).

[5] US Supreme Court, Gertz v. Welch, 418 U.S. 323 (1974).

Thirdly, metaphorical language fits in very well with legal reasoning[6], but it should be handled properly (and with care).

Metaphor implies knowledge transfer across domains (from the Greek *meta pherein*, to "carry over"). This means that we have two relevant constitutive domains: the source domain and the target domain. The free market of ideas metaphor carries over from the source domain of economic activity to the target domain of speech a systematic set of entailments that supersedes the limitations of the older free speech model. In order to understand it fully, it is important not to forget the features of the source "market" domain when Holmes used the metaphor in 1919 and the US Supreme Court subsequently adapted it to the internet in 1997. Holmes wrote in a period of *lasser faire* Capitalism, in which the liberal state and market competition were at their zenith. If Holmes was sceptical about any external verification of the truth and removal of news proven to be false, the concept of a free market provided a meaningful alternative model for the notion that truth, just as economic wellbeing, could result from competition between (true and false) ideas and information. Similarly, when the US Supreme Court borrowed the metaphor, referring to the internet as the "new market place of ideas", the economic market of the web (during its period of genesis) was absolutely free and not in any way affected by dominant positions, not to speak of monopolies or oligopolies. Within this context, the metaphor of the free marketplace of ideas and the proposed test for the truth (competition in the absence of any public control) made perfect sense. By contrast, today the same metaphor seems to completely decontextualised given that the economic market, as the source domain from which the metaphor has been taken, is far from "free": as is well known in the DG Competition in Brussels and in every national competition authority, the internet is characterised by huge market failures which require not only *ex post* intervention but also *ex ante*, by public authorities. Against this background, if fake news is arguably the most significant and pervasive source of failure in the marketplace of ideas, one can surely not exclude the possibility of intervention by public

[6] See from a US perspective, S.L. Winter, *A clearing in the forest. Law, life and Mind* (2001) and more than thirty years earlier, from a European perspective, A. Giuliani, *La nuova retoricae la logica del linguaggio normativo*, in XLVII Riv. Intern. Filosofia dir. 374 (1970).

authorities because, in contrast to the US Supreme Court's definition of the internet as the "new free marketplace of ideas", the source domain of the digital relevant market is anything but a free market, being characterised by economic concentration and the strength of (a few) private operators.

Nobody is advocating for a "public tribunal of the true" or for enhancing the liability regime of new (and old) social platforms.

The only point should be quite clearly made is that metaphors (also) in digital law should be managed with care. Otherwise the concrete risk is, as it has been tried to prove above, to be lost in legal metaphors.

ARTICLES

IS FREEDOM OF THOUGHT STILL RELEVANT?

Giuseppe de Vergottini[*]

Abstract

The most recent broadcast technologies do nothing other than enrich constitutionalism. They simultaneously maintain guarantees in order to ensure the full exercise of freedom of thought and determine which limits of it must inevitably be accepted. This freedom of thought lies at the root of all political debate and is inherent to ideological pluralism. Freedom of thought may be exercised in different ways, for example, by simply expressing an opinion by virtue of the right of criticism, by the freedom of the press, and by the complex engagement with information right through to the right to satire. A satirical message may enter into conflict with constitutional rights to honour, decorum or reputation and thus, as is the case for freedom of the press and the right to criticism, it is necessary to weigh up the interests in conflict. Freedom of thought, in its various manifestations, is necessary subject to limits. One of the most debated issues nowadays concerns the rules applicable to the internet, which potentially impinge upon various consolidated constitutional rights. The direct circulation of opinions and information through the web has proved to be one of the now sacrosanct characteristics of modern communications systems, which have proved to be essential for politics and the economy. The matter has been considered both by states and international institutions. The case law is thus fluid and in practically all countries the constitutional courts have been called upon to fill in gaps in the law.

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1. Premise

The development of technology and the role of the internet[1], have not prevented traditional freedom of thought and the right to express it actively through different means of dissemination from remaining one of the linchpins of liberal democracy[2]. This is the case both with regard to interpersonal relations and to broader relations involving means of communication and broadcasting which influence social and political behaviour through the formation of public opinion[3]. This freedom intersects in various ways with freedom of religion, scientific research and teaching, which are covered by separate provisions under constitutional law and international treaties, all of which are characterised by the elaboration and dissemination of ideas, opinions and beliefs. The most recent broadcast technologies do nothing other than enrich the panorama of current constitutionalism both as regards the need to maintain

[1] B. Wagner, *Global Free Expression - Governing the Boundaries of Internet Content* (2016); N. Lucchi, *The Impact of Science and Technology on the Rights of the Individual* (2016); U. Carlsson, *Freedom of Expression & Media in Transition: Studies and Reflections in the Digital Age* (2016).

[2] E.M. Barendt, *Freedom of Speech*, 2nd ed., (2007); K.W. Saunders, *Free Expression and Democracy: A Comparative Analysis* (2017).

[3] On means of broadcasting and freedom of expression see: E.M. Barendt, *Broadcasting Law: A Comparative Study* (1995).

guarantees in order to ensure the full exercise of freedom of thought and also in order to determine which limits must inevitably be accepted.

This freedom is recognised in all constitutions inspired by liberal principles. On the other hand, it is subject to significant limits under authoritarian constitutions operating within a different ideological framework, which share the common feature of controlling public opinion by impairing the circulation of ideas and information, which is only permitted where it is compatible with the official political positions of the regime. The authoritarian regimes may assure free speech, but to qualify it by clarifying that the right must be exercised "in accordance with the provisions of the law" or some similar limits. For example, such language is present in the constitutions of Vietnam, Jordan and Qatar. In other words, there is little correlation between the written constitution and the real degree of protection provided[4]. The limits, stemming from Article 10 ECHR, though, have to fulfil precise requirements to fall within the range of restrictions that are permissible under Article 10 ECHR. All interferences with the exercise of freedom of expression, provided by Article 10 ECHR must be based on law, serve a legitimate aim and should be necessary in democratic society.

International conventions are replete with provisions establishing guarantees.

The Universal Declaration of 1948[5] covers freedom of thought, conscience and religion in Article 18. Article 19 protects freedom of opinion and expression including the right not to be harassed on account of one's own opinion and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Also the International Covenant on Civil and Political Rights[6] from 1966 makes similar provision in Articles 18 and 19, specifying however in a rather detailed manner the possible restrictions that

[4] A. Bhagwat, *Free Speech Without Democracy*, in 49 U.C. Davis L. Rev. 68 (2015) available at https://lawreview.law.ucdavis.edu/issues/49/1/Articles/49-1_Bhagwat.pdf.
[5] UNESCO, *The Universal Declaration of Human Rights: A History of Its Creation and Implementation, 1948-1998* (1998).
[6] S. Joseph & M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 3rd ed., (2013).

may be adopted by law that are necessary in order to respect the rights of others or prove to be necessary on the grounds of national security, public order, health or public morals. Article 13 of the 1969 American Convention on Human Rights[7] guarantees the right to seek, receive, and impart information and ideas of all kinds. Needless to say, these universal principles are respected in very limited areas of the globe and are systematically violated or subjected to serious challenge, above all in Asia and Africa.

Within Europe, the ECHR[8] from 1950 provides for freedom of thought, conscience and religion in Article 9, whilst Article 10 protects freedom of expression including freedom to hold opinions and to receive and impart information and ideas. This right must be guaranteed to all persons without interference by public authority and regardless of frontiers. However, the right is not explicitly extended to the right to search for information. Restrictive measures may be adopted in accordance with the law, provided that they are "necessary in a democratic society" and justifiable on the grounds of national security, territorial integrity, public order, prevention of disorder or crime, the protection of health or morals, the protection of the rights of others, protection of classified information and protection of the judicial function. Thus, the Convention leaves scope for a truly broad spread of possible restrictions.

When reviewing applications deeming the violation of Article 10 ECHR the Court uses the margin of appreciation to allow the State to choose the restrictions which it considers necessary. The State in question can justify its restrictions by reference to protection of national security, public morals, reputation and rights of others, prevention of disorder and crime. Moreover, if states, for example, justify their restriction by reference to national security – they must define the concept in a strict and narrow way avoiding the inclusion of areas which fall outside the real scope of national security. Equally,

[7] For an up-to-date comment on the American Convention on Human Rights see: T.M. Antkowiak & A. Gonza, *The American Convention on Human Rights: Essential Rights* (2017).

[8] Among the many publications concerning the ECHR see the classic: D. Harris, M. OôBoyle, E. Bates & C. Buckley, *Harris, O'Boyle, and Warbrick Law of the European Convention on Human Rights*, 3rd ed., (2014).

states must prove the existence of a real danger against the protected interest, such as national security, and must also take into account the interest of the public in being given certain information. If all these are ignored such limitations on the freedom of expression have an absolute nature and are inconsistent with Article 10, paragraph 2[9].

These articles are confirmed almost verbatim by Article 10 and Article 11 of the Charter of Fundamental Rights of the European Union[10]. The second paragraph of Article 11 adds that "The freedom and pluralism of the media shall be respected".

2. Freedom of Thought as The Root of All Political Debate

Within the legal systems inspired by liberal principles, freedom of thought is also at the root of all political debate. It is inherent within the ideological pluralism which characterises the very essence of democracy. It leads to differences in cultural and political outlook and the juxtaposition of different opinions within the country and the institutions, lying at the root of the right to dissent and thus to political opposition, including parliamentary opposition.

Even in systems which we are accustomed to consider as liberal, this freedom (which nobody denies in words) is constantly jeopardised by the traditional trend towards conformity which characterises social and political relations and is placed under continuous threat by the trend towards uniformity of conscience, which is facilitated by the control of the most important means of communication either by the political authorities or by economic operators occupying a monopolist or oligopolist position.

As regards its structure, it amounts not only to a negative freedom (i.e. the right not to be impaired in relation to the formulation of one's own opinions and the expression of beliefs as a maxim requirement to be protected, as it is inherent within human personality), but also a positive freedom as active thought directed

[9] M. Macovei, *Freedom of expression. A guide to the implementation of Article 10 of the European Convention on Human Rights*, available at https://rm.coe.int/168007ff48, 23.
[10] R. Arnold, *The Convergence of the Fundamental Rights Protection in Europe* (2016).

dynamically at other persons within a context of social complexity using different means of dissemination, which politics must not hinder and, in particular, must contribute to upholding.

Freedom of thought may be exercised in different ways, reflecting the possible range of different content. For instance, one may simply express an opinion by virtue of the right of criticism, freedom of the press and the complex engagement with information through to the right to satire.

In protecting the right of criticism, the legal system guarantees the aspect of freedom of thought that is functional to democratic debate. Guaranteeing that right reaches well beyond the mere protection of opinions. Freedom of opinion enables individuals to express their own ideas in relation to a given question. Freedom of criticism on the other hand involves a polemical opposition aimed at objecting to the opinions or behaviour of others. The intention is to shake up a situation, to provoke a reaction. Freedom of criticism is clearly distinguished from freedom of the press, which involves reporting an actual phenomenon (fact or conduct). Since reporting involves information, it must be objective. Since criticism involves personal assessments, it is subjective. Reporting emerges with the fact, which it describes, whilst criticism follows and evaluates the fact. Reporting expresses an identity between an actual phenomenon and the information conveying it, whilst criticism expresses a form of dissent towards an actual phenomenon (see ECtHR – Bladet Tromso v Norway, Application No.21980/03, Cumpănă and Mazăre v. Romania, Application No. 33348/96).

In this way the full richness of the right to inform emerges which in the context of Italy stems from freedom of the press under Article 21 of the Italian Constitution. This must be supplemented by the "reflex effects" resulting from the need to be informed, insofar as the recipients of information have an undoubted interest in receiving the maximum level of information without any impediment whatsoever. The variety of sources of information and their free accessibility is characteristic of a social right. The rules applicable to duties of secrecy thus take on a particularly delicate role and can only

be justified in cases involving a plausible justification under constitutional law in order to protect particular interests.

Freedom of the press and the right to criticism are not unlimited rights, and must be exercised in a manner that respects the reputation of the individuals affected by those exercising the rights.

Not only constitutions but also all international law instruments have permitted and continue to permit various exceptional limits on the grounds of security, public order, health and morals, which in liberal democracies may only be imposed by law and are subject to judicial review.

3. The Freedom of Satire as a Convergence Between the Expression of Thought and Criticism

An interesting convergence between the expression of thought and criticism occurs in the right of satire, which straddles Articles 21 and 33 of the Italian Constitution, as it impinges both on the expression of thought as well as freedom of artistic creativity.

Satire understood in its traditional sense, involves the pillorying of a public figure by placing him or her on the same level as the man on the street. From this point of view, satire is considered as a vehicle for democracy as it entails the application of the principle of equality.

A satirical message may enter into conflict with constitutional rights to honour, decorum or reputation and thus, as is the case for freedom of the press and the right to criticism, it is necessary to weigh up the interests in conflict. This balancing operation must take account of the special characteristics of the satirical work.

It is important to note that, again with reference to Italy, satire also falls within the scope of Article 21 as the starting point for the creative process of the author lies in the freedom of opinion, which is exalted by the manner of artistic expression. A special feature of satire is the *public interest* pertaining to the public figure represented, which provides the sole criterion for assessing the legitimacy of the satire. This interest is construed in broader terms than in relation to freedom of the press and freedom of criticism.

The significance of the "nexus of causal coherence" between the public prominence of the public figure targeted and the content of the satirical message may be appreciated by bearing in mind the difference between satire on the one hand and reporting and criticism on the other. *Reporting* captures the reality (or the presumed reality), which is disseminated through various means of transmission, highlighting the public dimension of the public figure. *Criticism* expresses a judgment regarding one or more aspects of the public figure. *Satire* selects certain aspects, which it moulds and develops.

It is precisely this artistic activity that is protected in Italy by Article 33 of the Constitution. This means that satire is not subject to an obligation to respect the truth. In fact, the principal characteristic of satire is precisely the *distortion of reality*, or its representation in paradoxical terms.

Some commentators consider that this fact distances satire from the scope of Article 21 or any other provisions put in place in order to protect freedom of thought in its multiple manifestations.

We do not agree with this position, considering that the essence of satire nonetheless lies in freedom of opinion.

The question is not merely academic but is absolutely tangible with particular reference to satire that is not directed at people who are alive, but at spiritual entities or religious symbols, and which thus has the potential to harm not the reputation of a particular individual but religious sentiment, as is demonstrated by the recent case involving anti-Islamic cartoons and the dramatic conclusion of the terrorist attack on a Parisian satirical magazine[11]. Religious satire gives rise to a conflict between opposing constitutional values, on the one hand, artistic freedom under Article 33 of the Constitution and on the other hand – no longer the right to reputation (as in the other cases mentioned above), but – religious sentiment, which is protected in Italy under Article 19 of the Constitution enshrining freedom of religion. In reality, the evident problem which arises involves not so much giving preference to the issue of protecting religious sentiment over and above artistic expression but in the much more serious

[11] H. Esmaeili, M. Irmgard, & J. Rehman (eds.), *The Rule of Law, Freedom of Expression and Islamic Law* (2017).

question as to whether or not to accept that the protection of religious sentiment prevails over the freedom of expression resulting in the graphic formulation of the satirical message. It is ultimately necessary to decide whether to salvage or eliminate the right of critical assessment expressed in satirical terms. It is astonishing that in the 21st Century a secular state can accept forms of censorship based on an alleged "blasphemy" or the causing of offence to a religious creed, and unfortunately the feeling is that the only justification for such potential censorship is the fear of violent reprisals, and thus an act of cowardice.

Obviously, it is not easy to propose a solution to this dilemma since, according to some commentators, the protection of religious sentiment should take absolute precedence. However, it must be reiterated that this line of thought leaves serious doubts. The impression is that the cause which results in a limitation of the right to satire in scenarios such as the Charlie Hebdo case[12] is quite different, as it consists in the, albeit understandable, fear of serious reprisals by terrorists. It is not out of place to think that the religious sentiment argument would never have been advanced in the event that satire had struck out in another direction at the sensitivity of Christians or Jews, who would never have responded with violence.

4. The Limits to the Freedom of Thought

Freedom of thought, in its various manifestations, is necessarily subject to limits. Alongside the legal limits, which are a structural part of all liberal legal systems and are intended to balance out the expression of that right against the respect for individual reputations, public morality and public security, a reference must be made to the significant expansion in the scale of security limitations, which have found a new impetus and justification throughout various legal systems from the enhanced danger of terrorist attack.

The wave of fear which crossed the globe following the terrorist attack of 11 September 2001 had significant repercussions on

[12] A. Zagato (ed.), *The Event of Charlie Hebdo: Imaginaries of Freedom and Control* (2015).

freedom of information. The emergency legislation aimed at contrasting terrorism, which was introduced by common acclaim, subjected this freedom to severe limits even in countries with a strong tradition of guaranteeing rights.

In particular, as we know, controversy surrounded the adoption of emergency legislation in the United States introducing exceptions to the Freedom of Information Act (FOIA)[13], above all in relation to the information that could be obtained with reference to measures limiting the individual freedom of suspected terrorists detained without fundamental legal guarantees. Not only did the legislation appear to many to be excessively restrictive, but also the case law– through to the Supreme Court rulings from 2004 onwards – has demonstrated its acceptance of the priority of security requirements also over freedom of information and access to information.

Finally, it is also important to note the recent anti-terrorism law enacted in France (Law no. 2014-1353 of 13 November 2014, followed by Law no. 2015-912 of 24 July 2015, the latter in response to the Charlie Hebdo massacre). Through decision no. 713 DC of 23 July 2015, the Constitutional Council struck down several provisions of Law no. 912, which were deemed to be incompatible with the constitutional right of freedom of expression. Following the objections raised by the Council, Parliament made the amendments considered necessary, following which the law was promulgated.

Both of the recent laws have significant implications for freedom of expression in relation to the use of new technologies. In particular, it is important to note: the attention dedicated by the French Government to the transmission of potentially dangerous messages over the internet; the exploitation of cooperation with Internet Service Providers (ISP) with the aim of conducing massive and invasive investigations involving the processing of information collected from the internet; the identification and localisation of individuals regarded as dangerous by cross-referencing any online traces left behind; the presumption of affiliation with terrorist

[13] U.S. House of Representatives Committee on Oversight and Government Reform, *FOIA Is Broken: A Report* (114th Congress, January 2016).

organisations on the basis of regular visits to websites regarded as dangerous, or on the basis of the posting of seditious content on social networks; the expansion of crimes of opinion through the punishment of forms of expression that represent a danger for public order involving the intention to pursue jihad[14].

In many aspects, the new French legislation has various points in common with the Turkish legislation introduced by the Erdogan Government during the Arab Spring[15]. The administrative power to block websites without authorisation by the courts is one example, along with forced cooperation on the part of ISPs.

5. The Dissemination of New Technologies and the Freedom of Thought

Particular questions arise in relation to the dissemination of new technologies[16]. This section will be limited to a few references, and will start by recalling the importance of legislation governing access to data.

As noted above, the right to receive information from the public authorities and to access electronic archives and databases is of particular significance. The more up-to-date legislation is normally now cumulated with rulings on the traditional formulation of the guarantee of freedom of thought and of opinion along with the dissemination of information.

For example, in the United Kingdom the Freedom of Information Act 2000 regulated the passive aspect of freedom of information including, in particular, the duty of the government to guarantee a constant flow of information concerning its own activities

[14] For a very recent study on terrorism and the use of social networks see: L. Scaife, *Social Networks as the New Frontier of Terrorism: #Terror* (2017).

[15] On the waves and reverse waves of democratization in North Africa after the start of the so-called Arab Spring see: J.O. Frosini & F. Biagi, *The Political and Constitutional Transitions in North Africa. Actors and Factors* (2015).

[16] D.R. Johnson & D.G. Post, *Law and Bordersï The Rise of Law in Cyberspace*, in 48 Stan. L. Rev. 1367 (1996); D.G. Post, *Against ñAgainst Cyberanarchyò*, in 17 Berkeley Tech. L.J. 1365 (2002); J.L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, in 5 Ind. J. Global Legal Stud. 475 (1998); Id., *Against Cyberanarchy*, in 65 U. Chi. L. Rev. 1199 (1998).

for the benefit of voters and representative bodies[17]. Similarly, Article 20 of the 1987 amended Austrian Constitution requires the central authorities and the *Länder* to provide information to citizens. Article 110 of the Dutch Constitution, as amended in 1983, stipulates the requirement of transparency of administrative action, but not an explicit right of access, which was subsequently provided for by a specific law in 1991. Constitutional amendments have resulted in the introduction into the Argentinean Constitution of the right of *habeas data* (Article 43), which entitles individuals to request information concerning persons detained by the public authorities, and also by private bodies, and where necessary to require their rectification or cancellation in the event that they are false or detrimental.

Other provisions may be found in Article 5(2) of the 1999 Brazilian Constitution and Article 32 of the 1996 South African Constitution, whilst a very large number of examples may be found on both constitutional and legislative level.

The right of access has a long history, even though in its most recent conception it is presented as a relatively recent right. In fact, the adoption in Colombia of the Code of Political and Municipal Administration dates back to 1888, granting citizens the right to request documents held by the public authorities. The significant moment for freedom of information in Italy came with the establishment in law of the right of access (Law no. 241 of 1990), which grants citizens the right to gain information relating to documents held by the public administration.

6. The Debate Concerning the Rules Applicable to the Internet

One of the most debated issues nowadays concerns the rules applicable to the internet, which potentially impinge upon various consolidated constitutional rights. The matter has been considered both by states and international institutions.

[17] For an interesting comparison between Freedom of Information in the United Kingdom and Italy see: P. Leyland, D. Donati & G. Gardini, *Freedom of Information in the United Kingdom and Italy – L'accesso alle informazioni nel Regno Unito e in Italia* (2010).

It will suffice here to refer to the report on "Freedom of expression, media and digital communications" published in 2012 by the European Commission in which it stressed the importance of the new web platforms for the purposes of improving pluralism within democracies in transition, as well as fragile democracies, also thanks to the individual contribution of all web users[18]. In fact, whilst the advent of the internet has concentrated considerable power in the hands of a few giant internet service providers, it has also expanded the freedom to convey content and messages far beyond the national borders of the printed press, rendering regimes of pseudo-censorship practically impossible. This fact became clearly apparent – a fact which was duly acknowledged by the Commission – during the period of the Arab Spring where various governments attempted in all possible ways, albeit unsuccessfully, to block messages considered to relate to terrorism or to be otherwise subversive. The Commission went on to stress the role of the Union in maintaining the regime of freedom of digital communication based on Article 11 of the Charter of Fundamental Rights. It also pointed to the urgent need for new regulations within the digital realm that were capable of reconciling copyright law with freedom of expression and the requirements of public security.

The attention of part of the Italian political world was echoed in the Declaration of Online Rights drawn up by a dedicated working group established at the Chamber of Deputies, which was released at the end of July 2015[19]. It seeks to present itself as the authoritative statement of the issues that would require systematic treatment by lawmakers, although it is only a proposal and it is not known whether it will be implemented by the Government or Parliament.

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[18] A. Puddephatt & P. Oesterlund, *Freedom of Expression, Media and Digital Communications: A Practical Guide* (2012) available at https://ec.europa.eu/europeaid/sites/devco/files/study-freedom-expression-communication-guide-201212_en_1.pdf, accessed January 30, 2017.

[19] Commissione per i diritti e i doveri in Internet, *Dichiarazione dei diritti in Internet* (2015) available at http://www.camera.it/application/xmanager/projects/leg17/attachments/upload_file/upload_files/000/000/187/dichiarazione_dei_diritti_internet_pubblicata.pdf, accessed January 30, 2017.

In a nutshell, the fundamental rights which should be recognised within the ecosystem of the internet should include: the right of access (Article 2), the right to information (Article 3), the protection of *privacy* (Article 5 and, with regard to various aspects, Articles 7 and 8, construed as the inviolability of systems and protection against automatised processing) along with the right to be forgotten, derived directly from the now famous judgment of the Court of Justice (Article 11), which operates in parallel to the right to identity (Article 9). It is important to point out the classification of net neutrality as a right of the individual, which is construed in terms of non-discrimination against data transmitted and the prohibition on restrictions or interference (Article 4(1)) and is regarded as an essential precondition for the effective exercise of fundamental rights online (Article 4(2)).

It may appear singular that it is precisely a document which purports to engage with the entire panoply of the consequences resulting from new information technologies that has practically forgotten to make a strong reference to freedom of expression, which is confined to an article dedicated to network security, whilst the (positive) right of access to the internet acts as the cornerstone for the hypothetical charter.

The Declaration could turn into a point of reference also on international level, proposing a convergence of the various legislation providing for protection (above all on European level). This vocation is evidently driven on by the intention to provide – also on a formal level, as is stated in the final recital of the Preamble: in substantive terms the issue can already be asserted *in nuce* – a constitutional basis for protecting the rights of the individual within the "network of networks"[20].

[20]Commissione per i diritti e i doveri in Internet, *Dichiarazione dei diritti in Internet* (2015) available at http://www.camera.it/application/xmanager/projects/leg17/attachments/upload_file/upload_files/000/000/187/dichiarazione_dei_diritti_internet_pubblicata.pdf, accessed January 30, 2017.

7. Is There A Right of Access to the Web?

The rights debated include the right of access to the web, which involves the adaptation in line with current technologies of the traditional right to express one's own thoughts freely, and thus also entails the specification through regulation of potential limits on its exercise. Several legal systems have already adopted specific legislation in this regard. In other systems it is the courts that are responsible for identifying its scope and limits. The discussion is thus very open and extremely topical.

What appears to have been clear for some time is the apparent inability of Article 21 of Italian constitution to cover the issue comprehensively, even though a broad reading of that provision would appear to extend its scope to the right of each of us to look for and access information, to inform others and to be informed by accessing the web.

Freedom of expression nowadays involves the right to receive under equal conditions any service provided in order to convey and share content. Moreover, freedom of expression over the internet entails the protection of net neutrality. This is because, as the Court of Justice has asserted on various occasions, every new information society service itself constitutes the exercise of freedom of expression, and as such must be defended against interference by the state and the public authorities in general.

It would appear to be an innovative solution to provide clear recognition of a genuine right of access. Many countries have already taken steps in this direction. Following the constitutional amendment of 6 April 2001, access to the internet is already regarded as a right in Greece. Article 5A(2) provides that "everyone has the right to participate in the information society", specifying for this purpose that "the state is obliged to facilitate access to information circulating in electronic form, along with the production, exchange and dissemination of this information".

The provisions of the 2008 Ecuador Constitution appear to be more decisive, Article 16 of which refers to an individual right.

In other countries this step has been taken within constitutional case law and by the merits courts. At least two very well-known judgments may be cited in this regard.

On freedom of expression on the internet in the United States, the Supreme Court (Reno v American Civil Liberties Union, 521 U.S. 844, judgment of 26 June 1997) ruled unconstitutional the Communications Decency Act prohibiting indecent online communications under certain circumstances on the grounds that it violated the First Amendment, which enshrines freedom of expression, irrespective of the essence of the content asserted. As part of a balancing of interests, it held that the aspect relating to the expression of speech prevailed over that relating to the confidential and secret status of the communication, which is also protected under constitutional law by the Fourteenth Amendment. According to the Court, "The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship".

In France, in the Constitutional Council ruling (decision no. 2009-580 DC, 10 June 2009) on the law concerning the Hadopi – the administrative authority with competence over the protection of rights on the internet – the court identified the "fundamental right" to access the internet as prevailing over the protection of copyright because, against the backdrop of the generalised diffusion of the internet, freedom of communication and expression necessarily presupposes the freedom to access those online communication services.

The Constitutional Council held that it is not possible for an administrative decision to block services in order to protect copyright without a prior court order, because such an act would conflict with Article 11 of the 1789 "Declaration of the Rights of Man and the Citizen".

The case law is thus fluid and in practically all countries the constitutional courts have been called upon to fill in gaps in the law. The Italian Constitutional Court was seized by the administrative courts (Regional Administrative Court for Lazio, 1st Division, orders no. 10016 and 10020 of 2014 of 26 September 2104) with a question as to whether it was possible for an administrative authority to order the removal of online content. According to the position stated by the lower court, the various rights in play were balanced against the "right of access to online communication". The Court was requested to "read the constitutional provisions on freedom of expression and the right to information in such a manner as to guarantee protection equivalent to that in place for the printed press also to new means of dissemination of expression through the 'web', not because the printed press and 'internet' are equivalent (in fact, the manner of operation is radically new and different) but because today's information society, which is networked and united in real time by the 'web', has supplemented the role of the printed press with that of the 'internet' as an essential moment of freedom of expression, the right to inform others and to be informed, democratic pluralism and freedom of economic initiative under conditions of full competition". It is important to note the stress placed by the Regional Administrative Court on the fact that the internet "may already be defined as one of the principal instruments for implementing 'freedom of expression' enshrined in Article 21 of the Constitution"; for the first time since the advent of the internet, the Constitutional Court was discussing the issue of freedom of expression on the internet as a political right. We shall see whether, thanks to the Court's intervention, it will be possible to establish clarity on the constitutional relevance of rights related to the internet.

8. Concluding Remarks

Broadly speaking, it can be confirmed that, by providing a guarantee of its various manifestations and exploiting the possibilities offered by the conquests of modern technology, freedom of thought – as it has evolved over time – continues to be one of the

keystones of any democratic system as it is closely related to the practical possibility for individuals to gain information and to remain up to date, including in particular in relation to matters of relevance for the national and local political community. The direct circulation of opinions and information through the web has proved to be one of the now sacrosanct characteristics of modern communications systems, which have proved to be essential for politics and the economy. Within this context, governance of the web has become essential. Here the as yet still not fully clarified question concerning the relationship between internet self-regulation and the role of politics intersect with each other. This question is vital in order to guarantee access to ideas, opinions and information by anyone who intends to avail themselves of this means of communication and dialogue. This also establishes the essential importance of information as related to the principle of publicity, transparency and the rejection of forms of secrecy that make it impossible to gain knowledge and, as a consequence, create obstacles on the assessment of political behaviour, as a result rendering problematic the commitment of political responsibility made by governments.

Democracy also means responsibility and good government. Citizens have the right to control the actions of their own leaders and to engage in an in-depth discussion of those actions. They must be capable of assessing the performance of the government, which is dependent upon access to information concerning the state of the economy, social systems and other questions of public interest. One of the most effective ways of dealing with instances of poor administration involves open and informed debate. Freedom of information is also a fundamental instrument in the fight against corruption and governmental wrongdoing.

INHERENT DEFICIENCIES IN THE CONSTITUTIONAL REFORMS (JUSTICE SECTOR) ACT, 2016: A CASE OF NO STEP FORWARD, TWENTY STEPS BACKWARD?

*Kevin Aquilina**

Abstract

The Parliament of Malta has on 5 August 2016 enacted a law which amends the Constitution of Malta. It deals primarily with the addition of new provisions regulating judicial appointment, discipline and removal. This paper studies these novel articles of the organic law and concludes that the 2016 amendments are flawed for a plurality of reasons, the most important however being that they breach human rights law, in particular, Article 6 of the European Convention on Human Rights and Fundamental Freedoms. Moreover, the recent constitutional amendments also violate fundamental constitutional doctrines such as those of the rule of law, the separation of powers and the independence of the judiciary. In this respect, these changes are far from being modern, progressive or forward looking. On the contrary, they are a backward step, illiberal and inconsistent with a vibrant democratic society.

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1. Introduction

Malta became an independent state on 21 September 1964[1]. This date was established as the appointed day for Malta's independence from the United Kingdom by Her Majesty the Queen of the United Kingdom, Queen Elizabeth II, in terms of section 2 of the Malta Independence Order 1964[2]. The latter Order was made under the UK Malta Independence Act, 1964[3]. Malta had been a colony of the United Kingdom since 1800 after Napoleon Bonaparte had conquered Malta in 1798 from the Knights of St. John[4]. The 1964 Constitution of Malta regulated judicial appointment and removal but had no provision in relation to day-to-day judicial discipline apart from the sole punishment of judicial removal. The situation changed lately, fifty-two years after independence, when a new amending law was enacted by the Parliament of Malta to change the Constitution in relation to judicial appointment and discipline. No substantial changes were however made recently in relation to judicial removal where the procedure remains very much the same as it obtained way back in 1964. This paper studies the new amendments introduced on 5 August 2016

[1] For a history of the Constitution of Malta, see, for instance, J.J. Cremona, *The Maltese Constitution and Constitutional History Since 1813* (1994); H. Frendo, *Maltese Political Development 1798-1964* (1993); J.M. Pirotta, *Fortress Colony: The Final Act: 1945-1964, Volume I - 1945-1954* (1987); *Volume II - 1955-1958* (1991); *Volume III - 1958-1961* (2001); C. Scerri Herrera, *A Historical Development of Constitutional Law in Malta 1921-1988* (1988); K. Aquilina, *The Legislative Development of Human Rights and Fundamental Freedoms in Malta: A Chronological Appraisal*, in N. A. Martinez Gutiérrez, *Serving the Rule of International Law: Essays in Honour of Professor David Joseph Attard*, First Volume, (2009) 225; M.J. Schiavone, *L-Elezzjonijiet F'Pajjiżna Fl-Isfond Storiku 1800-2013* (Translation: Elections in our Country within a Historical Background 1800-2013) (2013).

[2] Statutory Instrument 1964 No 1398 made on 2 September 1964 at the Court at Buckingham Palace, United Kingdom.

[3] 1964 c 86.

[4] C. Testa, *The French in Malta 1798-1800* (1997).

to the Constitution[5] in order to determine whether the novel judicial appointment and discipline procedure and the slight additions made to judicial removal are a step in the right direction or backward looking. It concludes that, all in all, the new law is riddled with several difficulties notable amongst which are breaches of fundamental human rights.

2. Flaws in the new judicial appointments procedure

On independence, the Queen of the United Kingdom gave the Maltese their Westminster modelled Constitution which has a brief chapter dealing with the judiciary[6]. A Westminster Constitution is one which respects the rule of law and fundamental rights and freedoms including the right to a fair trial, where a person is adjudged by an independent court established by law and where there is a separation of powers. Thus, a judge cannot be both a prosecutor and an adjudicating person at one and the same time. Nor may an adjudicating body first make a appraisal of guilty, then pass on to hear the accused as its judgment would have already been tainted by bias. The Constitution provided, prior to 5 August 2016, that the 'judges of the Superior Courts shall be a Chief Justice and such number of other judges as may be prescribed by any law for the time being in force in Malta'[7]. Judges were appointed 'by the President [of Malta] acting in accordance with the advice of the Prime Minister'[8]. A similar provision is made with regard to the appointment of Magistrates of the inferior courts'[9]. In other words, the judiciary composed of three layers – the Chief Justice, judges and magistrates – were appointed by the government of the day. No consultation was held with the Opposition, the judiciary or other sectors of society. It was very much of a unilateral decision based on political patronage. No evaluation was made of the advocates to be appointed to the bench and Parliament did have no say, nor any involvement in,

[5] An updated version of the text of the Constitution of Malta is available at: http://www.justiceservices.gov.mt/LOM.aspx?pageid=27&mode=chrono. Last accessed on 13 August 2016.

[6] Constitution, Chapter VIII, articles 95 to 101.

[7] Constitution, article 96(1).

[8] Constitution, article 96(2).

[9] Constitution, article 100(1).

such appointments. New judges and magistrates were not grilled before a parliamentary committee, a higher council for the judiciary or some other appointing mechanism. Over time, this selection procedure brought about considerable criticism as it was embroiled in political nepotism, afforded no transparency and accountability in the selection process and was perceived as outdated bearing in mind that the rest of Europe had moved on to a position that the executive organ of the state was no longer involved in judicial appointments, leaving the matter to be determined by independent institutions of the executive, if not of the judiciary itself[10].

The situation was changed only on 5 August 2016 where a new law, the Constitutional Reforms (Justice Sector) Act, 2016[11] was enacted to retain the *status quo* in so far as the appointment of the Chief Justice was concerned, to establish a Judicial Appointments Committee, to give privileged treatment to certain parliamentary offices and public officers over other advocates who are now requested to submit an expression of interest for appointment to judicial office, and who have to be evaluated and interviewed. It further sets out the composition of the new Judicial Appointments Committee and its functions.

Although one would have expected that the August 2016 amendments would have brought in more transparency, accountability and openness in the new judicial selection procedure, a study of new article 96A[12] of the Constitution and the 2016 amendments made to articles 96[13] and 100[14] of the Constitution leave much to be desired. The end result of these amendments is that government had not allowed the judiciary to appoint their own brethren as is the position in continental Europe but has left such power concentrated in the hands of the executive organ of the state with utter disrespect to the doctrine of the separation of

[10] See W. Voermans and P. Albers, *Councils for the Judiciary in EU Countries*, European Commission on the Efficiency of Justice (CEPEJ) (2003), available at: http://www.coe.int/t/dghl/cooperation/cepej/textes/CouncilOfJusticeEurope_en.pdf. Last accessed on 13 August 2016.

[11] Act No. XLIV of 2016.

[12] This article introduces a new provision in the Constitution establishing the composition, functions and powers of the newly constituted Judicial Appointments Committee.

[13] Article 96 of the Constitution deals with the appointment of judges.

[14] Article 100 of the Constitution deals with the appointment of Magistrates.

powers which mandates that the judiciary should self-regulate itself. The reasons why the 2016 amendments are backward looking rather than forward looking follow.

First, in so far as the appointment of Chief Justice is concerned, the August 2016 amendments to the Constitution retain the *status quo ante*. The Chief Justice continues to be appointed by the President on the binding advice of the Prime Minister. There is no need to issue a public expression of interest for prospective eligible applicants to apply. Nor is the Chief Justice grilled before a parliamentary committee, or by the newly established Judicial Appointments Committee or vetted in any other way. Essentially the Chief Justice continues to be appointed in the same way as other political appointees. Nor is the Leader of the Opposition consulted in this constitutional appointment to the top judicial office in Malta. Like when appointing chairpersons of public sector bodies, it is within the government's absolute and exclusive prerogative to decide whom to appoint Chief Justice. The main difference lies in the fact that the chairpersons are appointed for a limited period of time whilst the Chief Justice is appointed until retiring age, that is until sixty-five years of age[15]. No judicial evaluation of the proposed Chief Justice's credentials need be made by the Judicial Appointments Committee[16]. The situation is further compounded by the fact that the Chief Justice may be chosen from amongst advocates, not from amongst judges, who would have probably at least already been subjected to an evaluation procedure[17]. However, if an advocate is appointed, via political patronage, to the Office of Chief Justice s/he bypasses the whole evalua-

[15] Constitution, article 97(1).

[16] Article 96A(6)(a) of the Constitution, when listing the functions of the Judicial Appointments Committee, provides that the Committee is 'to receive and examine expressions of interest from persons interested in being appointed to the office of judge of the Superior Courts (other than the office of Chief Justice)'.

[17] For a person to be appointed Chief Justice, s/he may be appointed either from the judiciary (from amongst judges or magistrates, though there have been no appointments of Chief Justices from the magistracy) and from advocates (whether in the employ of the state or in private practice). But the Constitution establishes only one criterion, a quantitative one, for judicial appointment in article 96(2): 'A person shall not be qualified to be appointed a judge of the Superior Courts unless for a period of, or periods amounting in the aggregate to, not less than twelve years he has either practised as an advocate in Malta or served as a magistrate in Malta, or has partly so practised and partly so served'.

tion system[18]. That is totally conducive to bad governance because it establishes a twofold system of appointment: one which requires judicial evaluation and one which does not require judicial evaluation. And to compound matters, it is the highest office in the judiciary – that of Chief Justice – which does not require judicial evaluation.

Second, the Judicial Appointments Committee is composed, *inter alia*, of the Auditor General[19] and the Commissioner for Administrative Investigations (that is, the Parliamentary Ombudsman)[20]. In the case of the President of the Chamber of Advocates there is a provision which states that s/he is debarred from being appointed to judicial office unless at least two years would have already expired since he last sat on the Judicial Appointments Committee[21]. But for the Auditor General and the Parliamentary Ombudsman – should they be advocates with at least twelve years of professional practice in Malta – no such two year qualification is required: they can be appointed a member of the judiciary on the very same day they resign from Auditor General or Ombudsman. Again, it is not conducive to good governance for two members of the Judicial Appointments Committee to be ap-

[18] The evaluation system is found in article 96A(6)(c) of the Constitution which provides that, amongst the functions of the Judicial Appointments Committee, there is that 'to conduct interviews and evaluations of candidates for the abovementioned offices [of judge and magistrate but not of Chief Justice] in such manner as it deems appropriate and for this purpose to request information from any public authority as it considers to be reasonably required'. By 'judicial evaluation', in this paper, I intend all the functions taken together as referred to in this constitutional provision.

[19] The office of Auditor General is established by article 108(1) of the Constitution. The Auditor General is a public officer: 'There shall be an Auditor General whose office shall be a public office'.

[20] The office of Ombudsman is established by article 64A(1) of the Constitution. The Constitution does not establish this office as a public office. However, the Ombudsman Act, Chapter 385 of the Laws of Malta, establishes the Ombudsman in article 3 as an officer of Parliament: 'There shall be appointed as an Officer of Parliament a Commissioner for Administrative Investigations to be called the Ombudsman'. Further information on the Office of the Ombudsman is available at www.ombudsman,org.mt.

[21] The proviso to section 96A(1) of the Constitution reads as follows: 'Provided that the President of the Chamber of Advocates shall not, before the expiration of a period of two years starting from the day on which he last occupied a post on the [Judicial Appointments] Committee or he was last a Committee member, be eligible to be appointed a member of the judiciary'.

pointed members of the judiciary without a breathing space of time having elapsed, giving the impression that they have appointed themselves to the bench simply because they are members of the Judicial Appointments Committee thereby bypassing the public call for expression of interest application procedure. This procedure does not augur well in so far as transparency is concerned. One asks: why is the President of the Committee of Advocates afforded a different treatment and granted second class status when compared to the parliamentary and public officers mentioned above?

Third, the new constitutional provision establishes a twofold category of applicants for judicial office, the privileged and the underprivileged. If a person occupies the office of Attorney General[22], Audit General, Ombudsman or Magistrate, then s/he forms part of an elitist category of parliamentary and public officers which are afforded different privileged treatment from the underprivileged category of advocates which have to go through an application procedure. Even judges are not treated in the same privileged way as magistrates in the case where a judge is to be appointed Chief Justice. Indeed, in case of judges, the Chief Justice need not be chosen from amongst judges and is not subjected to any form of evaluation. These privileged parliamentary and public officers do not submit themselves to any form of judicial evaluation process as the underprivileged advocates have to do when submitting an expression of interest to join the judiciary. In the case of the latter they are subject to a due diligence screening process which includes attendance at an interview, a judicial evaluation and the provision to the Judicial Appointments Committee of information from any public office. But in the case of these parliamentary and public officers, the selection standards have been deliberately lowered. Why is this so? These officers were, on appointment, not even subjected to proper evaluation when they were appointed to the parliamentary and public offices

[22] The office of Attorney General is a constitutional office. The Attorney General is a public officer and is 'appointed by the President acting in accordance with the [binding] advice of the Prime Minister' (article 91(1)). For a person to be appointed Attorney General, s/he has to have the same qualifications for appointment as a judge of the Superior Courts (article 91(2)). Essentially the Attorney General has a twofold function: s/he is the Chief Government Legal Officer and Director of Public Prosecutions.

they hold. And, even if this were the case – which is not – time would have elapsed since this judicial evaluation would have been carried out. The same applies to Magistrates who might have been subjected to such an evaluation process several years ago when they were appointed Magistrates and, on their appointment to the bench, a twenty year period might have elapsed since such evaluation last took place. There have indeed been several instances where a promotion from magistrate to judge took several years to materialise.

Fourth, although the Prime Minister is requested to seek the evaluation of the Judicial Appointments Committee with regard to selection of an advocate from the second class underprivileged category before he advises the President of Malta to appoint him or her judge or magistrate, the Prime Minister is not bound by that advice[23]. Thus, all the time, money, energy and resources invested in the judicial evaluation process is thrown overboard simply because the Prime Minister might not agree with the Committee's advice. This means that the Prime Minister is at liberty to appoint the candidate who placed twentieth on the list or even one of those candidates who failed the judicial evaluation process, even though there might have been adverse peer references on that failed candidate or the candidate has a reputation amongst his or her peers of incompetence, is outright lazy or skirts responsibility or taking decisions. Provided that the Prime Minister or the Minister responsible for justice publish a declaration in the Government Gazette announcing that the Prime Minister will not comply with the result of the judicial evaluation and the reasons therefor are explained in a statement in the House of Representatives then any person tainted with professional mediocrity can be appointed to the judiciary[24]. This provision defeats the whole purpose of having

[23] Nowhere does the Constitution stipulate that the Prime Minister has to act on the advice of the Commission. The situation would have been different had the term 'recommendation' been used instead of 'advice'. This distinction emerges quite clearly from the wording of article 86(1) of the Constitution: 'Where by this Constitution the Prime Minister is required to exercise any function on the recommendation of any person or authority he shall exercise that function in accordance with such recommendation'.

[24] Article 96(4) of the Constitution provides that 'the Prime Minister shall be entitled to elect not to comply with the result of the evaluation' but, if he were to have recourse to this procedure, the Prime Minister or the Minister responsible for justice have to '(a) publish within five days a declaration in the

a Judicial Appointments Committee set up and a proper judicial evaluation procedure.

3. The right to an unfair trial for an accused member of the judiciary

The 1964 Constitution had only one form of judicial discipline. It consisted in removal from office. It provided that: 'A judge of the Superior Courts shall not be removed from office except by the President upon an address by the House of Representatives supported by the votes of not less than two-thirds of all the members thereof and praying for such removal on the ground of proved inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or proved misbehaviour'[25]. A similar provision is found in the Constitution for magistrates[26]. No other form of punishment was established for minor offences of a disciplinary nature. This made the Constitution unworkable as it was not possible to suspend a member of the judiciary, transfer him/her to a lower court, fine him/her, reprimand him/her or impose such other sanction of a minor nature short from removal from office.

The Constitutional Reforms (Justice Sector) Act, 2016 has added a new provision to the Constitution – new article 101B – which deals with judicial discipline. It establishes a Committee for Judges and Magistrates composed of three members of the judiciary which are entrusted with judicial discipline[27]. The function of the Committee is set out as follows: 'The Committee shall exercise discipline on judges and magistrates in the manner prescribed in

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[Malta Government] Gazette announcing the decision to use the said power and giving the reasons which led to the said decision; and (b) make a statement in the House of Representatives about the said decision explaining the reasons upon which the decision was based by not later than the second sitting of the House to be held after the advice was given to the President'. A similar provision, found in article 100(4), applies to magistrates. Once again, this provision does not apply to the Chief Justice as this office is still regulated under the old regime of political patronage (article 96(4) second proviso – 'Provided further that the provisions of the first proviso to this sub-article shall not apply to the case of appointment to the office of Chief Justice').

[25] Constitution, article 97(2).

[26] Constitution, article 100(4).

[27] Constitution, article 101B(1).

this article'[28]. A right of appeal exists from the decision of the said Committee to the Commission for the Administration of Justice[29]. Although the Commission for the Administration of Justice is ordinarily presided by the President of Malta, the latter is debarred from presiding when the Commission is hearing appeals from the Committee[30]. In this case, it would be the Deputy Chairman of the Commission – the Chief Justice – who would preside[31]. The new provision outlines the procedure to be followed by the Committee when determining judicial discipline[32], the power to suspend a judge or magistrate whilst still in office[33] and the punishments which can be inflicted for judicial misbehaviour[34].

Disciplinary proceedings against a judge or magistrate may commence upon a complaint by the Chief Justice (or the Minister responsible for justice)[35]. The Chief Justice, as complainant, has several procedural rights bestowed upon him which can be exercised throughout the *iter* of judicial disciplinary proceedings. He draws up the complaint 'in writing' which will 'contain definite charges for breach of the provisions of the Code of Ethics for Members of the Judiciary or of a code or disciplinary rules for members of the judiciary promulgated according to the same pro-

[28] Constitution, article 101B(4).

[29] Constitution, article 101B(12)(a).

[30] Constitution, article 101B(12)(e): 'The President of Malta shall not form part of the Commission for the Administration of Justice when the said Commission is hearing an appeal from a decision of the Committee'.

[31] Article 101A(1)(a) of the Constitution states that the Commission for the Administration of Justice is composed of 'the Chief Justice who shall be Deputy Chairman and shall preside over the Commission in the absence of the Chairman'.

[32] Constitution, article 101B(5) to (11).

[33] Constitution, article 101B(10)(b) and second sentence of paragraph (c), and article 101(11).

[34] Constitution, article 101B(10).

[35] Article 101B(5) states that: 'Disciplinary proceedings against a judge or magistrate shall be commenced upon a complaint in writing and containing definite charges made to the Committee [for Judges and Magistrates] by the Chief Justice or by the Minister responsible for justice, for breach of the provisions of the Code of Ethics for Members of the Judiciary or of a code or disciplinary rules for members of the judiciary promulgated according to the same procedure according to which the said Code of Ethics is promulgated which are from time to time applicable to the members of the judiciary. The complaint shall also include the grounds upon which each of such charges is based'.

cedure according to which the said Code of Ethics is promulgated'[36]. The complainant is enjoined to include the grounds upon which each of such charge is based[37].

First, the charge is prepared by the Chief Justice. The latter, in his role of Deputy Chairman of the Commission for the Administration of Justice, partakes in the promulgation of the Code of Ethics or a code or disciplinary rules binding the judiciary[38]. Should the complainant Chief Justice win the case against an accused judge or magistrate and the latter appeals before the Commission for the Administration of Justice, it is the complainant Chief Justice and disciplinary code or rule maker who presides the Commission[39]. Not only is the Chief Justice the prime mover and accuser of a judge or magistrate, but he is also one of the framers of the disciplinary offences upon which a judge or magistrate may be charged[40]. To make matters worse, on appeal, he is to judge the accused judge or magistrate upon that same charge which the Chief Justice as prime mover and complainant would have levelled against the accused judge or magistrate[41]. He therefore exercises different conflicting roles which are not conducive to the granting of a fair hearing to the accused judge or magistrate. There is therefore a twofold type of justice: that administered to ordinary persons and that administered to the judiciary. Whilst the former are entitled to a fair hearing, the latter are not. Instead the Constitution guarantees the accused judge or magistrate a right to an unfair trial.

Of course, government might argue that the Chief Justice can be challenged when he presides the Commission for the Administration of Justice. But what if the Chief Justice sees no reason why he should abstain and continues to hear and decide the case against the accused judge or magistrate? There is no provision in

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[36] Constitution, article 101B(5).

[37] *Ibid.*

[38] Article 101A(11)(e) of the Constitution provides that one of the functions of the Commission for the Administration of Justice is 'to draw up a code or codes of ethics regulating the conduct of members of the judiciary' whilst article 101B(5) extends this provision to apply also to a 'code or disciplinary rules' for the judiciary.

[39] *Supra*, note 30.

[40] *Supra*, note 35.

[41] *Supra*, note 31.

the Constitution, as in the case of the President of Malta,[42] which obliges him to abstain in those cases where he would have, or been involved, in the framing of the charge or, worse still, in prosecuting the accused judge or magistrate before the Committee. And who is going to decide whether the Chief Justice should abstain? Is it himself? As the provision is drafted, the right to a fair trial is prejudiced by the conflicting and antagonistic roles afforded by these amendments to the Chief Justice.

Second, when the Committee for Judges and Magistrates decides that 'there are sufficient grounds to continue the disciplinary proceedings the Committee shall appoint a date for the hearing'[43] and the Committee, after hearing all evidence adduced, decides the charge[44]. This means that the accused judge or magistrate will not be afforded a fair hearing as the same Committee members who are called upon to judge the accused would have already made a *prima facie* appraisal of guilt. Now the accused judge or magistrate has lost his presumption of innocence and the burden of proof has been shifted upon him or her to prove innocence. The evidentiary rule now is guilty unless proven innocent. Having found a *prima facie* case of guilt, the Committee now has to be convinced by the accused that s/he is innocent. This provision is surely not conducive to the exercise of the right to a fair trial.

Third, 'the Commission for the Administration of Justice may also appoint an advocate to act as a special independent prosecutor in the disciplinary proceedings'[45]. Why should the Prosecutor be appointed by the Commission and not by the Prime Minister or by some other body or person totally unrelated to judicial discipline? Will the fact that the Prosecutor is appointed by the Commission imply that when deciding an appeal it will favour its own appointee to the detriment of the accused? Does it mean that the prosecutor is acting in that office on behalf of the Commission or is its delegate? Does not this provision place the special independent prosecutor in an advantageous position more so that s/he is answerable to the Commission for the duties entrusted to him or her and that his or her conditions of employment are estab-

[42] *Supra*, note 30.
[43] Constitution, article 101B(8).
[44] Constitution, article 101B(10).
[45] Constitution, article 101B(9).

lished by the Commission? Will not this appointment be tainted by objective bias?

Fourth, when the Commission does not exercise its constitutional right to appoint a Prosecutor, who will prosecute? Will it be the Chief Justice who is now complainant, prosecutor, law giver who partakes in the formulation of disciplinary offences and, at appeal stage, judge who will adjudicate the accused judge or magistrate?

Fifth, if the Committee considers the disciplinary breach such as to merit removal from judicial office, the Commission presided by the Chief Justice, can decide to suspend the accused judge or magistrate and refer the matter to the Speaker.

The fact that: a charge against an accused judge or magistrate is formulated by the Chief Justice (who is the Deputy Chairman of the Commission; partakes in the promulgation of the Code of Ethics or a code of discipline for the judiciary; and, on appeal, presides the said Commission when it determines the guilt or otherwise of the accused judge); when the Committee makes a *prima facie* appraisal of guilt prior to having heard the accused in breach of his/her presumption of innocence; that the Prosecutor is appointed by the adjudicating authority and not by an extraneous independent body; where the law does not oblige the Commission, in all cases, to appoint an independent prosecutor, nor does it prohibit outright the Chief Justice (rather than an independent Prosecutor) from prosecuting the accused member of the judiciary when the Commission (of which the Chief Justice is Deputy Chairperson and which he presides when an appeal is lodged from decisions of the Committee); and the Commission presided by the Chief Justice may suspend the accused judge or magistrate, all raise doubts as to where the right to a fair trial can be called into question because of the independence and impartiality of the adjudicating bodies – the Committee and, on appeal, the Commission.

4. Judicial removal by the House of Representatives which lacks independence

The 1964 Constitution did contemplate judicial removal, as stated above, in articles 97(2)[46] and 100(4)[47], though it did not empower Parliament or any other body or person to suspend a judge or magistrate from office as the 2016 amendments do[48]. The 2016 amendments do not change the position at law with regard to judicial removal but do introduce the possibility to suspend a judge or magistrate from office[49].

The deficiency with the Constitutional Reforms (Justice Sector) Act, 2016 lies with the fact that it has completely skirted re-evaluating the procedure in the Constitution which relates to removal of the judiciary from office. Currently, a member of the judiciary – Chief Justice, Judge or Magistrate – may be removed from office by means of a vote of at least two-thirds of the members of the House of Representatives[50]. The judicial role of the House has already received criticism by the European Court of Human Rights in *Demicoli v. Malta*[51]. However, when the Constitution was amended following the Demicoli judgment, the Constitution was amended piece meal and the other judicial sanctioning power of the House related to the judiciary was kept wholly intact. In this latter case, Strasbourg's voice fell on deaf ears.

This thorny issue of judicial removal has not been addressed at all in the latest amending act to the Constitution. On the contrary, where the August 2016 amendments refer to judicial removal, they simply retain the *status quo* compounding it further by taking it for granted that it is human rights law compliant. But, as explained below, there is a spate of Strasbourg case law which has condemned constitutions and laws like the Maltese which breach the right to a fair trial as envisaged in Article 6 of the European Convention on Human Rights and Fundamental Freedoms in so far as judicial removal by a political institution is concerned.

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[46] *Supra*, note 25.
[47] *Supra*, note 26.
[48] *Supra*, note 33.
[49] *Ibid.*
[50] *Supra*, notes 25 and 26.
[51] European Court of Human Rights, decided on 27 August 1991, application no. 13057/87.

This point has already been addressed elsewhere[52]. Yet since then other case law has been decided by the Strasbourg court which clearly makes the point that, from a human rights perspective, the House of Representatives can never guarantee a fair trial to a member of the judiciary. In brief, reference was made to the first case which was decided by the European Court of Human Rights in relation to Malta, *Demicoli v. Malta*,[53] which specifically dealt with the judicial functions of the House. Although applicant Demicoli was neither a judge nor a magistrate but an editor of a satirical newspaper, the question of independence of the adjudicating authority – the House of Representatives – was debated there and the *ratio decidendi* of that judgment still holds good for judicial removal from office. In the said 2014 paper an analysis was made of the case law of the European Court of Human Rights relevant to the parliamentary removal of a member of the judiciary notably *Vilho Eskelinen and Others v. Finland*[54], *Olujić v. Croatia*[55] and *Oleksandr Volkov v. Ukraine*[56] and the Maltese originating case of *Demicoli v. Malta*[57].

In the Eskelinen judgment, the Strasbourg court reversed its earlier interpretation of Article 6 of the European Convention on Human Rights where it had originally held that the right to a fair trial did not apply to the judiciary, including, therefore, a case of a judicial removal motion. In its new interpretation, the Strasbourg court now held that is was possible, were the House of Representatives to attempt to remove a member of the judiciary from office, that a breach of Article 6 materialises in relation to the right to a fair trial. But what government, through Parliament, did in the August 2016 constitutional amendments is to extend the procedure for judicial removal of a member of the judiciary to the case where it is now the Committee for Judges and Magistrates (which

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[52] K. Aquilina, *The Strasbourg Court's Case Law and Its Impact on Parliamentary Removal of a Judge in Malta: Turning Over a New Leaf?*, 3 Inter'l Human Rights L. Rev., Issue 2, 248 (2014).

[53] *Ibid.*

[54] European Court of Human Rights, decided on 19 April 2007, application no. 63235/00.

[55] European Court of Human Rights, decided on 5 February 2009, application no. 22330/05.

[56] European Court of Human Rights, decided on 9 January 2013, application no. 21722/11.

[57] *Supra*, note 51.

is entrusted with judicial discipline) which should not: 'if it considers the breach is of such a serious nature that it merits the removal of the judge or magistrate from office, it shall report its findings to the Commission for the Administration of Justice which shall consider whether the evidence constitutes *prima facie* proof and, if it considers that such degree of proof exists the Commission shall suspend the judge or the magistrate concerned and shall refer the matter to the Speaker of the House of Representatives'[58]. In other words, the three members of the judiciary who sit on the Committee are being directed by the Constitution to ignore Strasbourg case law and, in effect, do the obverse that Strasbourg directs in such cases. Now the House can proceed to advise the President to remove the accused judge or magistrate in clear breach of Strasbourg case law on the matter cited above.

Bearing in mind Strasbourg case law, the suspension procedure of the accused judge or magistrate by the Commission for the Administration of Justice, presided by none other than the Chief Justice, raises human rights law compliance issues.

Since then new cases have been decided on the question of judicial removal, the latest being *Baka v. Hungary*[59]. Judge Baka was a former Hungarian judge at the European Court of Human Rights between 1991 and 2008. In 2009, he was elected by the Parliament of Hungary as President of the Supreme Court of Hungary. The Grand Chamber of the European Court of Human Rights held that 'the premature termination of the applicant's mandate as President of the Supreme Court was not reviewed, nor was it open to review'[60] as is the situation in Malta with judicial removal by the House of Representatives. The Court considered this 'lack of judicial review was the result of legislation whose compatibility with the requirements of the rule of law is doubtful'[61]. The Court could not fail to note 'the growing importance which international and Council of Europe instruments, as well as the case-law of international courts and the practice of other international bodies are attaching to procedural fairness in cases involving the removal or dismissal of judges, including the interven-

[58] Constitution, 101B(10)(c).
[59] European Court of Human Rights, decided on 23 June 2016, application no. 20261/12.
[60] *Ibid.*, para. 121.
[61] *Ibid.*

tion of an authority independent of the executive and legislative powers in respect of every decision affecting the termination of office of a judge'[62]. Unfortunately, the Maltese government has fallen foul of this failure.

In *Saghatelyan v. Armenia*[63] the European Court of Human Rights held that 'when disputes to which Article 6 is applicable are determined by organs other than courts'[64] – and the House of Representatives is one such organ – 'the Convention calls at least for one of the following systems: either the jurisdictional organs themselves comply with requirements of Article 6 paragraph 1'[65] (and *Demicoli v. Malta*[66] has clearly stated that this is not the case in so far as the House of Representatives is concerned) 'or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 paragraph 1'[67] – which undoubtedly is not the case in Malta. It is a great pity that there were all these pointers to the Maltese government which were not taken on board in the August 2016 constitutional reform amendments. Instead the matter of judicial removal continues to cry out for serious reform.

5. Conclusion

Overall, the main problem with the 2016 law on justice sector reform is that is raises serious human rights infringements concerns and aspects of bad governance apart from constituting an unwarranted interference by the executive in the independence of the judiciary viewed in the light of the separation of powers and independence of the judiciary doctrines. This paper has limited itself only to a study of the August 2016 constitutional reforms from the perspectives of judicial appointment, discipline and removal. The main difficulty raised in this paper is that right from day one these new provisions are clearly in violation of the right to a fair trial as enshrined in the European Convention on Human Rights and Fundamental Freedoms and as espoused by the European

[62] *Ibid.*
[63] European Court of Human Rights, 20 October 2015, application no. 7984/06.
[64] *Ibid.*, paragraph 39.
[65] *Ibid.*
[66] *Supra*, note 51.
[67] *Supra*, note 63, para. 39.

Court of Human Rights in its case law. This is further complicated by the fact that an accused judge or magistrate – notwithstanding that his or her human right to a fair trial are breached – does not have an effective remedy before the Maltese courts[68]. This is because the provisions of the Constitution cannot be challenged under the European Convention Act[69] in the light of the supremacy provision of the Constitution[70], notwithstanding the provisions of Article 1 of the Convention, that is, the obligation to respect human rights[71]. Stoner[72] apart, there is not much of a likelihood that

[68] The right to an effective remedy in the Convention is guaranteed by Article 13: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'.

[69] Although the European Convention Act, Chapter 319 of the Laws of Malta, incorporates into Maltese Law the provisions of the European Convention on Human Rights, article 3(2) that: 'Where any ordinary law is inconsistent with the Human Rights and Fundamental Freedoms, the said Human Rights and Fundamental Freedoms shall prevail, and such ordinary law, shall, to the extent of the inconsistency, be void'. The expression 'ordinary law' is defined in article 2 as meaning 'any instrument having the force of law and any unwritten rule of law, other than the Constitution of Malta'.

[70] Article 6 of the Constitution states that: '... if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void'. The Constitution does not allow the Constitutional Court to declare a provision in the same Constitution to be in breach of the human rights provisions of the Constitution.

[71] Article 1 of the Convention states that: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.

[72] In *Paul and Evelyn Stoner v. Hon Prime Minister et*, the Constitutional Court (22 February 1996) declared that article 44(4)(c) of the Constitution was discriminatory and in violation of the freedom of movement of the Stoner couple. Hence, in this unique case, the Constitutional Court declared a human right provision to run counter to another human right provision in the same chapter of the Constitution with one human right provision related to protection from sexual discrimination having the upper hand on the other human right (the sexual discrimination in treatment between a married couple where the Constitution allows a foreign woman married to a Maltese national born in Malta freedom of movement in Malta but not vice-versa). This is indeed a very controversial judgment, a one-off, and its constitutionality is dubious. Whether the Constitution Court will adopt the same reasoning in future judgments still has to be seen. The Stoner judgment, in Maltese, is reproduced in the *Kollezzjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta* (Collection of Decisions of the Superior Courts of Malta), Volume LXXX, Part I, 85-114 (1996).

the 2016 amendments can be challenged under the human rights provisions of the Constitution as these provisions have been introduced in the Constitution itself.

Hence, in order to exhaust domestic remedies in terms of Article 35 of the European Convention on Human Rights[73] any person claiming that the 2016 law is in breach of his or her human rights must go through the national courts, in all probability lose the case there, and then move on to Strasbourg. Alternatively, if such person prefers a shorter route bypassing Maltese courts, s/he may request a Member State of the Council of Europe to take the case against Malta before the European Court of Human Rights through the inter-state procedure set out in Article 33 of the Convention[74]. Yet even if Strasbourg where to eventually pronounce against the Government of Malta, there is no guarantee that the required two-thirds majority would be mustered to have the Constitution of Malta changed and brought in line with the right to a fair trial.

I therefore come to these conclusions with regard to judicial appointments, discipline and removal.

5.1 Criticisms Related to Judicial Appointments, Discipline and Removal

5.1.1 Judicial Appointments

The judicial appointments reform amendments are now law, part of the highest law of the land. Rather than ensuring that the most deserving, reputable, talented, capable, knowledgeable and upright members of the legal profession are appointed to the bench, the new law empowers the Prime Minister to exercise his political patronage to appoint whomever he wants, with no proper evaluation by an independent committee, to the office of

[73] Article 35 of the European Convention on Human Rights provides that: '1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken'.

[74] Article 33 of the European Convention on Human Rights provides that: 'Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and Protocols thereto by another High Contracting Party'.

Chief Justice. If the Prime Minister wants to appoint a parliamentary or a public officer above-mentioned to the bench, he is not bound to require proper judicial evaluation of these officers before their appointment. In the case of those advocates who submit themselves to such an evaluation process, there is no guarantee that those who deserve appointment to judicial office will get it for the Prime Minister is not bound by the independent Committee's report. Nor is he bound by the principle of merit. Indeed, he can select candidates who performed miserably or who even failed the evaluation. All in all, these amendments have embedded into the Constitution new public service values – those of mediocrity, nepotism, discrimination in treatment, elitism and favouritism. Indeed, they are a historic mess never seen before in the annals of Maltese Constitution law making. It makes banana republics shame themselves for not having adopted the new Maltese method of judicial procedure themselves!

5.1.2 Judicial Discipline

All in all, the provisions on judicial discipline are unworkable. The Chief Justice should be totally detached from the filing of the charge or prosecution thereof. The Chief Justice should not exercise all the diverse conflicting and antagonistic functions conferred upon him by the August 2016 constitutional amendments. The Committee adjudging a disciplinary office should not make an appraisal of guilt then pass on to decide the case. The Commission should not be involved in appointing the prosecutor. If at all, such task should be carried out by a prosecutor who is neither appointed by the Commission, nor by the Committee. Further, the provision is prone to be challenged on the ground that it does not afford the accused judge or magistrate a fair trial as the law does not strike a fair balance between the rights of the prosecution and those of the accused judge or magistrate who is judged by his prosecutor and who is presumed guilty unless proven innocent. If this is not a travesty of justice, then what is?

In *Mitrinovski v. The Former Yugoslav Republic of Macedonia*[75], the European Court of Human Rights stated that a person who had set in motion judicial disciplinary proceedings (in our case it would be the Chief Justice) 'has acted as "prosecutor" in respect of

[75] Decided on 30 April 2015, application no 6899/12.

the applicant' (the disciplined judge). In that case, the judge who initiated the judicial disciplinary proceedings subsequently took part in the decision to remove from office the accused judge, casts objective doubt on his impartiality when deciding on the merits of the case.

In Gerovska Popĉevska v. The Former Yugoslav Republic of Macedonia[76], the European Court of Human Rights held as follows:

> 50. In such circumstances, the Court considers that the applicant had legitimate grounds for fearing that Judge D.I., the then President of the Supreme Court, was already personally convinced that she should be dismissed for professional misconduct before that issue came before the SJC (see, *mutatis mutandis*, *Werner v. Austria*, 24 November 1997, § 41, *Reports* 1997-VII).

In *Jakŝovski and Trifunovski v. The Former Yugoslav Republic of Macedonia*[77], the Court held that the complainants had brought in motion the impugned proceedings, submitted 'evidence and arguments in support of the allegations of professional misconduct on the part of the applicants', acted as prosecutors and 'were also parties to the decisions of the plenary of the SJC in respect of the applicants' dismissals'. For the court, this casted 'objective doubt on the impartiality of those members when deciding on the merits of the applicants' cases. It therefore concluded that 'the confusion of roles of the complainants ... in the impugned proceedings resulting in the dismissal of the applicants prompted objectively justified doubts as to the impartiality of the SJC.'

Finally. the same point made in *Jakŝovski and Trifunovski* was reiterated in *Poposki and Duma v. The Former Yugoslav Republic of Macedonia*[78].

All the above quoted decisions of the Strasbourg Court indicate that the latter is not prepared to allow a situation where an adjudicating body fails the test of impartiality or where it exercises antagonistic roles ranging, on the one hand, from those of a witness, prosecutor, or complainant to, on the other hand, that of a

[76] Decided on 7 January 2016, application no. 48783/07.
[77] Decided on 7 January 2016, applications nos. 56381/09 and 58738/09.
[78] Decided on 7 January 2016, applications nos. 69916/10 and 36531/11).

judge. This is because justice must not only be done but must seen to be done.

5.1.3 Judicial Removal

The Constitution, thanks to the 2016 amendments, now establishes a twofold mechanism whereby an accused judge or magistrate can be found *prima facie* guilty of misbehaviour. In terms of the 1994 amendments to the Constitution[79] (which established the Commission of the Administration for Justice), and the Commission for the Administration of Justice Act[80], it is the Commission which makes such *prima facie* evaluation of judicial misbehaviour. With the 2016 amendments, it is the Committee for Judges and Magistrates which is also tasked with making, concurrent with the Commission for the Administration of Justice, such *prima facie* evaluation.

It is not clear why two distinct procedures are resorted to in order to arrive at a *prima facie* appraisal of judicial misbehaviour. Moreover, the 2016 amendments did not address the difficulties which are ingrained in the 1994 amendments, that is, that the body established by those amendments to arrive at a *prima facie* appraisal of guilt - the Commission for the Administration of Justice - like the High Council of Justice in *Volkov v. Ukraine* does not enjoy independence and impartiality. For instance, one of the members of the Ukrainian High Council of Justice was at the time the prosecutor. The Attorney General, the public prosecutor in Malta, also sits on the Commission for the Administration of Justice and the 2016 constitutional amendments have not taken stock of the Volkov judgment. In Volkov, the Strasbourg court held that 'the presence of the Prosecutor General[81] on a body concerned with the

[79] Article 101A(11)(f) of the Constitution states that the Commission for the Administration of Justice may be given 'such other function as may be assigned to it by law'. Such other function has been conferred upon it by article 9 of the Commission for the Administration of Justice Act, Chapter 369 of the Laws of Malta, in relation to judicial discipline.

[80] Article 9(5) of the Commission for the Administration of Justice Act states that: 'If the report of the Commission contains a finding *prima facie* that the misbehaviour or incapacity has been proved then, the motion referred to in article 97(2) of the Constitution shall, together with the report of the Commission, be taken up for consideration by the House'.

[81] In the case of Malta the Prosecutor General is called the Attorney. Article 91 (4) of the Constitution states that: '(3) In the exercise of his powers to institute,

appointment, disciplining and removal of judges created a risk that judges would not act impartially in such cases or that the Prosecutor General would not act impartially towards judges of whose decisions he disapproved'[82]. The issue which arises is that if the Strasbourg Court finds, as it did in Volkov, that the Judicial Appointments Committee is tainted with human rights violations, does it mean that all appointments made following a recommendation by the Judicial Appointments Committee are null and void and that all decisions taken by the member of the judiciary appointed in this way are also null and void?

Other difficulties which the legislator failed to tackle in the 2016 constitutional amendments in relation to judicial removal include the following: (a) there is no procedure which allows a Member of Parliament who has a conflict of interest in the judicial removal procedure from abstaining *di proprio motu* on being challenged by the accused judge or magistrate; (b) the separation of powers and the independence of the judiciary doctrines are breached when the judiciary are removed by the Legislature and not by the judiciary; (c) there is no review proceedings after Parliament arrives at a decision to remove a judge or magistrate from office before an independent and impartial judicial tribunal; and (d) Parliament - contrary to a court of justice - does not follow an adversarial procedure such that all the guarantees set out in Article 6 of the European Convention in Human Rights are not followed by the House of Representatives when it is hearing and deciding upon a judicial removal motion. This is because the Constitution does not mandate the House of Representatives to strictly abide by such due process.

5.2 Concluding Remarks

Article 65(1) of the Constitution mandates Parliament to enact law which are 'in conformity will full respect for human

undertake and discontinue criminal proceedings and of any other powers conferred on him by any law in terms which authorise him to exercise that power in his individual judgment the Attorney General shall not be subject to the direction or control of any other person or authority'.

[82] *Volkov v. Ukraine*, para. 114.

rights'[83]. Clearly, the Constitutional Reforms (Justice Sector) Act 2016 is in breach of this direction[84]. Whilst the judiciary are mandated by the Constitution and the European Convention Act to dispense justice to litigants and accused persons appearing before them, the Constitution does not establish a corresponding obligation towards the judiciary when it is they who are accused before the Committee for Judges and Magistrates - the right to a fair trial here is allowed to be trampled upon with impunity. The Constitution is adopting different weights and different measures when it comes to the dispensation of justice: a human rights friendly approach to non-members of the judiciary and a human rights infringement approach to members of the judiciary. The inevitable conclusion arrived at in this paper is that the Constitutional Reforms (Justice Sector) Act, 2016 has no redeeming features. It is a constitutional mess which a democratic republic that respects the rule of law, the independence of the judiciary and the separation of powers should abort without any unrepentant remorse being felt for such total and complete contemptuous disavowal. It is surely not a case of a forward looking law which encapsulates those majestic principles of the rule of law, the separation of powers, the independence of the judiciary, respect for human rights, good governance and transparency in government. On the contrary, it serves to deny these laudable constitutional principles. As the issues raised in this paper give rise to serious and grave concerns of the functioning of the rule of rule in a democratic society which fall within the competence of the Venice Commission, the latter should examine these issues as it has already done in the case with regard to, *inter alia*, Hungary and Poland.

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[83] K. Aquilina, *The Parliament of Malta versus the Constitution of Malta: Parliament's Law Making Function under Section 65(1) of the Constitution of Malta*, 38 Commonwealth Law Bulletin, Issue No 2, 217.

[84] Article 65(1) reads as follows: 'Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Malta in conformity with full respect for human rights, generally accepted principles of international law and Malta's international and regional obligations in particular those assumed by the treaty of accession to the European Union signed in Athens on the 16th April, 2003'.

WHAT IS STILL MISSING TO ACHIEVE AN OPTIMUM CURRENCY AREA UNDER EU LAW?*

*Antonio Marcacci***

Abstract

The article normatively assesses the effectiveness of the European Union's post-crisis reforms in the banking field against the economic theory of the Optimum Currency Area, with the aim to ascertain whether the legal requisites claimed by this theory have been institutionally incorporated. First, the article lists the economic criteria that a currency area needs to fulfil in order to be optimal. Second, it explains the implications of such a theory for the institutional design of a currency area. Third, it tests such theoretical findings against the actual architecture established by the recent reforms. The findings show that the new institutional design has many deficiencies. In particular, the governance structure of the Single Supervisory Mechanism is weak because it is based mainly on soft-law measures and on coordination between the European Banking Authority and the European Central Bank. Due to constitutional constraints, the current institutional infrastructure does not include the necessary fully-fledged lender of last-resort and fiscal backstop. Finally, although it was legally feasible, the creation of a Single European Deposit Guarantee Scheme is still a legislative proposal of the European Commission.

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1. Introduction

The 2011 Euroarea sovereign debt crisis was characterized by a scramble for home debt, with many European banks buying too much sovereign debt in order to support their home country's public institutions, thirsty of funds. Unfortunately, this behavior ended up causing significant problems. First, too much public debt negatively impacted the banks' own funds requirements. Second, too much effort on national financial markets seriously hampered the correct functioning of the single European financial services market, with the significant loss of business opportunity deriving from it. Third, given the *odd* relationship between commercial banks and sovereign debts – the so-called "vicious circle"[1] –, the transmission belt of the European Central Bank (ECB) monetary policy became unstable and pressed alongside national borders with the credit provision to real economy dimming alarmingly[2].

[1] D. Valiante, *Last Call for a Banking Union in the Euro Area* (2012).

[2] On the consequences of the crisis: European Commission, *Legislative package for banking supervision in the Eurozone – frequently asked questions - Why is a single*

The establishment of a Single Supervisory Mechanism (SSM) and a Single Resolution Mechanism (SRM) – politically emphasized as the "Banking Union" – is, undoubtedly, the main regulatory outcome of the 2011 Euroarea sovereign debt crisis. The

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supervisory mechanism necessary and when should it be in operational? MEMO/13/780, 12/09/2013, at 1, http://europa.eu/rapid/press-release_MEMO-13-780_en.htm accessed 7 November 2015. As Valiante argues: "Instability of the banking system in the Eurozone is mainly caused by moral hazard and adverse selection problems. The moral hazard issue fosters liquidity ring-fencing in national boundaries (Draghi, 2012), while adverse selection impedes the restart of cross-border interbank activities for the risk aversion of northern Eurozone banks. This situation hampers the transmission channels of monetary policy, as liquidity injections by the ECB have not been able to restart a well-functioning interbank market." D. Valiante, *Last Call for a Banking Union in the Euro Area,* cit. at 1. Moreover, Sarcinelli highlights that many scholars argue how national regulators have been too lenient towards domestic banking institutions, thus worsening the crisis. M. Sarcinelli, *L'Unione Bancaria Europea e la stabilizzazione dell'Eurozona,* in 66 Moneta e Credito 24 (2013). Also: V. Constâncio, *Towards a European Banking Union*, Lecture held at the start of the academic year of the Duisenberg School of Finance, Amsterdam, (2012) 7 September 2012, available at https://www.ecb.europa.eu/press/key/date/2012/html/sp120907.en.html accessed 7 November 2015. On the nationalitation of trasmission belt of the ECB monetary policy, Merler and Wolf point out how: "Relying on national authorities can only lead to major differences and applications in different countries, thereby undermining financial integration and reinforcing the re-nationalisation of finance that has been seen in the last few years. This is not only sub-optimal, but also undermines monetary integration to the extent that the fragmentation of financial markets along national borders hinders the transmission of the single monetary policy." S. Merler & G. Wolff, *Financial Odyssey: How should the first steps of the banking union be implemented*, VoxEU.org, available at http://www.voxeu.org/article/first-steps-banking-union-implementation, accessed 11 December 2015.

Alongside these economic reasonings, Kaarlo Touri makes the case for a legal analysis of the crisis in that he argues how this is not only an economic or financial crisis but also a constitutional crisis since the Europeanized monetary policy and the ECB monetary programs have shaken the foundations of the so-called the "second layer of the EU economic constitution" (*i.e.*, the one dealing with macroeconomics – being the first layer the one focusing on the basic principles of microeconomics), shown a tendency towards monetary policy's politicization and, thus, raised legitimacy issues. In the words of prof. Touri: "The further away from a monetary policy directed by the price-stability objective the ECB ventures and the more active a role it adopts in fiscal rescue operations, the more the original justification for its present institutional status loses coverage." K. Touri, *The European Financial Crisis – Constitutional Aspects And Implications*, EUI Working Papers, Law 2012/28, 38 (2012).

New Institutional Architecture for the banking sector (NIA) was conceived to establish a legal "safety net"[3] meant to overcome the crisis. Ironically, the need for such a safety net had been long heralded, even if implicitly, by the Theory of an Optimum Currency Area – OCA. This article argues, normatively, that it is not clear whether the legal requisites claimed by the OCA theory have been incorporated through the recent reforms in the baking law field.

As a first step, the article starts by listing the economic criteria that a currency area needs to fulfil in order to be optimal according to the OCA theory. It then explains what are the implications of such theory for the public institutional design of a currency area. As a last step, the article tests such theoretical findings against the actual design of the SRM/SSM legislative package in order to verify whether it covers all the pillars of the OCA's safety net. Unfortunately, the findings are quite disappointing and the road leading to the institutionalization of an Optimum Currency Area under the EU law is still long.

2. The Theory of an Optimum Currency Area [i.e., what the Euroarea is supposed to be(come)]…

In 1953 Milton Friedman analyzed the so-called "asymmetric shocks"[4] which only hit one of the regions/member countries of a single currency area (SCA) and not the others, and

[3] The expression "safety net" is used, among others, by D. Gros & D. Schoenmaker, *European Deposit Insurance and Resolution in Banking Union,* 52 J. Comm. Mkt St. 9 (2014). Carmassi et al. argue in favor of a safety net for Europe, since the necessity to tame "moral hazard and excessive risk-taking requires a consistent set of regulatory incentives, based not only on common rules but also on integrated supranational powers in banking supervision, deposit insurance and crisis management, including resolution. The three functions are intimately interconnected, and only their joint management can eradicate the expectation of national bail-outs from the system and thus establish proper incentives against reckless risk-taking by banks in the internal market." J. Carmassi et al., *Banking Union: a federal model for the European Union with prompt corrective action*, Centre for European Policy Studies CEPS 282/2012, 1, (2012) available at http://www.ceps.eu/publications/banking-union-federal-model-european-union-prompt-corrective-action, accessed 7 November 2015.

[4] M. Friedman, *The Case for Flexible Exchange Rates*, in M. Friedman, *Essays in Positive Economics* (1953).

that, due to a fixed exchange, which cannot be rebalanced through a flexible exchange rate. Less than a decade later, in 1961 Robert Mundell theorized the OCA[5] for the first time by assuming that countries and/or regions with strong economic ties and high level of market integration would economically benefit by sharing the same currency.

Mundell held that an SCA achieves its optimality when asymmetric shocks can be overcome, and this "implies a single central bank (with note-issuing powers) and therefore a potentially elastic supply of interregional means of payments"[6]. What Mundell had in mind was a central bank able to jump in and contribute to fighting the distortions provoked by economic shocks through tools affecting the efficient allocation of capital. This assumption was enriched and pushed forward by several other economists in the following decades, such as McKinnon,[7] Kenen[8], Mongelli[9], Grubel[10], and Fleming[11].

As of today, it is possible to highlight the criteria[12] – developed over the decades as a shared vision[13] – which make the exchange rate tool of little help to solve economic shocks:

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[5] R.A. Mundell, *A Theory of Optimum Currency Areas,* 51 Am. Econ. Rev. 657 (1961).

[6] Id., 658.

[7] R.I. McKinnon, *Optimum Currency Areas,* 53 Am. Econ. Rev. 717 (1963), cited in M. Petreski, *Is the Euro Zone an Optimal Currency Area?* (2007) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=986483, accessed 7 November 2015.

[8] P.B. Kenen, *The Optimum Currency Area: An Eclectic View,* 58 Am. Econ. Rev. 356 (1969), cited in M. Petreski, *Is the Euro Zone an Optimal Currency Area?* cit. at 7.

[9] F.P. Mongelli, *"New" Views on the Optimum Currency Area Theory: What is EMU telling us?* ECB Working Paper Series - no 138/2002 available at http://repec.org/res2002/Mongelli.pdf, accessed 7 November 2015, (2002). Cited in M. Petreski, *Is the Euro Zone an Optimal Currency Area?* (2007), cit. at 7.

[10] H.G. Grubel, *The Theory of Optimum Currency Areas,* 3 Can. J. Econ./Revue canadienne d'Economique 318 (1970), cited in M. Petreski, *Is the Euro Zone an Optimal Currency Area?* (2007), cit. at 7.

[11] J.M. Fleming, *On Exchange Rate Unification*, 81 Econ. J. 467 (1971), cited in F.P. Mongelli, *"New" Views on the Optimum Currency Area Theory: What is EMU telling us?*, cit. at 9.

[12] M. Petreski, *Is the Euro Zone an Optimal Currency Area?*, cit. at 7. For the history and development of the OCA theory, see: R. Horvath & L. Komarek, *Optimum Currency Area Theory: An Approach For Thinking About Monetary Integration*, Warwick Economic Research Papers - No 647/2002, (2002).

1. Full mobility of labor and other factors of production such as capital between a shock-hit country and a non-shock-hit country. This is because such factors ease the aftermath of a shock by pushing down unemployment (through the migration of unemployed people from a country to another) and increasing productivity (through, for instance, the relocation of a company's business process).

2. Price and wage flexibility within a currency area, because shocks turn into a decrease of prices and wages, and unemployment in one country and inflation in another one are avoided;

3. financial market integration and economic openness. The first criterion leads to a level-playing-field for all financial players and unhook capital mobility from currency exchange rates; whereas the second criterion is linked to the fact that international prices easily penetrate into a currency area making thus currency exchange rates useless;

4. production and consumption, because a highly diversified economy does not need currency exchange rates as production and consumption quite easily adjust to and overcome shocks;

5. convergence of inflation rates and trade, because when inflation rates of different countries converge, then the terms of trade also converge, leading to equilibrated current account transactions that do not need an exchange rate adjustment;

6. fiscal and political integration. This is because through a politically-based fiscal backstop, wealthier areas support shock-hit areas through fund conferrals[14].

[13] M. Petreski, *Is the Euro Zone an Optimal Currency Area?*, cit. at 7.

[14] In this regards, Tower and Willet have clearly stated that "a successful currency area needs a reasonable degree of compatibility in preferences towards growth, inflation and unemployment and significant ability by policy-makers in trading-off between objectives". E. Tower & T. D. Willett, *The theory of optimum currency areas and exchange-rate flexibility*, (1976), cited in Petreski, *Is the Euro Zone an Optimal Currency Area?*, cit. at 7.

3. …and what it implies in legal and institutional terms: the safety net

The OCA criteria spelt out above imply the establishment of a "safety net"[15] meant to ensure financial stability in the long run. In synthetic institutional terms, such safety net involves an interplay of the following private and public law tools:

1. An administrative supervisory authority, usually the Central Bank, tasked with watching over banks' management.
2. A lender of last resort, usually the Central Bank in full control of its monetary policy, charged with lending financial institutions liquidity in order to avoid a systemic stand-off and "maintain financial stability"[16].
3. A fiscal backstop, which is, usually, the Government injecting monies (either/both direct taxpayers' money or/and borrowed fund) to recapitalize troubled banks.
4. A deposit insurance scheme[17], which is a tool employed to boost depositors' confidence in the financial system as a whole, reduce the risk of bank runs, and limit the

[15] See note 3.

[16] P. De Grauwe, *The European Central Bank: Lender of Last Resort in the Government Bond Markets?*, CESifo Working Paper Series No. 3569/2011, (2011) http://www.cesifo-group.de/portal/page/portal/DocBase_Content/WP/WP-CESifo_Working_Papers/wp-cesifo-2011/wp-cesifo-2011-09/cesifo1_wp3569.pdf, accessed 7 November 2015.

[17] D. Gros & D. Schoenmaker, *European Deposit Insurance and Resolution in Banking Union*, cit. at 3. Also mentioning M.H. Engineer, et al., *A positive analysis of deposit insurance provision: Regulatory competition among European Union countries,* 9 J. Financial Stability 530 (2013); and F. Allen, et al., *Cross-Border Banking in Europe: Implications for Financial Stability and Macroeconomic Policies,* (2011), available at http://www.voxeu.org/sites/default/files/file/cross-border_banking.pdf, accessed 7 November 2015, regarding the close relation between resolution and deposit guarantee schemes, even proposing a single fund covering both resolution and deposit insurance needs so as to avoid potential conflicts between two funds. On the fact that a Deposit Guarantee Scheme is a core component of the "financial safety net" is also highlighted by M. Gerhardt & K. Lannoo, *Options for reforming deposit protection schemes in the EU*, European Credit Research Institute - ECRI Policy Brief no 4 (2011), available at http://www.ceps.eu/publications/options-reforming-deposit-protection-schemes-eu, accessed 7 November 2015.

negative externalities generated by bank failures[18]. It can be either a private or a public law scheme, whether it is established and funded by the Government or by the industry. Hybrid solutions, such as fund based on private law, recognized by a public authority and funded by fees paid by the industry is, actually, very likely to occur[19].

5. A resolution fund and mechanism, intended to work hand-in-hand. The fund can be based either on public or private law, or even have a hybrid nature, such as, for instance, having a private law nature while being fuelled by the Government or by both the Government and the industry. However, despite the legal nature of the fund, the resolution authority implementing the resolution mechanism, thus enforcing resolution laws and managing the winding down or – when necessary – the resolution of troubled banks, is (usually) public and uses a mix of administrative law powers and private law instruments[20].

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[18] European Commission, *Deposit Guarantee Schemes* (2015) available at http://ec.europa.eu/internal_market/bank/guarantee/, accessed 7 November 2015.

[19] The Italian, French, and Spanish Deposit Guarantee Funds share some significant similarities but also diverge in several aspects. The Italian "*Fondo Interbancario di Tutela dei Depositi*" is a private law consortium recognized by the Bank of Italy and funded by the member banks. See: *Fondo Interbancario di Tutela dei Depositi, Statuto e Regolamento* (2012). The French "*Fonds de garantie des dépôts*" was established as a private law legal person directly by the law in 1984 by art. Article 52-1 of Act n° 84-46 du 24 janvier 1984 and amended in 1999 by Article 65 of Act n°99-532 du 25 juin 1999. Fees are paid by the Fund's Members. The Spanish "*Fondo de Garantía de Depósitos de entidades de Crédito*" was originally established in 1977 by the Real Decreto 3048 of 1977 (and amended in 1980 by the Real Decreto 4 of 1980) as a public legal person enabled to conclude private law contracts and funded by the industry. The Real Decreto *2606 of 1996*, instead, simply provides that the fund is a legal person able to private law contracts, and the private law nature of Fund has been confirmed by the last amendment done by the Real Decreto-ley 16 of 2011.

[20] In Italy, for instance, on the basis of a proposal coming from the domestic Central Bank – Banca d'Italia – the Ministry of Economy and Finance appoints ad-hoc administrators tasked with running the trouble institution. The appointment of the ad-hoc administrators is an administrative law measure and can, under certain circumstances, be challenged before a Public Administrative Court, whereas the management of the firm is carried out with the usual private law tools. As regards resolution procedures, see: Title IV, Section I and II of the Italian Consolidated Banking Law (decreto legislativo 385/1993).

4. The New Institutional Architecture for the banking sector: the European safety net

The OCA theory had long influenced the economic debate about the establishment and development of Europe's Economic and Monetary Union (EMU)[21]. However, even if pre-SSM/SRM Euroarea was an SCA, it was crystal clear that it did not meet all the OCA criteria[22]. Actually, not even half of them were met. The mandate of the European Central Bank (ECB) as a lender of last resort[23] was quite limited compared to that of the Bank of England

[21] J. Horvath, *Optimum currency area theory: A selective review*, BOFIT - Discussion Papers No. 15 Bank of Finland - Institute for Economies in Transition, 7 (2003), available at http://www.suomenpankki.fi/pdf/110655.pdf, accessed 7 November 2015. The author uses the words of Bofinger: "[the OCA theory] seems to be almost generally accepted as the main touchstone of the advantages of EMU and as the theoretical basis for all empirical tests in this area". P. Bofinger, *Is Europe an Optimum Currency Area?* (1994). See also: M. Buford Canzoneri & C. Ann Rogers, *Is the European Community an Optimal Currency Area? Optimal Taxation versus the Cost of Multiple Currencies,* 80 Am. Econ. Rev. 419 (1990); H. Snaith, *Narratives of Optimum Currency Area Theory and Eurozone Governance*, 3 New Political Econ. (2014); J. Jager & K.A. Hafner, *The Optimum Currency Area and the EMU: An Assessment in the Context of the Eurozone Crisis*, 5 Intereconomics 315 (2013); F.P. Mongelli, *What is European Economic and Monetary Union Telling us About the Properties of Optimum Currency Areas?,* 43 J. Comm. Mkt. St. 607 (2005); W. Schelkle, *The Optimum Currency Area Approach to European Monetary Integration: Framework of Debate or Dead End?,* South Bank European Paper 2/2001.

[22] According to Krugman, an "optimum currency area theory suggested two big things to look at – labor mobility and fiscal integration. And on both counts it was obvious that Europe fell far short of the U.S. example, with limited labor mobility and virtually no fiscal integration." P. Krugman, *Revenge of the Optimum Currency Area*, The New York Times (2012), available at http://krugman.blogs.nytimes.com/2012/06/24/revenge-of-the-optimum-currency-area/?_r=0, accessed 7 November 2015.

[23] As stated by Article 127.1 of the Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/1: "The primary objective of the European System of Central Banks (hereinafter referred to as 'the ESCB') shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119."

or the Federal Reserve[24], and the "fiscal" and "political integration" were just missing. Perhaps, only economic openness was, for the time being, a concrete achievement.

In more concrete legal terms, the EMU was established without a single supervisory authority[25]. Monetary policy was practically the only tool the ECB was officially endowed with. As regards resolution procedures and deposit guarantee schemes[26],

[24] A very interesting analysis of the role of the ECB as a lender of last resort compared to that of the FED and the BoE is provided by: P. De Grauwe, *The European Central Bank: Lender of Last Resort in the Government Bond Markets?*, cit. at 16.

[25] Up to now prudential supervision was run by the Member States' banking Authorities and Central Banks, with the supervision of the payment system being split between some domestic authorities, namely the Central Banks of Germany, France, and Italy. [*Source*: Banca d'Italia, '*Sistema di pagamenti*' (bancaditalia.it 2014) https://www.bancaditalia.it/compiti/sispaga-mercati/sistemi-pagamenti/index.html, accessed 7 November 2015] and the ECB.

[26] On the importance of a Pan-European deposit guarantee mechanism: J. Carmassi et al., *Banking Union: a federal model for the European Union with prompt corrective action*, cit. at 3, 2; J. Pisani-Ferry, et al., *What Kind Of European Banking Union?* (Bruegel Policy Contribution - Issue 2012/12, 18 (2012), http://bruegel.org/2012/06/what-kind-of-european-banking-union/, accessed 7 November 2015. Moreover, as regards the close relationship between deposit insurance and resolution scheme, see: D. Schoenmaker, *Governance of International Banking: The Financial Trilemma*, 139 (2013); M.H. Engineer, et al., *A positive analysis of deposit insurance provision: Regulatory competition among European Union countries,* cit at. 17. In particular, Colliard highlights the importance of a Deposit Guarantee Scheme in a multi-States currency area: "A corollary is that common deposit insurance is useful precisely because part of the losses in this case will be borne by non-nationals". J.E. Colliard, *Monitoring the Supervisors: Optimal Regulatory Architecture in a Banking Union*, HEC Paris - Finance Department, 27 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2274164, accessed 7 November 2015. This is actually why a few Member States fiercely opposed the establishment of a single Deposit Guarantee Scheme. With different but complementary words, Gros & Schoenmaker: a deposit guarantee scheme can "make a material difference because it would provide an external loss absorption mechanism, which is independent of the solvency of the sovereign [*the sovereign debt*]. Such an external loss absorption mechanism is important, especially during a financial crisis, which usually goes hand in hand with a deep recession and thus large deficits and increasing public debt levels". D. Gros & D. Schoenmaker, *European Deposit Insurance and Resolution in Banking Union*, cit. at 3, 6. Ruding too backed Gros & Schoenmaker's argument by stating that a "deposit guarantee scheme and [a] bank resolution probably should be implemented simultaneously. They are separate arrangements, but in

the landscape was empty. And the same held true for the fiscal backstop[27]. Within this context, the new institutional architecture is a potential "game changer"[28] able to solve the problems lying in the flawed institutional design of the EMU[29].

From a normative point of view, the wider picture of the NIA is made up with two legislative packages, the SSM and the SRM. The first is the Single Supervisory Mechanism – SSM, based on Council Regulation 1024/2013[30] and Regulation 1022/2013[31]. Council Regulation 1024/2013 moves from the domestic to the European level the administrative prudential supervision over larger banks[32] established in countries whose currency is the Euro.

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practice they must go hand-in-hand. Their institutional and financial governance may, to a certain extent, be integrated or coordinated." H.O. Ruding, *The Contents and Timing of a European Banking Union: Reflections on the differing views,* Centre for European Policy Studies CEPS - Essays ed. (2012), http://www.ceps.eu/publications/contents-and-timing-european-banking-union-reflections-differing-views, accessed 7 November 2015.

[27] In the words of Sarcinellli: "[a] banking union requires a fiscal backstop and this can be provided only by a sort of Euroarea's treasury endowed with tax resources and with the power to borrow" (*my own translation from Italian*). M. Sarcinelli, *L'Unione Bancaria Europea e la stabilizzazione dell'Eurozona,* cit. at 2, 37.

[28] Lannoo uses the expression "game changer" to define the potential impact of the Single Supervisory Mechanism. K. Lannoo, *The New Financial Regulatory Paradigm: A transatlantic perspective,* Centre for Economic Policy Research - CEPS Policy Briefs ed., 8 (2013) http://www.ceps.eu/publications/new-financial-regulatory-paradigm-transatlantic-perspective, accessed 7 November 2015.

[29] A. Enria, *The Single Market after the Banking Union*, speech at the AFME and EBF Banking Union in Europe Conference, 3 (2013), https://www.eba.europa.eu/-/speech-by-andrea-enria-at-the-afme-and-ebf-banking-union-in-europe-conference, accessed 7 November 2015. The Banking Union is a game changer because, on the hand, it centralises supervision in the hands of the ECB [on the importance of arranging the three functions together (banking stability, system of payments, and monetary policy), *see*: T. Padoa-Schioppa, *The euro and its central bank - Getting united after the union*, the MIT Press, 119 (2004); on the other hand, more holistically, it (partially) fills the current huge gap with the creation of a single resolution fund and a uniform resolution mechanism. In the words of Vítor Constâncio: "The deeper rationale is however the need to construct a Banking Union for ensuring a successful and well-functioning Monetary Union." V. Constâncio, *Towards a European Banking Union*, cit. at. 2.

[30] Council Regulation 1024/2013 OJ L 287/63, 29.10.2013.

[31] Regulation 1022/2013 OJ L 287/5, 29.10.2013.

[32] The remit covered by the supervision of the ECB is circumscribed to those institutions which are not considered as less-significant, such as those firms: *i*) whose assets' total value exceeds 30 billion €; *ii*) whose total assets' ratio over

To avoid the ECB being overwhelmed by the supervision activity, the Council Regulation splits responsibilities along three lines, that is:

a. between National Competent Authorities (NCAs) and the ECB. Unfortunately, there is no clear-cut division between the ECB and the NCAs but the responsibilities are, in actual law and in practice, very intertwined. For instance, the ECB is exclusively competent for authorizations (and withdrawal!) and for the vetting of shareholders as suitable for all Euroarea banks. In addition, the ECB has the ultimate responsibility for the functioning of the entire supervisory system, being able to take on direct supervision of non-significant banks hitherto under NCAs' purview;

b. between the ECB and the other European Authorities[33], in particular the European Banking Authority (EBA) – whose governance is reformed by Regulation 1022. The EBA is, indeed, in charge of drafting the single rulebook – e.g. the "glue that should keep together the Single Market"[34] – and adopting converging supervisory practices – the Single Supervisory Handbook – at EU level[35].

c. between NCAs as regards exchange of information concerning cross-border operations of banks based in the SSM.[36]

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the GDP of the Euro participating Member State of establishment exceeds 20%, unless the total value of assets is below 5 billion €; *iii*) on the bases of a NCA's notification considering an institution of significant relevance with regard to the domestic economy, the ECB takes a decision confirming such significance following a comprehensive assessment, including a balance-sheet assessment, of that credit institution. Art. 6 (4), Council Regulation 1024/2013.

[33] In this context, Article 3 of Regulation 1024/2013 clearly states that the "ECB shall cooperate closely with EBA, ESMA, EIOPA, and the European Systemic Risk Board (ESRB), and the other authorities which form part of the ESFS", namely the European System of Financial Supervision.

[34] A. Enria, *The Single Market after the Banking Union,* cit. at. 29, 4.

[35] J. Carmassi et al., *Banking Union: a federal model for the European Union with prompt corrective action,* cit. at. 3, 5.

[36] And, when necessary, even a cooperation with the national judicial authorities. On this point, see: F. Lafarge, *Les autorités européennes de surveillance, la régulation financière et l'union bancaire européennes* (2013).

Cooperation is the key element of the new European system of banking supervision. Notably, Art. 3(1) and (6) of Council Regulation 1024 identifies quite a common soft-law tool such as "memoranda of understanding" as *the* tool to be employed by the ECB when cooperating with other EU and/or national authorities. From a governance perspective, the Supervisory Board (SB) – made up of a Chair[37] and Vice Chair[38], four representatives of the ECB[39], and one representative of the each NCA coming from an SSM-participating MS[40] – is informally responsible for the overall correct functioning of the SSM. However, due to the fact that the SB was not created by the Treaty, the ultimate responsibility lies with the Governing Council which must approve any supervisory decision through the non-objection procedure[41].

The other legislative package is the Single Resolution Mechanism – SRM, based on Regulation 806/2014[42]. Such Regulation provides that the banks subject to the SSM are also subject to the SRM, the European procedure to orderly wind down or resolve troubled banks. The SRM is run by the Single Resolution Board (SRB), a new EU agency, whereas traditional National Resolution Authorities (NRAs) are now asked to assist and coordinate with the Resolution Board. Regulation 806/2014 also establishes the European Single Resolution Fund (SRF) with the aim of financing troubled banks[43]. Significantly, NRAs are still responsible for handling non-SSM banks' resolution procedures, unless the SRF is asked for help: In this case the SRB is the resolution authority.

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[37] The Chair is an external candidate.

[38] The Vice Chair is a member of the ECB executive board.

[39] The four representatives are appointed by the ECB Governing Council.

[40] Art. 26 (1), Council Regulation 1024/2013.

[41] Article 26(8) of Regulation 1024/2013.

[42] Regulation 806/2014/EU, OJ L 225/1, 30.7.2014.

[43] The SRF is run by the SRB. Very importantly, the SRF is not part of the EU budget, but it is fed by fees paid by banks and collected at national level. At least for the first eight years, it will be made up of national compartments that will be gradually merging. Over this transitional period, mutualisation of the resolution burden between national compartments will be gradually increasing: 60% during the first two years and then 6.7% for each of the remaining six years. Should a bank fails over this transitional period, what would remain uncovered would be funded by national authorities (where the failed institution has its legal headquarters). Importantly, temporary lending among national compartments are also allowed. Regulation 806/2014.

The Regulation introduces a single regulatory framework for the recovery and resolution of banks through certain tools such as the *bail-in* (Article 27). Significantly, for those EU Member States not joining the SSM/SRM, another piece of legislation introduces a harmonized framework for the recovery and resolution of credit institutions and investment firms, the so-called Bank Recovery and Resolution Directive (BRRD),[44] whose content substantially reproduces that of the SRM Regulation in terms of legal tools that national resolution authorities can use.

Notably, the Single Resolution Mechanism was indispensable for Europe to complete an integrated financial framework, for three main reasons: the establishment a fair and swift decision-making process; the reduction of resolution costs and break down the bank-sovereign nexus; and the completion of the Single Supervisory Mechanism by making sure that banks on the edge of default are being restructured or even closed down rapidly if needed.[45] The two pieces of legislation were, thus, conceived to be working hand-in-hand.

5. Testing the OCA Theory over the European safety net: what is missing? what is unlikely to work?

5.1. A supervisory authority based on coordination

The ECB-NCAs cooperation mechanism[46] sounds smooth, at least on paper. If the ECB is accountable for the "effective and consistent functioning of the SSM"[47], in any case both the ECB and the NCAs are "subject to a duty of cooperation in good faith, and an obligation to exchange information".[48] Domestic authorities are clearly and explicitly asked to provide the ECB "with all information necessary for the purposes of carrying out the tasks conferred on the ECB by this Regulation",[49] giving the idea that cooperation is strongly based on exchange of information. Importantly, if NCAs are to assist the ECB in the preparation and

[44] Directive 2014/59/EU, OJ L 173/190, 12.6.2014.
[45] As rightly claimed by Mr. Van Rompuy. H. Van Rompuy, *Towards A Genuine Economic And Monetary Union,* 7 (2012).
[46] Art. 6, Council Regulation 1024/2013.
[47] Art. 6 (1), Council Regulation 1024/2013.
[48] Art. 6 (2), Council Regulation 1024/2013.
[49] Art. 6 (2), Council Regulation 1024/2013.

implementation of any acts relating to the ECB's supervisory tasks, the ECB is asked to coordinate and summarize traditional national supervision cultures and practices[50].

So far, so good. However, the ECB-EBA relationship raises some doubts. Due to Treaties constraints, the EBA could not be charged with supervisory tasks. Council Regulation 1024/2013[51] is, indeed, based on Art.127(6) TFEU, which reads as follows:

> "The Council […] may […] confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions […]."

The result is that, on the one hand, the European Central Bank carries out supervisory tasks through the Single Supervisory Mechanism; but, on the other hand, as mentioned above, the European Banking Authority is still entrusted with the task of drafting and issuing the rules of the European single rulebook[52] for the entire EU[53] (which is, actually, its most daunting challenge!) [54].

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[50] When a person opposes an inspection carried out by the ECB, the national authority must, when its power is not sufficient, must request the indispensable assistance of other national authorities [Art. 12 (5), Council Regulation 1024/2013], thus making the administrative cooperation system even more complex.

[51] Council Regulation 1024/2013 OJ L 287/63, 29.10.2013.

[52] As the official website states: "The term Single Rulebook was coined in 2009 by the European Council in order to refer to the aim of a unified regulatory framework for the EU financial sector that would complete the single market in financial services". The European Banking Authority, "The Single Rulebook", http://www.eba.europa.eu/regulation-and-policy/single-rulebook accessed 7 November 2015.

[53] J. Carmassi et al., *Banking Union: a federal model for the European Union with prompt corrective action*, cit. at 3, 5.

[54] A. Enria, *The Single Market after the Banking Union,* cit. at 29, 12. The conundrum is made even more puzzling by the hierarchical relationship between the Single Supervisory Handbook and its domestic counterparties and the relationship between the Single Supervisory Handbook and the supervisory activity of the SSM. In the words of Enria: "the legislative mandate refers to the single handbook as a collection of good practices competent authorities can refer to. Hence, we will have the handbook, but also the SSM manual and national manuals in Member States not participating in the SSM". A. Enria, *The*

Given the increasing convergence at European level of banking and financial regulation – which is likely to be boosted by the early 2014 landmark Short Selling Case[55] in which the ECJ gave a specific interpretation of the *Meroni* doctrine[56] and provided the EU regulatory agencies with a broader leeway – the role of the EBA's rulebook is meant to become more and more pervasive. For this very reason, Regulation 1022/2013[57] amended EBA's governance to rebalance the lopsided power equilibrium

Single Market after the Banking Union, cit. at 29,8. On this point also M. Sarcinelli, *L'Unione Bancaria Europea e la stabilizzazione dell'Eurozona*, cit. at 2, 29.

[55] United Kingdom v Council and Parliament (ESMA's powers on Short Selling).

[56] In the Meroni case, the ECJ stated four important principles: first, coherently with the idea that *nemo plus iuris transferre potest quam ipse habet,* the ECJ excluded the possibility for a delegating authority to delegate on other bodies powers different from those already possessed by the delegator under the Treaty, S. Griller & A. Orator *Everything under control? The "way forward" for European agencies in the footsteps of the Meroni doctrine,* 35 Eur. L. Rev. 10 (2010). Second, a delegation of powers cannot be presumed, but the delegating authority must make an express delegation [*Ibid*, at 10]. Third, a delegation of "discretionary powers" is unlawful because it can "make possible the execution of actual economic policy" [Case 9/56, Meroni & Co Industrie Metallurgiche SpA vs High Authority of the European Coal and Steel Community (Meroni I),[1957] ECR 133] thus replacing "the choices of the delegator by the choices of the delegate"[Ibid], and causing "an actual transfer of responsibility" [Ibid]. Finally, a delegation of "discretionary powers" is unlawful because it would jeopardize the balance of powers between the European institutions, X.A. Yataganas, *Delegation of Regulatory Authority in the European Union – The Relevance of the American Model*, (2001). http://www.jeanmonnetprogram.org/archive/papers/01/010301.html, accessed 7 November 2015. Since then, ECJ case law has not authorized the creation of European agencies endowed with "discretionary power to translate broad legislation guidelines into concrete instruments". D. Geradin & N. Petit, *The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform*, (2004), available at http://jeanmonnetprogram.org/archive/papers/04/040101.pdf, accessed 7 November 2015. This approach has, for 50 years, been "a constitutional limit to delegation", P. Craig, *EU Administrative Law*, 161 (2006), and it has substantially impeded the establishment of regulatory agencies [for the debate on European regulatory agencies, see: G. Majone, *Delegation of Regulatory Powers in a Mixed Polity,* 8 Eur. L. J. 319 (2002), with functions and powers like those belonging to US federal regulatory agencies, such as the SEC [For the categorization of EU agencies, see: S. Griller & A. Orator *Everything under control? The "way forward" for European agencies in the footsteps of the Meroni doctrine,* cit. at 56.

[57] OJ L 287/5, 29.10.2013.

between Euroarea Member States (MSs) – now far more unified under the SSM – and non-Euroarea MSs, in particular the UK. Possible hurdles may stem not only from potential rifts between SSM-MSs and non-SSM-MSs[58], but, in particular, from the fact that, on the one hand, the ECB supervision covers only Euroarea MSs; on the other hand, the EBA rulebook covers the entire Union's banking system. This fragmentation may obstacle the harmonization process[59].

Leaving aside the more technical issues linked to the new EBA's voting system and governance procedures[60], what matters more is the doubts stemming from the not-so-easy coordination between a supervisor without regulatory powers and a regulator without supervisory powers. If joint within the same body, supervision and regulation can turn into a very strong combination[61]. In this regard, the US Federal Reserve Board can be taken as a yardstick since it is vested with both regulatory and supervisory powers[62], something that is still missing in Europe.

Concerning the coordination between NCAs, this was already "regulated" by Article 116 of Capital Requirement Directive IV which provides that the consolidating supervisor must establish colleges of supervisors with the aim to facilitate the exercise of supervisory tasks of a bank involved in cross-border businesses[63]. Not surprisingly, the EBA is asked to "contribute to promoting and monitoring the efficient, effective and consistent functioning of colleges of supervisors"[64].

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[58] A. Enria, *The Single Market after the Banking Union,* cit. at 29, 3.

[59] See: L. C. & G. F., *Il governo della vigilanza nell'Unione bancaria europea*, 12 Bancaria, 28 (2013).

[60] System and procedures that increase "the complexity of an already burdensome decision-making process". A. Enria, *The Single Market after the Banking Union,* cit. at 29, 12.

[61] About the role of enforcement in financial markets, see: J. C. Coffee Jr., *Law and the Market: The Impact of Enforcement*, (2007) https://www.law.upenn.edu/journals/lawreview/articles/volume156/issue2/Coffee156U.Pa.L.Rev.229%282007%29.pdf, accessed 7 November 2015.

[62] On the enforcement actions of the FED: http://www.federalreserve.gov/newsevents/press/enforcement/2015enforcement.htm.

[63] For banks coming from MSs joining the BU, the competent authority is the ECB.

[64] Article 116 (1), Directive 2013/36/EU, OJ L 176/338, 27.6.2013.

In the same vein, the BRRD as well pays attention on the coordination mechanism[65] between authorities charged with resolving banks with cross-border activities[66], and it provides the establishment of resolution colleges alongside the supervisory colleges[67]. Within the SRM framework, Recital 91 of the SRM Regulation clarifies that since the SRM Board replaces the local resolution authorities of the Member States joining the SSM/SRM in their resolution decisions, then the Board also replaces the very same authorities in terms of the cooperation with non-participating Member States, including in the resolution colleges regulated by the BRRD.

This institutional framework is not convincing. Loyal cooperation between different levels of power is welcome and very often necessary. Subsidiarity is a basic principle of the EU[68]. Cooperation is a necessity due to the number – more than 6000[69] – of the banking institutions subject[70] to the new centralized supervision. However, the complexity of this multi-layered

[65] As specified by Babis: "The EU Recovery and Resolution Directive makes provisions for group recovery plans, intra-group financial assistance and coordinated early intervention measures for groups" V. Babis, *European Bank Recovery and Resolution Directive: Recovery Proceedings for Cross-Border Banking Groups,* (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2346310, accessed 7 November 2015.

[66] Recital 42 clearly states that "any resolution action should take into account the potential impact of the resolution in all the Member States where the institution or the group operates".

[67] These resolution colleges must include not only domestic resolution authorities but also competent ministries, central banks, the EBA and, when necessary, authorities overseeing national deposit guarantee schemes. As it is the case for supervisory colleges in term prudential supervision, resolution colleges are designed to provide a forum for the exchange of information and the coordination of resolution actions.

[68] On the subsidiarity principle, see: P. Craig & G. de Búrca, *EU Law: Text, Cases, and Materials*, 5th Ed., 95 (2011).

[69] As reported by R. Goyal, et al., *A Banking Union for the Euro Area*, IMF Staff Discussion Note, 14, (2013), available at https://www.imf.org/external/pubs/ft/sdn/2013/sdn1301.pdf, accessed 7 November 2015.

[70] The EBC is the supervisor of all Euroarea banks for authorization and shareholder vetting. In addition, the EBC runs the generic SSM oversight on more than 120 significant banking groups (with many more banks in them), with the support of the NCAs.

structure based on cooperation raises doubts[71] about how far it is meant to effectively work[72], at least in the short run, and whether it concretely overcomes the previous fragmentation[73].

Such a complex system, characterized by the inconvenience of having too many governance layers[74], is, instead, very likely to take quite a long span of time before greasing the wheels and smoothly working, so that it might result in potential credibility risks which would minimize the stability efforts justifying the building of the NIA[75]. And alongside the time needed to put the entire machine into work, potential problems arising from information asymmetries between the ECB and the NCAs – and the related agencies costs – should not be ignored[76].

This is complicated further by the use of a soft-law tool like the Memoranda of Understanding envisaged by Article 3 Reg. 1024/2013 in such an economically sensitive area, as it would add institutional uncertainty and, thus, have a negative impact on the final goal, the achievement of an OCA (in particular given the already-experienced Eurozone governance uncertainty, which proved to be extraordinary weak during the sovereign crisis).

Generally speaking, soft law measures are defined as those "rules of conduct which, in principle, have no legally binding

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[71] In the words of Enria, A. Enria, *The Single Market after the Banking Union,* cit. at 29, 12: "the institutional set-up for banking, supervision and resolution is becoming increasingly European, but not necessarily less complex".

[72] The Framework Regulation 468/2014, OJ L 141/1 (ECB/2014/17) adopted by the ECB pursuant to Article 6(7) of Council Regulation 1024/2013 deals with the procedures governing the cooperation between the ECB and NCAs as regards the supervision of significant credit institutions and the supervision of less significant credit institutions.

[73] On the uncompleted centralization brought about the SSM and the stability of the EU financial system: L. Chiarella & G. Ferrarini, *Il governo della vigilanza nell'Unione bancaria europea,* 12 Bancaria 28 (2013).

[74] E. Ferran & V. S.G. Babis, *The European Single Supervisory Mechanism*, University of Cambridge Faculty of Law Research Paper No. 10/2013, 14 (2013) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2224538, accessed 7 November 2015.

[75] In the words of an IMF Staff Discussion Note: "the challenge of developing the requisite competence at the ECB and building credibility in supervision should not be underestimated", R. Goyal, et al., *A Banking Union for the Euro Area* cit. at. 69, 14.

[76] On this point, see: L. Chiarella & G. Ferrarini, *Il governo della vigilanza nell'Unione bancaria europea,* cit. at. 73.

force but which nevertheless may have practical effects"[77]. This kind of measures are very hard to classify by using traditional legal categories (contract law, administrative law, and so on and so forth). In particular, the memoranda of understanding do not undoubtedly fall into any well-defined legal category since, on the one hand, they are used as non-binding regulatory tools provided by the EU law; but, on the other hand, they can be considered neither as EU administrative law, nor as international public law.

However, leaving aside the more legalist categorization issue, it is anyhow possible to place the memoranda of understanding provided by Art. 3(1) and (6) across two subcategories of EU soft-law tools: commitments about the conduct of institutions and model law-making[78]. If the former concerns those agreements used to organize the intra-EU institutional relations; the latter is far more controversial and it concerns those areas of the EU law where harmonizing measures cannot take the form of hard-law tools – such as Regulations, Directives, and Decisions –, and guidelines and recommendations set out best practices for Member States' authorities.

The crucial point with the memoranda of understanding provided by Art. 3 (1) and (6) is that, on the one hand, they look as if they were intra-institutional agreements produced by a multi-layered organization like the EU and aimed at easing the exchange of information flow; but, on the other hand, they are the king tool through which a European cooperation system designed for "an adequate level of regulation and supervision"[79] is based, thus hinting at the option that not only intra-institutional relations but also proper regulatory areas are covered by them. Therefore, even if highly flexible soft-law tools can be a useful resource when wisely employed in the governance of a broad common currency area, for the time being, fears for the institutional uncertainty seem to dwarf the hopes for efficiency through flexible rules.

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[77] Soft law measures are those "rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects". F. Snyder, *Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, 56 Modern L. Rev. 35 (1993).

[78] Categorization reported by D. Chalmers, et al., *European Union Law: Cases and Materials,* 102 (2010).

[79] Art. 3 (1), Council Regulation 1024/2013.

Finally, the fact that the Supervisory Board is made up of members coming from the National Competent Authorities may not result in a concrete and firm centralization of supervisory powers on the hands of the SSM[80]. This is due to the fact that the most influent Central Banks (i.e., those Central Banks coming from the economically strongest Member States) may be successful in eroding the SSM's supervisory powers (in particular over local, formerly public banks) with the effect of watering down the financial stabilization aim pursued by the supervisory centralization. Consequently, the SSM runs the risk to turn into a lame duck[81], characterized by a certain degree of uncertainty.

To conclude, the more uncertain the supervisory and legal framework at EU level, the more the ECB is likely to rely on the necessary loyal cooperation of national authorities[82], thus making things more complicated. Unfortunately, this quite complex system of cooperation does not meet an OCA's institutional demands, which theoretically require a strong centralization of supervision and resolution powers with clear-cut institutional responsibilities.

5.2. The absence of a lender of last resort and a fiscal backstop

A central bank empowered to act as the lender of last resort for its polity's Treasury through the purchase of sovereign bonds in the primary market can strongly contribute to stabilizing intra-SCA financial imbalances and preventing members of an SCA "from being pushed into bad equilibria by self-fulfilling fears of liquidity crises in a monetary union"[83]. However, this is not the

[80] In the words of Troeger: "the ECB-led supervision [is] essentially a common activity of Member States". T. Troeger, *The Single Supervisory Mechanism – Panacea or Quack Banking Regulation?* SAFE Working Paper No. 27, 24, (2013) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2311353, accessed 7 November 2015.

[81] L. Chiarella & G. Ferrarini, *Il governo della vigilanza nell'Unione bancaria europea*, cit. at. 73, 10.

[82] E. Ferran & V. S.G. Babis, *The European Single Supervisory Mechanism*, cit. at. 74, 30.

[83] P. De Grauwe, *The European Central Bank: Lender of Last Resort in the Government Bond Markets?,* CESifo Working Paper Series No. 3569 (2011).

case for the ECB[84], and even if the Emergency Liquidity Assistance (ELA)[85] program is carried out under supervision of the ECB, it is still decentralized through national borders due to the fact that the central bank credit to Euroarea banking institutions is exceptionally granted by the National Central Banks and not by the ECB. Unfortunately, the recent reforms not even touch upon the subject.

Nevertheless, it would be unfair to blame the reform package for this. Alike the *constitutional* constrains prohibiting the conferral of supervisory powers on the EBA's shoulders, other constrains did not permit to modify the existing scenario and turn the ECB into a fully-fledged Central Bank empowered to purchase sovereign bonds in the primary market (interpretation confirmed by the ECB in the recent *Gauweiler* case[86]). Article 127.1 of Treaty on the Functioning of the European Union (TFEU) clearly reads:

> "The primary objective of the European System of Central Banks[87] […] shall be to maintain price

[84] In the very recent *Gauweiler* case the ECJ held that the ECB can purchase sovereign bonds if "*a minimum period is observed between the issue of a security on the primary market and its purchase on the secondary market*". Case 62/14, Peter Gauweiler and Others vs Deutscher Bundestag (2015).

[85] European Central Bank, ELA Procedures. Available at: https://www.ecb.europa.eu/pub/pdf/other/201402_elaprocedures.en.pdf?e716d1d560392b10142724f50c6bf66a, accessed 7 November 2015.

[86] Case 62/14, Peter Gauweiler and Others *vs*. Deutscher Bundestag, [2015]. The Court was asked to determine whether the ECB's financing program (so-called "Outright Monetary Transactions"): (*i*) was a tool of economic policy (which would go beyond the powers granted by the Treaty) or, instead, a tool of monetary policy (which is, instead, legitimate); (*ii*) was compatible with the ban of monetary financing of Member States. The ECJ recognized the lawfulness of the ECB financing program thus grating the ECB the necessary powers to efficiently deploy its monetary policy. Furthermore, while reaffirming the prohibition to buy sovereign bonds directly from a Member State, the ECJ stated that the ECB financing program does not break such prohibition since the ECB's purchase takes place after "a minimum period is observed between the issue of a security on the primary market and its purchase on the secondary market". Case 62/14, Peter Gauweiler and Others *vs*. Deutscher Bundestag, (2015) 9.

[87] The European System of Central Banks comprises the ECB and the national central banks of all EU Member States, both Member and non-Members of the Eurozone. This is not to be confused with the Eurosystem, which comprises the ECB and the national central banks of those countries that have adopted the

> stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union […]. The ESCB shall act in accordance with the principle of an open market economy with free competition, favoring an efficient allocation of resources, […]."

As regard the fiscal backstop, the establishment of a European Federal Treasury would itself require a Treaty reform, which represents an even greater leap forward involving a sound political footing. Unfortunately, even if the NIA is the most far-reaching step of federalization in many years, it is "just" a bespoke legislative product devised to solve specific urgent matters in Europe. And yet, when this is read through the lenses of OCA theory, the assessment cannot but be negative.

5.3. The absence of a single deposit guarantee scheme

The absence of a *federal* centralized deposit guarantee scheme raises serious questions about the entire project. A deposit guarantee scheme insures all deposits held by banks within a certain jurisdiction (which should correspond to a single integrated market). Under the same scheme, all depositors are treated equally and all deposits are considered holding the very same currency[88], which is particularly important in the still fragmented European retail banking market[89].

From a legal point of view, the establishment of a centralized deposit guarantee scheme was feasible. Article 1 of the

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Euro. The ESCB and the Eurosystem will co-exist so long as there are EU MSs not adopting the Euro. See: European Central Bank, *ECB, ESCB and the Eurosystem* (2014), available at http://www.ecb.europa.eu/ecb/orga/escb/html/index.en.html, accessed 7 November 2015.

[88] J. Carmassi et al., *Banking Union: a federal model for the European Union with prompt corrective action*, cit. at 3, 2, correctly point out a "deposit insurance must be centralized to provide not only equal incentives to bank shareholders and managers with ex-ante funding and risk-based fees throughout the internal market, but also full risk pooling and an adequately funded insurance fund across the banking system at EU level, so as to be able to cushion large shocks affecting one of the largest cross-border banks".

[89] On the fragmentation of banking and credit markets in Europe, see: Vincent Bignon, et al., *Currency Union with and without Banking Union*, Banque de France - Working paper no 450 (2013).

SRM Regulation establishes the Single Resolution Fund in order to support the effectiveness of SRM and leaves certain technical (but politically hot) aspects of the functioning of the Fund to an agreement among the SRM-participating MSs. The SRM Regulation is based on Article 114 of the TFEU on the measures for the approximation of MSs' rules, which implies that institutional bodies backed by it are established with the aim to "improve the conditions for the establishment and functioning of the internal market"[90]. The very same choice could have been made for a centralized deposit guarantee scheme[91], but, due to a substantial lack of political consensus[92], it was made for far less demanding recast Directive[93] of the 1994 Directive on national Deposit Guarantee Schemes[94].

Unfortunately, when compared to the United States, the EU still looks far behind. In the US, the Banking Act[95] established in 1933 the Federal Deposit Insurance Corporation (FDIC)[96], a government corporation which still serves as a guarantee for deposits held by US banks, up to $250000[97] per depositor per bank[98]. Regrettably, nothing like this currently exists in Europe[99].

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[90] Case C-217/04, *United Kingdom vs. European Commission and Council*,[2006] ECR I-3771., para.42.

[91] On this point: A. Pagliacci, *The Three Pillars Of The European Banking Union: An Evolutionary Road*, 2 IJPL, 304 (2014).

[92] Reuters, *Germany says it remains opposed to EU deposit guarantee scheme*, 9 December 2015. Available at http://www.reuters.com/article/eu-summit-deposits-germany-idUSB4N0ZH00Z20151209#34qAXX4C9PXFwyIo.97

[93] Directive 2014/49/EU, OJ L 173/149, 12.6.2014.

[94] Directive 94/19/EC, OJ L 135/05, 31.05.1994.

[95] Banking Act (Glass–Steagall Act) Pub.L. 73-66, 48 Stat. 162 (1933).

[96] Interesting comparative analyses between the US and the EU are carried out by: K. Lannoo, *The New Financial Regulatory Paradigm: A transatlantic perspective*, cit. at. 28; M. Gerhardt & K. Lannoo, *Options for reforming deposit protection schemes in the EU*, cit. at. 17; J.N. Gordon & W.G. Ringe, *Banking Union Resolution Without Deposit Guarantee: A Transatlantic Perspective on What it Would Take*, Columbia Law and Economics Working Paper No. 465, (2013) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2361347, accessed 7 November 2015.

[97] The ceiling was $2,500 in 1934 but has been progressively increased over the time.

[98] In 1991, in the aftermath of the so-called Savings and Loans crisis, the Congress promulgated the Federal Deposit Insurance Corporation Improvement Act (FDICIA) [*Federal Deposit Insurance Corporation Improvement Act Pub.L. No. 102-242,105, Stat. 2236 (1991)*] which strengthened the leeway of

The combination of a single deposit guarantee scheme and a single resolution fund would put all European banks under the same umbrella thus making the entire financial system more stable[100]. The benefit, then, would be maximized by the new unified supervision that could guarantee a uniformed application of the same rules throughout the Union. And yet, even if it was legally feasible and several scholars[101] argue in favor of the

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the FDIC in protecting bank depositors by granting it access to funds provided directly by the Treasury. The "savings and Loans crisis" is a label indicating the failure of about 25% of the US thrifts institutions spanning over the '80s and '90s. See: M. E. Lowy, *High Rollers: Inside the Savings and Loan Debacle* (1991); L.J. White, *The S&L debacle: public policy lessons for bank and thrift regulation* (1992).

[99] Gros & Schoenmaker argues that "Recognising the interconnectedness, the functions of resolution and deposit insurance should be combined in Europe, as is done in the US.". D. Gros & D. Schoenmaker, *European Deposit Insurance and Resolution in Banking Union*, cit. at 3, 11.

[100] *Ibidem,* 2.

[101] *Ibidem*; J.E. Colliard, *Monitoring the Supervisors: Optimal Regulatory Architecture in a Banking Union*, cit. at. 26. Paul Krugman states that a "Europe-wide backing of banks" is needed, with this implying "both some kind of federalized deposit insurance and a willingness to do TARP-type rescues at a European level – that is, if, say, a Spanish bank is in trouble in a way that threatens systemic stability, there should be an injection of capital in return for equity stakes by all European governments, rather than a loan to the Spanish government for the purpose of providing the capital injection. The point is that the bank rescues have to be severed from the question of sovereign solvency." P. Krugman, *Revenge of the Optimum Currency Area*, cit. at. 22.
Interestingly, Buch et al. highlight the perils of the establishment of a Deposit Guarantee Scheme without certain preconditions which would, instead, avoid moral hazard: "central powers covering supervision, restructuring and resolution of banks are the preconditions for the introduction of European deposit insurance. These preconditions will not be in place for the foreseeable future. The introduction of pan-European deposit insurance would mutualize risks without, at the same time, establishing sufficient central surveillance mechanisms." C. Buch, T. Körner & B. Weigert, *Towards Deeper Financial Integration in Europe: What the Banking Union Can Contribute,* Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung, Working Paper No. 2/2013, 33 (2013) available at http://www.sachverstaendigenrat-wirtschaft.de/fileadmin/dateiablage/download/publikationen/arbeitspapier_02_2013.pdf, accessed 7 November 2015. On the relationship between market discipline and the functioning of Deposit Guarantee Schemes, *see*: E. Vasileiou, *The new "Bail-in" regime and the need for stronger market discipline. What we can learn from the Greek case?* 3 Intn'l J. Finance & Banking St. (2014). Finally, Mayer argues that "no industry or state deposit insurance scheme is required. A simple 100% reserve requirement is sufficient", T. Mayer, *A Copernican turn in*

necessity to construct a truly federal deposit guarantee scheme which would simply come to terms with the fact that Europe is already a wholesale financial market, the NIA is not equipped with it. If viewed through the lenses of the OCA theory, the absence of a single deposit guarantee scheme is an unforgivable missed chance.

Being aware of the necessary of a *federal* deposit guarantee scheme, the European Commission has very recently submitted a proposal for a Regulation[102] establishing a European Deposit Insurance Scheme (EDIS). According to the Proposal, the EDIS will cover banks subject to the SSM/SRM, be built on the existing national deposit guarantee schemes, and gradually introduced through the following three steps:

> 1) Until 2020, the re-insurance phase: where a national DGS would be able access the EDIS should its own funds dry out;
>
> 2) in the years 2020-2023, the co-insurance phase: the EDIS would be turning into a progressively mutualized system. In the phase, the EDIS would contribute to sharing the costs of the depositors' reimbursement, starting with quite a low quote (20%), to be increased on a yearly basis;
>
> 3) as of 2024, the full insurance: the EDIS would be fully insuring national DGSs, with the latter becoming integrated parts of the EDIS itself. The EDIS would be operating through a European Deposit Insurance Fund run by the Single Resolution Board[103].

Banking Union urgently needed, CEPS Policy Briefs Centre for Economic Policy Research, (2013) available at http://www.ceps.eu/publications/copernican-turn-banking-union-urgently-needed, accessed 7 November 2015. Even if this proposal may be economically feasible, it would not be so in legal terms as it implies a strong involvement of the ECB which may exceed its mandate.

[102] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme, Strasbourg, 24.11.2015, COM(2015) 586 final, at: http://ec.europa.eu/finance/general-policy/docs/banking-union/european-deposit-insurance-scheme/151124-proposal_en.pdf

[103] *Supra*. See also: European Commission, *Fact Sheet - A European Deposit Insurance Scheme (EDIS) – Frequently Asked Questions*, Strasbourg, 24 November 2015. Available at: http://europa.eu/rapid/press-release_MEMO-15-6153_en.htm

The aim of the Commission is to create "a more European system, disconnected from the sovereign, so that financial stability is enhanced and citizens can be certain that the safety of their deposits does not depend on their geographical location"[104]. However, despite the very good intentions of the Commission, the necessary political consensus still seems to be lacking[105] and it is too early to predict which steps the European executive will take to overcome the current deadlock.

5.4. The anti-moral hazard bail-in mechanism and the discretionary powers of resolution authorities

Resolution mechanisms and, above all, the philosophy underpinning the new bail-in regulatory framework profoundly penetrate civil law traditions of the MSs. So far, bankruptcy procedures – and the public authorities entrusted with the powers to apply them – have always been national and are based on the idea that banks cannot default like other businesses do, and either the Government or the national Central Bank were asked to jump in and bail troubled banks out.

The introduction of the bail-in philosophy is a U-turn in bankruptcy law, not only for continental Europe, but also for the UK. It grants a public authority the power to write-down and/or convert liabilities of a bank under resolution in order to avoid using public funds. The bail-in concretizes the anti-moral hazard principle that the stabilization of the financial system must be borne by the financial industry itself[106]. In more details, the SRM bail-in redefines the classification of creditor claims, thus replacing national legal traditions on the order of preferred creditors and

[104] European Commission, "On steps towards Completing Economic and Monetary Union", COM(2015) 600 final, Brussels, 21.10.2015, http://ec.europa.eu/priorities/economic-monetary-union/docs/single-market-strategy/communication-emu-steps_en.pdf, accessed 7 November 2015.

[105] Reuters, 'Germany blocks small progress on banking union at EU summit', 15 December 2016. At: http://www.reuters.com/article/us-eu-banks-regulations-idUSKBN1442Z8

[106] In the words of Huertas and Nieto: "To end moral hazard and "too big to fail", investors, not taxpayers, should bear the loss associated with bank failures." T. Huertas & M.J. Nieto, *A game changer: The EU banking recovery and resolution directive*, (2013) available at http://www.voxeu.org/article/banking-recovery-and-resolution-directive, accessed 7 November 2015.

reforming the *pari passu* treatment of creditors[107]. In so doing, it adopts a "carve-out"[108] approach and puts deposits held by natural persons and small-medium enterprises on a higher priority ranking vis-à-vis the claims deriving from ordinary unsecured and non-preferred titles as identified under national laws regulating standard insolvency procedures.

Importantly, national resolution authorities enjoy a certain leeway about granting further exclusions to investors' claims. The SRM Regulation makes these exclusions possible either when the application of the bail-in tool would generate destruction in value so that financial loses borne by other creditors are higher than if these claims were not excluded from the bail-in procedure; or when it is strictly necessary to achieve the continuity of important functions and core business lines (Article 44). It goes without saying that the assessment, evaluation, and exclusion of assets and liabilities is a delicate – but necessary – activity.

Two problems arise here. First, at least in the short run, uncertainty about the *bail-inable* liabilities may (irrationally?) affect institutional investors' asset allocation. Second, the local public authorities' assessment of the *bail-inable* liabilities would eventually replace market evaluations of financial instruments. And the fact that the authorities' assessment can be subject to judicial review (but only if the entire resolution measure is challenged), increases uncertainty due to slow judicial procedures.

EU law grants extensive discretionary powers in areas of an economic nature and in complex issues as the ECJ has recently confirmed in the *Gauweiler* case[109]. However, alongside the EU law realm, the bail-in tool instinctively reminds us of the limit to discretionary powers administrative authorities are usually entitled to exercise under the Continental European administrative law traditions. Traditionally speaking, public administration discretion can be defined as "a comparative weighting analysis of several secondary interests vis-à-vis a

[107] On this point, T. Huertas & M.J. Nieto, *A game changer: The EU banking recovery and resolution directive,* cit. at. 106.

[108] So defined by T. Huertas & M.J. Nieto, *A game changer: The EU banking recovery and resolution directive,* cit. at. 106

[109] With the *Gauweiler* case the ECJ has endorsed a substantial strengthening of the ECB's leeway. For details on the *Gauweiler* case: note 86.

primary one"[110]. In this case the primary interest would be the stability of the EU financial system which can ultimately be granted only by the activity of a public administrative body.

Indeed, after the comparative evaluation of the primary interest – financial stability – against the secondary ones – personal economic rights –, the latter are necessarily shrunken and torn, even when they are formally protected by the Article 16 of Charter of Fundamental Rights of the European Union which clearly states that the "freedom to conduct a business in accordance with Union law and national laws and practices is recognized"[111]. Within this framework, the stability of the financial system is not just a mere collective economic interest but it is *the* common good sheltered behind a public administrative power and justifying limitations to the personal freedom of conduct of business.

To conclude, it can be said that the bail-in was indispensable to avoid lavishing tax-payers' money on poor-managed banks and to concretize the anti-moral hazard principle that the costs of the stabilization of a financial system's distortions must be paid by the industry itself. Making the industry responsible for its own mistakes at EU level may reduce the risk of financial shocks within a currency area and avoid the related distortions, thus endogenously[112] easing the OCA-building phase. However, the fact that local resolution authorities enjoy quite broad discretionary powers may, instead, spawn fragmentations, at least in market expectations.

5.5. The anti-fragmentation role of the European Court of Justice

Courts have always played a prominent role in bankruptcy procedures. They have always worked hand-in-hand with resolution administrative bodies, which are involved with the justification of the necessity to "rescue" troubled banks – given the extremely delicate business carried out by credit institutions – and

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[110] M.S. Giannini, *Diritto Amministrativo, vol. II*, 47 (1993). (Author's translation).

[111] OJ C 364, 18.12.2000.

[112] On the endogeneity of OCA, see: Jeffrey A. Frankel & A.K. Rose, *The Endogenity of the Optimum Currency Area Criteria*, NBER Working Paper No. 5700, (1996) http://www.nber.org/papers/w5700.pdf accessed 7 November 2015.

the need to avoid spill-over effects that bank failures very often generate.

So far, national courts have always judged the administrative measures produced by domestic resolution authorities. As of tomorrow, courts will substantially review the content of the decisions made by the Single Resolution Board, even if formally still conveyed by the traditional national administrative measures implementing those decisions. This is very likely to impact on the methods conventionally taken by domestic courts, not only due to the new bail-in tool, but also due to the looming (but slow) harmonization of the "bankruptcy culture" in Europe (an inevitable result of the centralization of the banking resolution procedures).

What is very important is that, in order to avoid national fragmentation, a certain leeway has been granted to the Court of Justice of the European Union (ECJ). First and foremost, Article 37 of the Resolution Regulation establishes that the lawfulness of the Resolution Board's decisions to conduct all necessary on-site inspections[113] are subject to review only by the EJC. In addition, Article 87 of the SRM Regulation also specifies how the ECJ is *the* court endowed with the jurisdiction to give judgment on the liability of the Board. Finally, coherently with Article 267 of the Treaty on the Functioning of the European Union, Recital 120 states that the ECJ is competent to give preliminary rulings upon request of national courts about the validity and interpretation of acts of the institutions, bodies or agencies of the Union.

The ECJ, which has always played a key role in building up the EU legal system[114], has been left with the last word with regard to the liability of the Board and on the lawfulness of its (very intrusive!) decisions with the aim to avoid centrifugal interpretations of the Board's decisions and shield the Board itself from locally-based interests likely to severely hinder the execution of its duties. This was a necessary step if a more uniformed landscape at European level was intended to be created, and against the backdrop of the OCA theory, this is clearly a very positive point.

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[113] Article 36.

[114] As regard the ECJ's judicial review in details, see: D. Chalmers, G. Davies & G. Monti, *European Union Law: Cases and Materials,* 396 (2010).

6. Conclusions

This article has tested the OCA theory against the new institutional architecture established at EU level in the banking law field and the results are shown in the table below:

LEGAL POINTS…	…READ THROUGH THE LENSES OF THE OCA THEORY
A single supervisory authority very much based on coordination and soft law	Negative in the short run
The absence of a fully-fledged lender of last resort and a fiscal backstop	Very Negative
The absence of a single deposit guarantee scheme in the original design of the reform package	Very Negative Moreover, the recent Commission's Proposal seems to lack the necessary political endorsement
The anti-moral hazard bail-in mechanism and the discretionary powers of resolution authorities	Potentially Positive
The anti-fragmentation role of the European Court of Justice	Very Positive

The post-crisis legislative reforms should be welcome as a very sophisticated arrangement based on an interplay of private and public laws through which the macro-prudential level – i.e., systemic financial stability – and the micro-prudential level – i.e., financial stability of single firms – holistically merge into one big picture. However, it is not possible to ignore the clear deficiencies.

If the absence of a fully-fledged lender of last resort and a fiscal backstop is justified by *constitutional* constrains, the absence of a single deposit guarantee scheme is clearly a missed chance. Unfortunately, the recent proposal put forward by the

Commission does not seem to be backed by the necessary political consensus. Furthermore, the byzantine governance of the SSM heavily based on cooperation and soft-law measures does not help at all. Potentially positive elements such as the anti-moral hazard bail-in mechanism and the anti-fragmentation role of the ECJ do not compensate for the missing parts.

To conclude, recent reforms do not establish under the EU law the institutional "safety net" that is considered necessary by OCA theory. Even if the new architecture does not look like a creaking edifice, it does not automatically create the necessary legal level-playing field where capital can move efficiently by readjusting internal distortions and imbalances among the MSs, thus effectively promoting an ever closer union.

THE RIGHT TO THE CO-CITY*

*Christian Iaione***

Abstract

This study is an effort to contribute to the current urban studies debate on the way to conceptualize the city by advancing a rights-based approach and to suggest that to build such vision one needs to reconceive the city as a commons, which is to say that the city serves as an infrastructure enabling the "pooling" of city inhabitants actions, energies, resources and the cooperation between city inhabitants and other four urban actors thereby embedding a "quintuple helix" or "pentahelix" approach in the governance design of the city. Part I articulates the most prominent visions or paradigms of the city of the 21st century and the "metaphors" that are currently used to conceptualize the city. From an interdisciplinary perspective, this part then discusses some complications and emerging key points that deserve further reflection. In Part II, the article argues that a rights-based paradigm or vision in the conceptualization of the city is emerging. It does so through the analysis of urban laws and policies adopted in exemplary case studies such as Naples and Barcelona, on one side, and Bologna and Turin, on the other side. Two main rights-based approaches seem to emerge: the rebel city model and the co-city model. In Part III, to better define this fourth urban paradigm and in particular the second approach, a focus on the key concept of *commons* and a review of the main bodies of literature is provided which are key to carve out the concept of "pooling" as a form of cooperation that encompasses both sharing of congestible resources to avoid scarcity and collaboration around non congestible, constructed resources to generate abundance. Building on the existing literature of a particular subset of studies on infrastructure commons, the concept of pooling is extracted from the observation of how pooling as a demand-side strategy can both expand or leverage the idle "capacity" of an infrastructure to avoid congestion and at the same time generate abundance. Pooling is particular effective in explaining the main features of a peculiar vision of the rights-based city, the co-city approach, ultimately envisioning the city as an enabling infrastructure for social and economic pooling. Part IV offers concluding remarks and proposes the idea of the "right to

the co-city" to build a body of urban law and policies advancing "urban rights to pooling" as a key legal tool to structure a commons-oriented interpretation of the fourth vision of the city, the rights-based approach.

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1. The paradigms or visions of a new "urban age"

The current discourse on cities suggests to privilege the city as a focal point for scientific observation of economic and institutional innovations. Cities will be the place where most people will spend their life and work together, will help each other, will co-produce and make evolution happen, in a sustainable way. Starting from an analysis of the arguments that help define the current age as a new urban age, this paragraph will provide a brief overview over the current urban discourse as it emerges from some of the most prominent scholars engaged in the academic debate around the city. It will argue that the existing urban paradigms build on mainly three different features or driving factors: (1) knowledge; (2) sustainability; (3) technology. Almost every study on urban related issues needs to start

nowadays from data on urbanization trends and urban economy outlook, stressing the role and power that cities will exercise in the 21st century[1]. Aggregated secondary data on urbanization trends suggest that cities will be the center of social[2] and economic[3] life

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[1] The NYU Furman Center on real estate developed a data center on housing and neighborhoods data of New York City (http://coredata.nyc/). UN Habitat, through the Explore Urban Data application offers possibilities for comparing cities on the basis of economic and social indicators (http://urbandata.unhabitat.org/). The University of Glasgow promoted a research project to develop urban datasets on several issues like education, housing, transportation among the others (see http://ubdc.ac.uk/). The University of Chicago organized in 2016 one of the first convening on urban data science (http://www.urbanccd.org/urbandataconven/).

[2] At the OECD level, more than 500 million people live in urban agglomeration. OECD, *Governing the city,* 3 (2015), available at http://dx.doi.org/10.1787/9789264226500-en. The OECD also defines the 21st century as the metropolitan century, considering that by 2100 the share of the urban population is projected to reach around 9 billion (85% of the population), and cities are motors of economic growth. Through the OECD areas, productivity and wages increase with city size and metropolitan areas, together with middle size cities are a great potential in terms of job creation innovation and green growth, which implies as a consequence that the way in which cities are planned and run will have a huge relevance from a socio-economic and environmental standpoint.

OECD, *The metropolitan century. Understanding Urbanization and its Consequences* 15 (2015), available at http://dx.doi.org/10.1787/9789264228733-en.

[3] Cities are the main creators of economic wealth, generating over 70 per cent of the world's Gross Domestic Product (GDP). There are economic benefits associated with urbanization, the agglomeration economies, that are key drivers of economic growth, but need to be harnessed in order to ensure that urbanization and economic growth of cities are strategically used in order to promote economic efficiency and social equity. UN Habitat, *Economy*, UN HABITAT (last visited 20/10/2016), available at http://unhabitat.org/urban-themes/economy/.

for humankind[4]. Cities are growing in both size and numbers[5], although with different trends (most mega-cities are in the Global South while the fastest growing cities are in Asia and Africa)

Public law scholars like Jean Bernard Auby[6] highlighted that the renaissance of cities and the growing importance of cities in comparison to power of nation states[7] is an important historical phenomenon. Political scientist Benjamin Barber has commented that one of the main differences between local and national politics relies in the pragmatic orientation of the governance approach that Mayors adopt in order to solve problem of everyday urban life, soon lacking at the national level[8]. Moreover, as Porras[9] outlined, prominent legal scholars, proponents of localism, such as Frug, Blank and Barron, have situated cities and associations of cities as a new influential actor in the international policy making arena. Cities affirmed their status of site of self-governing communities, an alternative to democratization beyond the state[10].

The choice of the city as an observation point is also suggested by the observation of the widespread of collaborative practices, that encountered an impressive evolution in recent years achieving a considerable economic[11] and social value, with a

[4] According to data on urbanization trends produced by the UN, "in 2016, an estimated 54.5 per cent of the world's population lived in urban settlements. By 2030, urban areas are projected to house 60 per cent of people globally and one in every three people will live in cities with at least half a million inhabitants[4]" United Nations Human Settlements Program (UN-Habitat) *The World's Cities in 2016,* 2 (2016). Available online here: http://wcr.unhabitat.org/main-report/.

[5] *Id.* at 4.

[6] J.B. Auby, *The Role of law in the legal status and powers of cities*, 2 IJPL 302, 305 (2013).

[7] Khanna has stated that we are moving into an era where cities will matter more than states P. Khanna, *Connectography: Mapping the future of globalization* (2016).

[8] B. Barber, *If Mayors Ruled The World* (2013).

[9] I.M. Porras, *The city and international law: in pursuit of sustainable development,* 36 Fordham Urb. L. J 537-538 (2009).

[10] I.M. Porras, *The city and international law: in pursuit of sustainable development,* cit. at 9, 537-538.

[11] Five key sharing economy sectors (car sharing, travel, finance, staffing, music and video streaming) have a potential to increase global revenues from 15 billion dollars today to around 335 billion dollars by 2025. The business models of sharing economy platforms are changing the way consumers think about value. Experiences, in fact, increase contentment far more than purchases do. See PWC, *The sharing economy,* 15 (PwC 2015)

considerable impact on the legal landscape, particularly at the local level[12].

Few point out, however, that the explosion of urbanization is going to strongly impact the physical aspects of cities and their social fiber, possibly having consequences for urban congestion and urban wars[13]. Fewer scholars are investigating the hidden effects of urbanization, for instance Brenner observed his impact on the countryside and sites of raw materials extraction[14].

The goal of this article is to start sketching the vision of a "co-city", a city that builds on all the new patterns of the age of

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https://www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf. Among the key disruptive lever for companies to consider in moving to a sharing economy model, PwC suggests to take into account under-usage of tangible and intangible assets owned by companies (this has to do with the idea of sharing investment cost in research and development. In the US, the report highlights, patent filers such as IBM or Sony collectively field more than 21,000 in 2013, but only a fraction of these was brought into the market because of high investment cost. General Electric created a partnership with Quirky, invertor community online, that gave open access to their patent to the community and resulted in the production of joint-venture products). See *Id.,* at 28-29. According to the EU study on the Cost of non-Europe in the sharing economy, the welfare loss from the under-utilization of labor (the largest component) accommodation, cars and other sectors is estimated to the equivalent to 572 billions of euros. P. Goudin, *Id.* at 33. P. Gouding, *The cost of non Europe in the Sharing economy,*33 (Directorate-General for Parliamentary Research Services of the Secretariat of the European Parliament 2016). http://www.europarl.europa.eu/thinktank/en/home.html.

[12] N. Davidson and J. Infranca observed that the sharing economy generates mainly externalities at the local level and it's largely a concern of local authorities. N. Davidson and J. Infranca, *The sharing economy as an urban phenomenon,* 34 Yale L. & Pol'y Rev 215, 223-238 (2016). Studies realized at the EU level highlights that policy implications for regulating sharing economy is willing to change over time, according to the development of this sector. The sharing economy is in fact likely to expand to new markets, and the peer to peer transaction share will decline. Goudin, *cit.* at 11, 19.

[13] J. Beall, *Cities, Terrorism and Urban Wars of the 21st Century*', Working Paper 9, 2 (Crisis States Research Centre, LSE 2007). The challenges that the 21st century urbanization will bring for cities are highly differentiated across countries, but among the most common features we can encounter the struggle to provide urban infrastructures (water, sanitation, electricity), air pollution, reduction of carbon footprint, improve in public transportation and connectivity, livability. OECD Report, *The metropolitan century. Understanding Urbanization and its Consequences,* cit. at 2, 120-121.

[14] N. Brenner, *Implosions/Explosions, Towards a Study of Planetary Urbanization*, (2013).

urban and the age of collaboration, considers possible downsides (a negative relation with rural and possible conflicts). In order to do so, we need to build a very simple and broad anthology of the XXI century urban visions, by first briefly describing some of the current visions of the city of tomorrow and then envision the characteristic of a co-city. The co-city also builds on the Lefebvrian vision of the "urban" as a process, rather than a fixed space[15], and therefore envisions the city as a complex adaptive and evolutionary system.

The application of complex adaptive systems' concept and theories, originated from mathematics, to social sciences[16], in particular to the analysis of cities allow us to identify some crucial features for the urban legal and policy design. The main question if one wants to conceive the city as a complex adaptive system, for Lansing, is: how can a city with millions of inhabitants avoid swings between shortage and glut without a centralized planning? The explanatory system provided by the theory of the invisible hand of the market is not enough for the author to explain the current state of the relationship between the market and society[17]. A crucial feature of complex adaptive systems is that, as Beinhocker also explains, "micro-level interactions of agents in a complex adaptive system create macro-level structures and patterns"[18]. For Lansing instead, the phenomenon can be described as "a process that seems to be governed by chance when viewed at the level of individuals turns out to be predictable at the level of society as a whole[19]". In order for global patterns of behavior to become apparent, the observer must shift the attention from the individual level causal forces to the behavior of the system as a whole. In the view of cities as a complex system, as Allen highlights, the most relevant phenomena are the *non aequilibrium* phenomena, because they offer a novel understanding of organization in systems with many interacting entities and individuals[20]. Another core aspect of the city as a complex system

[15] *See* H. Lefebvre, *The Right to City*, Writings on Cities 147 (E. Kofman & E. Lebas eds., trans., 1968). See also N. Brenner and C. Schmidt, *The urban age in question,* 38.3 Int'l J. Urb. Reg. Res. 731, 750 (2014).
[16] J. S. Lansing, *Complex adaptive systems*, 32 Ann. Rev Antropology, 183 (2003).
[17] J. S. Lansing, *Complex adaptive systems*, cit. at 16, 183.
[18] E. Beinhocker, *The origin of wealth,* (2006), 161.
[19] J. S. Lansing, *Complex adaptive systems*, cit. at 16, 185.
[20] P. Allen, *Cities the visible expression of Co-evolving complexity,* in Juval Portugali et al., *Complexity theories have come of age* 69 (2012):

is the mechanism of evolution, or co-evolution[21]. The complexity perspective views evolution from a different standpoint than the consolidated theory of social Darwinism in traditional biology does, stressing the long term adaptive capacity of cooperation. The perspective of evolutionary biology, widely studied by Edward Wilson, among the others[22], is an attempt to understand mechanism behind the evolution of the human being in the social system, looking at the biological foundation of competitive, altruistic, cooperative behaviors in order to enrich our knowledge of the relationship between nature and culture. The contribution of complexity and evolutionary theories is therefore the assumption that individuals are not inherently altruistic nor selfish, instead we can have strong reciprocity as a principle that govern cooperation among agents, the conditional cooperators, that perform better than agents following purely selfish or purely altruistic strategy[23]. A functioning evolutionary system is a system where state, market and communities are not one against the other, instead they work together to create wealth, social capital and opportunities, both competing and cooperating[24]. For providing a response to his own overwhelming complexity, the structure of society must change, since the cleavages of the previous century, state vs. market or left versus right,[25] are no more able to help policy makers to address complexity. Those patterns design different "ways of balancing the invisible system of economic self-regulation with the intentional decision making of policy makers"[26]. A new framework is needed, and it could be based teamwork rather than leadership, since it seems to be more appropriate than economic coordination or central decision to deal with complexity. Society should be thought as organized in teams and the policy challenge would then be to understand how to set up processes that create teams, and understand the way in which they might work together[27]. We will build on those ideas later in

[21] P. Allen, *Cities the visible expression of Co-evolving complexity,* cit. at 20, 70-75.
[22] See generally E.O. Wilson, *Sociobiology* (1975). See also P. Singer, *The expanding circle: ethics and sociobiology* (1981).
[23] See generally E. Wilson, cit. at 222 and E. Beinhocker, cit. at 18, 418-419.
[24] E. Beinhocker, cit. at 18, 421.
[25] E. Beinhocker, cit. at 18, 415.
[26] Y. Bar-Yam *Teams: a manifesto,* New England Complex Systems Institute and MIT Media Laboratory, (July 31 2016), https://medium.com/complex-systems-channel/teams-a-manifesto-7490eab144fa#.36d3lr1sk.
[27] Y. Bar-Yam, cit. at 26, 2/4.

the article in order to develop the vision of a co-city and urban pools as its elementary structures.

1.1 The XXIst century city's visions

The concept of urban is a complex and contested concept. Cities are changing their role, morphology, structure while urbanization is becoming a global process. The attempt of this paragraph is to provide a rough introduction, starting from historical studies on cities, to the understanding of the most relevant visions on cities from different disciplinary perspective.

The first body of literature to be addressed conceives the city as a marketplace. The idea of a knowledge-based city stresses the feature of cities as key centers of economic production and consumption. The urban economy is assuming a central role in global economic dynamics, and relevant economic phenomena, such as the sharing economy, are inherently urban[28]. Following the intuition of prominent scholar like Jane Jacobs[29] and Paul Bairoch[30] regarding the innovation potential of cities, a powerful strand of research has been investigating the relationship between agglomeration, knowledge production and urban economic growth in cities. Economic literature has emphasized that cities are economic spaces, focusing on the positive externalities that result from agglomeration, creativity and knowledge creation and their effect on urban growth[31]. The main idea behind the paradigm of the city as an economic place is that urban economic success relies on the one hand on the positive connection between human capital and economic growth, due to the high density and

[28] This is the case of sharing economy, as Nestor Davidson and John J. Infranca highlight in N. Davidson and J.J. Infranca, cit. at 12. The European Union made an effort in order to understand the local dimension of the sharing economy and propose a comprehensive analytical framework, see the Opinion of the Committee of the Regions of the European Union, *The local and Regional Dimension of the sharing economy,* Opinion Number: CDR 2698 (adopted on 4/12/20159, available at http://cor.europa.eu/it/activities/opinions/Pages/opinion-factsheet.aspx?OpinionNumber=CDR%202698/2015.

[29] J. Jacobs, *The economy of cities* (1969).

[30] P. Bairoch, *Cities and economic development,* (1988).

[31] Positive externalities of high density on the ecological performance has also been highlighted. There is a strand of literature that analyzed the idea of a "compact city" as an environmentally sustainable city. See C. Gaignéa, S. Riouc, J.F. Thissee, *Are compact cities environmentally friendly?* 72 J. Urb. Econ. 123, 2–3 (2012).

resulting inter connections and network. In other words, this literature focuses on the capacity of the city to be a *knowledge based – creative city,* a *consumer city*[32], and highlights how the growth of cities might bring opportunities and challenges at the same time. Urban agglomeration[33]is a positive[34] feature for economic growth, that also might result in negative externalities, such as congestion effects[35] that might represent a strong disincentive although the history of urbanization shows that cities made lot of efforts to bring them under control[36]. The emphasis placed by Florida on bohemian lifestyles is been questioned by some critics including Glaeser[37] who states that urban authorities might also invest in the urban basics, such as safety and basic public services (i.e. transportation and education), in order to reach the goal of attracting the human capital needed to drive urban economic growth[38].

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[32] E. L. Glaser, J. Kolko, A. Saiz, *Consumer city,* 1 J. Urb Geography, 27-50. (2001). See also E. Glaeser, *The triumph of the city,* (2011) and R. Florida, *Cities and the creative class*, 2 City and community 1, 7 (2003).

[33] G. Duranton and D. Puga, *Micro foundations of urban agglomeration economies,* in J.V. Henderson and J.F. Thisse (eds.), 4 *Handbook of Regional and Urban* Economics 48 (2004). As Mc Kinsey emphasized, "cities are instant markets for many types of business. As businesses cluster in cities, jobs are created and incomes rise", and agglomeration enables industries and service sectors to have higher productivity compared to the rural setting. McKinsey Global Institute, *Urban world: Mapping the economic power of cities* 11 (2011) http://www.mckinsey.com/global-themes/urbanization/urban-world-mapping-the-economic-power-of-cities. The ecological sustainability of life in a high-density city challenge the mainstream idea of the life in the country as a more environmental sustainable life. *See generally* D. Owen, *Green Metropolis,*1-39, 147-199 (2010).

[34] Among the positive externalities of agglomerations, we can comprehend the economy of scale that concentration brings: the cost of delivering basic urban services (housing and education, for instance) is 30 to 50 percent cheaper in concentrated population centers than it is in low populated areas. See McKinsey Global Institute, *Urban world: Mapping the economic power of cities* (2011), at 10-11.

[35] Traffic congestion clearly represents a negative externality of urban agglomeration. See J. Brinkman, *Congestion, agglomeration and the structure of cities*, 94 J. Urb. Econ. 13-31 (2016).

[36] A. J. Scott, *Creative cities: conceptual issues and policy questions,* 28, J. Urb. Aff. 1,1-17 (2006).

[37] S. Foster and N. Davidson, *The mobility case for regionalism,* 47 U.C.D.L. Rev. 63, 96. (2013-2014). See also E. Glaeser, *Review of Richard Florida's The rise of the creative class,* 35 Regional Sci. Urb. Econ. 5, 593-596 (2005)

[38] E. Glaeser, *The triumph of the city,* cit. at 32, 260.

A large body of academic literature related to the city has been developed to reflect on the vision of the city of tomorrow from an environmental standpoint. We can identify two main different concepts and literatures that conceive urban sustainability differently: the eco-city and the city as an ecosystem.

The eco-city approach considers how cities can achieve a better environment through the reduction in air, water and soil pollution and smart waste generation[39], while the city as an ecosystem approach is concerned about how the biophysical, social economic processes interact in the urban environment, and therefore how cities can achieve a sustainable development.

The eco-city and sustainable city literature is quite focused on the impact of cities on the natural ecological system as opposed to the idea of the city itself as an ecosystem. The idea of the eco-city has been used to describe a wide range of approaches aiming to turn cities in environmentally sustainable places[40] and at developing communities that respect the nature and have sustainable behaviors[41], while the ecological city approach is aimed at envisioning the city as the result of the interaction between biological, social, economic processes. Sheila Foster's contribution on the city as an ecological space[42] highlights that, whether designed by considering existing social networks of individuals and entities that have a common stake on the resource or rely upon it although geographically disperse, land use governance might revitalize cities and neighborhoods[43].

Finally, the paradigm of the tech-based city configures the model of smart cities and sharing cities, both still under definition. The literature on the tech-based city relies upon the idea that ICT technologies and the use of data as a tool to improve life in cities

[39] M. Marchettini et al, *The Sustainable City. Urban Regeneration and Sustainability,* WIT Press (2014).

[40] E. Rapoport, *Utopian Visions and Real Estate Dreams: The Eco-city Past, Present and Future 8* Geography Compass 60, (2014).

[41] E.J. Junior and M. M. Edward, *How Possible is Sustainable Urban Development? An Analysis of Planners' Perceptions about New Urbanism, Smart Growth and the Ecological City,* 25 Planning Prac. & Res., 417-419, (2010).

[42] S. Foster, *The city as an ecological space: social capital and land use*, 82 Notre Dame L. Rev. 68, (2006-2007).

[43] Sheila Foster explains that this is the case of the community gardens, were a significant percentage of garden's members live outside the community where the garden is located. S. Foster, *The city as an ecological space: social capital and land use* cit. at 42, 542.

and city government, with an emphasis on a sustainable and business led urban development[44]. The academic literature on smart city shows interest on this topic in several disciplines (urban studies, environmental studies, sociology) but the field of the study of the law and smart city is just emerging[45], although there are several legal and policy issues that might be addressed: privacy protection[46], security, law enforcement access and insurance[47] among the others. Several observers of the smart city admonish us to reflect over the wider implications of the technological evolution of cities. Antony Townsend, for instance, highlights that the dependence on technology makes cities more functional and equitable, but also exposes them to vulnerabilities[48] related to the dependence on internet, and potential hacker attacks. Brett Frischmann has argued that techno social engineering of humans, largely ignored by legal scholars, might represent one of the greatest constitutional issues caused by the spread of technology, because of its consequences of nudging people to behave like machines and therefore becoming predictable and programmable[49]. The mixture of urbanization with the increasing use of data and technology is in fact turning the city into a civic laboratory[50], and the smart city perspective is providing civic leaders and government with a unique opportunity to reinvent the city in a more open and democratic form through data – led strategies by integrating design and grassroots solutions[51] but at the same time it might face the risk of

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[44] V. Albino, U. Berardi, R.M. Dangelico, *Smart cities: Definitions, dimensions, performance, and initiatives* in 22 J. Urban Technology 1, 3-21 (2015) at 12.

[45] A. Decker, *Smart Law for smart cities, Symposium – Smart law for smart cities: regulation, technology, and future of cities,* 41 Fordham Urb. L. J. 1492 (2015).

[46] K. Finch & O. Tene, *Welcome to the Metropticon: protecting privacy in an hyperconnected town,* 41 Fordham Urb. L. J., 5 (2015).

[47] D.J. Glancy, *Sharing the Road: Smart Transportation Infrastructure,* 41 Fordham Urb. L.J. 1617 (2015).

[48] A. Townsend, *Smart cities. What if the smart cities of the future are chock full of bugs?* Places Journal, (last visited October 2013) https://placesjournal.org/article/smart-cities/.

[49] B. Frischmann, *Thoughts on Techno-Social Engineering of Humans and the Freedom to Be Off (or Free from Such Engineering)*17 Theoretical Inquiries L. 535 (2016).

[50] A. Townsend, *Smart Cities: Big Data, Civic Hackers, and the Quest for a New Utopia,* (2013), 85.

[51] A. Townsend, et. Al., *A Planet of Civic Laboratories: The Future of Cities, Information and Inclusion,* Institute for the Future studies 87 (2011), available at

fueling the conflict in socially and economically stratified cities[52], and deepen social divisions[53]. The concepts of smart city and sharing city sometimes overlap, in public debate and scientific literature or at the public policy level[54]. The sharing city shares some characteristic with the smart city, such as the strong reliance on ICT technologies and data, but has its own peculiar features. For Ageyman and Mc Laren, the distinction is clear: the smart city should be conceived as a mean[55] to reach the sharing city, recovering the original foundation of the city as the sharing space *par excellance*[56]: the market, the *polis*. The technology is still a crucial infrastructure in the sharing city, but it's not conceptualized as merely profit oriented, indeed it can be used for building resilient and strong communities. The vision of the sharing city that is gaining most momentum is the vision of a "crowd-based capitalistic city" that relies heavily on the use of sharing technologies and platforms to exploit the human and material idle capacity that is available in the city as proposed by Arun Sundarajan[57] which provided an interpretation of the sharing economy as a system in which the crowd-based networks replace centralized institutions corporations at the center of capitalism and peer-to-peer exchanges become increasingly prevalent. He has also highlighted that practices such as co-working, car sharing cooperatives, food cooperatives, time banks and others because do not belong to the crowd-based capitalism arena[58]. This kind of practices in fact has a different rationale[59].

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http://www.iftf.org/fileadmin/user_upload/downloads/IFTF_Rockefeller_CivicLaboratoriesMap.pdf.

[52] A. Townsend et. Al., *A Planet of Civic Laboratories: The Future of Cities, Information and Inclusion*, cit. at 51, 11-12.

[53] R. Hollands, *Will the real smart city please stand up?* City, 12, (2008)8 at 314.

[54] See http://www.sharingcities.eu/, or See https://www.transportation.gov/smartcity/infosessions/sharing-economy.

[55] A. Bergren Miller, *Interviewed: "Sharing Cities" Authors Duncan McLaren and Julian Ageyman,* Shareable (March 23, 2016) http://www.shareable.net/blog/interviewed-sharing-cities-authors-duncan-mclaren-and-julian-agyeman.

[56] A. Bergren Miller, *Interviewed: "Sharing Cities" Authors Duncan McLaren and Julian Ageyman,* cit. at 55, 119.

[57] A. Sundararajan, *The Sharing Economy. The End Of Employment And The Rise Of Crowd-Based Capitalism*, (2015).

[58] A. Sundararajan, *The Sharing Economy. The End Of Employment And The Rise Of Crowd-Based Capitalism*, cit. at 57, 19.

The transformative impact of technological sharing economy platform on cities has been addressed by Davidson and Infranca from a legal perspective. The rise of the sharing economy can possibly be understood, for the authors, as a reaction to the current landscape of urban governance[60], where innovative technology regulation is at the national level, although the main impact is at the local level as the controversy between Uber and the City of New York[61] shows.

Among the best known examples of sharing cities regulation, we can observe the case of Seoul[62] that enacted the Ordinance on the Promotion of Sharing and the enforcement Regulation, designated sharing organizations and enterprises, provided a Sharing Promotion Fund and organized sharing schools and communication activities since 2012, and the program is still ongoing. San Francisco is another paradigmatic example of sharing city, one recently leaning towards the Sundararajan approach. It is a highly attractive city for young people because of his high density of shared workspaces and the active role of the Office of Civic Innovation which promotes initiatives such as the Living Innovation Zones and the Entrepreneurship in residence program[63] or experiences like the Open door development group, a real estate investment firm established to buy buildings and convert them into co-living spaces in order to fight against gentrification and support diversity in city neighborhoods[64].

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[59] Anne Davies has explored the transformative impact of the food sharing economy dynamics in cities, that could contribute to food waste reduction, social relations enhancement and innovative business model development. See L. Devaney and A.R. Davies, *Disrupting household food consumption through experimental Home Labs: Outcomes, connections, contexts*, in Journal of Consumer Culture, 1 (2016).

[60] N. Davidson and J.J. Infranca, *The sharing economy as an urban phenomenon,* cit. at 12, 238.

[61] N. Davidson and J.J. Infranca, *The sharing economy as an urban phenomenon,* cit. at 12, 274-277.

[62] The model of the sharing city and the case of Seoul is been analyzed in S. Foster and C. Iaione, *The city as a commons*, 34 Yale l. & Pol'y rev 81 (2016).

[63] Through the entrepreneurship in residence program, startup companies are invited in the city to work with the government for a period in order to co-design solutions to increase efficiency and responsiveness of government, while with the Living Innovation Zones program provides zones where social innovators are provided with opportunities to test their ideas. D. Mc Laren and J. Ageyman, *Sharing Cities* (2015) 21-26.

[64] D. Mc Laren and J. Ageyman *Sharing Cities,* cit. at 63, 23.

2. The emerging of a rights-based approach.

The idea that we are living in an "urban age", and the utopic and optimistic vision of increasing urbanization (and the fact that the urban-rural divide is decreasing) can be challenged[65]. There are at least three levels of complications that can be used as a point of departure for a reflection on a renewed conception of the city or the "urban". The city that the abovementioned authors envision, or advocate for, does not face some of the most critical arguments.

First, thinking about the city today requires an expansive reasoning which considers crossovers between the global level[66] and the national level and the changing form and structure of the city. Brenner and Schmidt have questioned the mainstream idea of the urban[67] and of the urban age, as a chaotic conception[68] that does not seem to align with reality and is based on a theoretical conception of urban and urbanization, divorced from empirical realities. The argument advanced by Foster and Davidson for regionalism to temperate the strong localist tendency of the traditional Tieboutian view of local governance[69] is actually

[65] The UN Urbanization report shows that more people live in urban areas than in rural areas, from a global standpoint. As the report states "In 2007, for the first time in history, the global urban population exceeded the global rural population, and the world population has remained predominantly urban thereafter". United Nations, Department of Economic and Social Affairs, *Population Division World Urbanization Prospects: The 2014 Revision*, *Highlights 11* (UN Department of Social Affairs 2014).

[66] As Porras observes, cities are becoming active players in international settings: their aspiration to a greater autonomy has been embraced by the international actors that began to choose the, as direct interlocutors. I.M. Porras, *The City And International Law: In Pursuit Of Sustainable Development,* 36 Fordham Urb. L.J. 546 (2008). As the EU integration process accelerated, cities become more involved in EU matters. In particular after the Single European Act (1986) many EU legislation began to directly involve cities. E. Longo & G. Mobilio, *Territorial government reforms at the time of financial crisis: the dawn of metropolitan cities in Italy*, 1 Regional & Federal Studies 13 (2016).

[67] N. Brenner and C. Schmidt, *Toward a new epistemology of the urban?* 19 City 151–182 (2015).

[68] N. Brenner and C. Schmidt, *The Urban age in question,* cit. at 15, 731–55.

[69] The authors make an admonition to local administrator to consider the fact that intern regional competition can bring some risks. S. Foster and N. Davidson, *The mobility case for regionalism*, cit. at 37, 86.

supported by the observation of the regional scale of individual mobility choices[70].

Second, one must also take into account the urban – rural dualism. The urban - rural dualism, one of the theoretical foundations of the urban age thesis, should be reexamined, through the lenses of a new conceptualization of the city to work across boundaries. New visions need to bridge the gap between urban and rural by urbanizing the countryside and ruralizing the urban space, with the aim of achieving a non–conflictual relationship between these two poles. The urban-rural dichotomy seems to have taken the path that Lefebvre predicted[71]. The necessity of ruralizing the city, to make cities greener is strongly related with the urban commons perspective. The countryside is perceived from the birth of the modern city as the place where people can escape from the urban pressure and urban routine, still perceived today as a *status symbol,* in particular with the increasing lack of green spaces, pollution and congestion of cities, and the crisis of the urban commons[72] that makes urban life harder than ever and is a source of exclusion for low income people and vulnerable groups. The necessity of greening the city, ruralizing the city, seems to be an urgency to guarantee a minimum degree of quality of urban life and to maintain the contact between human and nature in the city. On the other hand, there needs to be a re-examination of urbanization of the rural to bridge the urban-rural divide in a non-conflictual way, as highlighted above in this paragraph. The urbanization of the rural is translated into the uncontrolled transformation of the country in sprawled suburbs[73], followed a consumerist approach[74], and created the issue of the

[70] The authors examine the role of Regions in regional mobility choices and argue that what attract residents and actually drive the inter-regional mobility is attractiveness of the regions, not the single municipality nor county. Locational choices are therefore based in part on a regional-scale evaluation that considers human capital, job and investment opportunity, among the other factors. S. Foster and N. Davidson, *The mobility case for regionalism*, cit. at 37, 81-100.

[71] D. Harvey, *Rebel cities*, (2012).

[72] See generally C. Iaione, *City as a commons,* Paper presented at the IASC thematic conference "Design and Dynamics of Institutions for Collective Action: A Tribute to Prof. Elinor Ostrom", 29 November - 1 December 2012, available at the Digital Library of the Commons.

[73] D. Harvey, *Rebel Cities,* cit. at 71, 158.

[74] D. Harvey, *Rebel Cities* cit. at 71 158.

inner areas while it might be turned into a different process through a smart rural approach[75] that brings social and technological innovation in the rural context to improve and facilitate agriculture and everyday life in the country, and promote storytelling and communication strategies to enhance sustainable tourism.

Finally, a third complication emerges that cities are at the same time places of opportunities and collaboration but also risks and conflicts. Rights and powers of citizens should be recognized. In his seminal work on the global city and expulsions, Saskia Sassen has raised a crucial issue of growing inequalities and impoverishment of the urban middle class in big cities[76]. Hardt and Negri identify a transition from an industrial to a biopolitical metropolis, conceived as a "reservoir of the common"[77], where the struggle, subordination and suffering path of what they call the multitude poses the positive and negative conditions for it's future. For Hardt and Negri, "the metropolis is to the multitude what the factory was to the industrial working class"[78], and this multitude is constituted by a "whatever singularity"[79]and is comparable to a multiplicity of singularities acting as a crowd[80].

What we try to argue here is that a reasoning centered on rights is required for overcoming the elements of complications briefly described above and explore limitations of current approaches to the city. Clearly the lines are blurred, and this essay is not representative of the high degree of diversity, and further reflections are required in order to build a urban visions' precise matrix. The above mentioned urban visions represent a broad description of the wide and diverse range of arguments discussed in the disciplines that address urban issues, but none of them provide a rights-based argument, if not partially.

But what does it mean to implement a rights-based city? The integration of the protection of human rights in the

[75] See the work of the Rural Hub on Rural social innovation, Italy, available at http://www.ruralhub.it/it/.
[76] See S. Sassen, *The global city: New York, London, Tokyo*, (1991) and *Expulsions. Brutality and Complexity in the Global Economy*, (2014).
[77] M Hardt and A. Negri, *Commonwealth,* (2009), 156.
[78] M. Hardt and A. Negri, *Commonwealth,* cit. at 77, 250.
[79] See generally G. Agamben, *The coming community,* (2007).
[80] M. R. Marella, *The constituent assembly of the commons,* Open Democracy (last visited October 28 2014) https://www.opendemocracy.net/can-europe-make-it/maria-rosaria-marella/constituent-assembly-of-commons-cac.

international law and issues on the commons, in relation to climate change[81], nature/environment and culture[82] is a great research challenge.

At the EU level, the Pact of Amsterdam, the Urban Agenda for the EU, considers among his priorities inclusion of migrants and refugees, urban poverty, housing, urban mobility and sustainable use of land.

The idea that a human rights based approach to cities can offer a better urban future has been addressed by the United Nations too: the vision behind the UN Habitat New Urban Agenda is that of a sustainable urban development, that aims at ending poverty, achieving a sustainable and inclusive urban prosperity. Paragraph 12 of the section "Our shared vision" states that "the aim should be to achieve cities and human settlements where all persons are able to enjoy equal rights and opportunities, as well as their fundamental freedoms, guided by the purposes and principles of the Charter of the United Nations, including full respect for international law. In this regard, the New Urban Agenda is grounded in the Universal Declaration of Human Rights, international human rights treaties, the Millennium Declaration, and the 2005 World Summit Outcome. It is informed by other instruments such as the Declaration on the Right to Development"[83].

The New Urban agenda envisions cities where the full realization of the right to adequate housing (as a component of the right to an adequate living), universal access to safe and affordable drinking water and sanitation, equal access for all to public goods and quality services in areas such as food security and nutrition, health, education, infrastructure, mobility and transportation, energy, air quality, and livelihoods" are promoted, cities that are participatory, engender a sense of belonging and ownership among all their inhabitants, and are committed "to promote equitable and affordable access to sustainable basic physical and

[81] S. Foster and P. Galizzi, *Human Rights and Climate Change: Building Synergies for a Common Future* in The Climate Law Encyclopedia (Daniel Farber and Marjan Peeters, eds. 2016).

[82] F. Lenzerini and A. F. Vrdoljak, *International law for common goods. Normative perspectives on human rights, culture and nature,* Oxford: Hart Publishing, Studies in international law, 50, (2014).

[83] Paragraph 12, section "Our shared vision", Habitat III, *New Urban Agenda,* Draft outcome document for adoption in Quito, October 2016 available at https://www2.habitat3.org (last visited October 28 2016).

social infrastructure for all, without discrimination, including affordable serviced land, housing, modern and renewable energy, safe drinking water and sanitation, safe, nutritious and adequate food, waste disposal, sustainable mobility, healthcare and family planning, education, culture, and information and communication technologies"[84]. The activity of the Global Platform for the Right to the city, that aims at contributing to the adoption of policies action and project aimed at developing fair cities, democratic, sustainable and inclusive by United Nations bodies and the national and local governments[85], has been crucial for the development of the concept of the right to the city in the UN Habitat New Urban Agenda[86]. The concept of the right to the city is outlined in paragraph 11 of the section "Our shared vision":

> We share a vision of cities for all, referring to the equal use and enjoyment of cities and human settlements, seeking to promote inclusivity and ensure that all inhabitants, of present and future generations, without discrimination of any kind, can inhabit and produce just, safe, healthy, accessible, affordable, resilient, and sustainable cities and human settlements, to foster prosperity and quality of life for all. We note the efforts of some national and local governments to enshrine this vision, referred to as right to the city, in their legislations, political declarations and charters.[87]

Two approaches seem to emerge as deeply rooted in the idea of a rights-based vision of the city: the "rebel cities" which prefer a conflict-based approach and the "collaborative cities"

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[84] Paragraph 4, section "The transformative commitment for the sustainable urban development". Habitat III, *New Urban Agenda*, Draft outcome document for adoption in Quito, October 2016 available at https://www2.habitat3.org (last visited October 28, 2016).

[85] Information about the Global platform for the Right to the city are available at http://www.righttothecityplatform.org.br/.

[86] *Urban Agenda for the EU*, Pact of Amsterdam, Agreed at the Informal Meeting of EU Ministers Responsible for Urban Matters on 30 May 2016 in Amsterdam. (last visited October 28, 2016), available at http://urbanagendaforthe.eu/pactofamsterdam/.

[87] Habitat III, *New Urban Agenda,* Draft outcome document for adoption in Quito, October 2016. (last visited 28 October 2016) https://www2.habitat3.org/bitcache/97ced11dcecef85d41f74043195e5472836f6291?vid=588897&disposition=inline&op=view.

which advance a governance-based vision. They of course overlap in few instances and complement each other because they are both inspired by the commons to some degree to construe a rights-based vision of city.

2.1 The rebel city

The idea of the right to the city, first advanced by Lefebvre[88], emphasizes the active role of urban inhabitants in the struggle against the threats represented by the strong neoliberal character of international capitalism that impact on the quality of urban[89]. Rebel cities[90] are those cities where there is an active resistance to the process of capitalist urbanization[91]. Harvey has highlighted that the anti-capitalist struggles of urban revolutionary movements in the rebel cities, like it happened in London in 2011 or in the Occupy Wall Street Movement[92], are struggles to reclaim a collective right to the city. Episodes of urban riots and urban conflict have deep and multidimensional causes, but we can certainly assume that inequalities in income distribution and job opportunities in the cities might profoundly affect a city and create a fracture that is hard to repair.

Technology innovations are also exacerbating such phenomena. For instance, in countries like France[93], Belgium[94],

[88] H. Lefebvre, *The Urban Revolution,* translated by Robert Bonnono, (1970). See also H. Lefebvre, *The Right to City*, Writings on Cities 147 (Elenore Kofman & Elizabeth Lebas eds., trans., 1968)

[89] D. Harvey, *The right to the city,* New Left Review 53, (September-October 2008), https://newleftreview.org/II/53/david-harvey-the-right-to-the-city) and D. Harvey, *The Right to the City*, 27 Int'l J. Urb. &Reg'l Res. 939 (Susan Clark & Gary Galle eds., 2003); See also E. W. Soja, *Seeking Spatial Justice* (2010); M. Purcell, *Excavating Lefebvre: The Right to the City and its Urban Politics of the Inhabitant*, 58 GEOJ. 99 (2002). *See also* World Urban Forum, *World Charter on Right to the City* (2004), available at http:// abahlali.org/files/WorldCharterontheRighttotheCity-October04.doc [https://perma.cc/3G8R-QQ8C]; European Council of Town Planners, *The New Charter Of Athens* (2003), http://www.ceu-ectp.eu/images/stories/download/charter2003.pdf.

[90] D. Harvey, *The Right to the City*, cit. at 89.

[91] D. Harvey, *Rebel Cities*, cit. at 71, 80.

[92] D. Harvey, *Rebel Cities* cit. at 71, 155 and 159.

[93] After the protest of taxi drivers – that eventually became violent- against the new app launched by Uber, Uper POP, French drivers of app companies like Uber and Chauffeurs Privées organized a counter protest in February. See M. Slater-Robins and B. Tasch *French taxi drivers shut down Paris as protests over Uber turn violent*, Business Insider UK, (January 2016)

Latin America and Costa Rica[95] and recently in Nairobi[96], sharing economy platforms like Uber are triggering the protests of taxi drivers. The same could happen for other categories of workers whose job will be disrupted by technological advancements if regulatory and/or policy action is not taken.

In the EU context, it is currently possible to observe the rise of radical democratic innovations at the political level. Social movements have started to propose a "rebel city" approach.

In Rome for instance collectives have started a drafting exercise to get to a "Charter of Common Rome" identifying ten fundamental principles: 1) the inalienability of State-owned assets; 2) the introduction of the right to the "common use" of such assets; 3) the distinction between legality and legitimacy in order to filter cases that are grounded in urban informal, social and solidarity practices; 4) the direct reference to the constitutional principles that can protect this approach such as Articles 2, 4, 42, 43, 45 and 118 of the Italian Constitution; 5) the recognition that law can be produced by society; 6) the recognition of the right to autonomy as a right to self-organize and self-regulate but with the possibility to keep the door open to the relations with others; 7) the need for a different bureaucratic approach towards experiences of self-management and solidarity that should be considered as social institutions; 8) the recognition of the urban commons (social spaces, virtuous associations, cultural centers,

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http://uk.businessinsider.com/uber-protests-in-paris-2016-1. And B. Pedersen, *After taxis, French Uber drivers launch their own protest*, France 24, May 2 201) http://www.france24.com/en/20160202-after-taxis-french-uber-drivers-plan-own-protest.

[94] See: http://www.reuters.com/article/us-uber-tech-belgium-idUSKCN0RG1XB20150916.

[95] Latin America is also the fastest development region for Uber, with Mexico on the top. See A. Willis, *Uber's fastest growing Region set for new no.1 Break-Even*, Bloomberg technology (May 30, 2006, 8 PM edt) http://www.bloomberg.com/news/articles/2016-05-31/uber-s-fastest-growing-region-set-to-break-even-fund-expansion. See also https://www.euractiv.com/section/transport/news/latin-america-europe-cab-drivers-team-up-against-uber/. See also C. Woody, *Latin America, Europe cab drivers tema against Uber* (last visited October 20 2016). http://uk.businessinsider.com/anti-uber-protests-in-costa-rica-and-latin-america-2016-8?r=US&IR=T.

[96] See BBC Africa, *Kenya investigates "barbaric" Uber attacks in Nairobi,* BBC NEWS (last visited October 20 2016) http://www.bbc.com/news/world-africa-35476405.

industrial reconverted assets and new forms of cooperative work) through a specific regulatory tool; 9) the recognition of the urban commons as functional to fundamental rights according to the findings of the Rodotà commission; 10) the recognition of the right to co-manage the urban commons and participate in decision-making processes related to them.

In cities like Naples or Barcelona, that declare themselves moving in the direction of dramatic change, in line with the right to the city tenets, this radical approach to the urban commons and the realization of the rebel city model has been transformed into a policy action.

The City of Barcelona is promoting a radical approach to the urban commons. The current government of the City of Barcelona, elected in 2015, is expressed by the civic platform Barcelona en Comù. Mayor Ada Colau has devised a bold policy innovation plan inspired by the governance of the commons. The range of recent policies promoted by the current city government of Barcelona that might represent a good example for a radical commons oriented approach to the city governance is very wide and addressed issues related to housing, urban mobility, energetic sovereignty, social and solidarity economy, digital democracy.

We will focus here on a brief overview on the most relevant policies for the outline of the rebel city model, regarding participation, right to housing, social and solidarity economy and social public procurement. With the "Pla d'Actuació Municipal 2016-2019" (PAM)[97] the new government claimed that the goals of their administration would be social justice, sustainable economic and social development, and to reverse dynamics of polarization and inequality. Nevertheless, this document has not been approved by the *Plenari del Consell de Ciutat (the Full City Council)*[98]. With these guidelines, the city launched the first plans focusing on housing, energetic and digital sovereignty, mobility and citizen participation. One of the areas of the City

[97] See City of Barcelona, *Pla d'actuacio municipal 2016-2019* (Program for Municipal Implementation 2016-2019. Full version of the plan is available here: http://governobert.bcn.cat/estrategiaifinances/ca/programa-dactuaci%C3%B3-municipal-pam-2016-2019bp.

[98] The Full City Council is the highest advisory body and participation of the City Council, where the representatives of the City Council and citizens discussed the main issues of the city with the constant pursuit of commitment and responsibility. http://www.conselldeciutat.cat/ca/page.asp?id=2

Administration that has recently created and whose goals are precisely to promote involvement of citizens in the city government is the Active Democracy Area. The area promoted a participatory process to issue the *Regulation for Citizen Participation*[99], currently (June 2017) under public consultation. Some articles are dedicated to the urban commons and the civic use and management of them. Article 109 establishes that the institutions, foundations, civic organizations and nonprofit associations can exercise municipal powers, or participate on behalf of the City in the management of services or facilities whose ownership corresponds to other public administrations. These organizations can contribute through their activities and projects to the exercise of municipal powers. They can also assist in the management of services and facilities owned by other public administrations.

Among the most pressing issues that the city of Barcelona addressed with an emphasis is the housing emergency. The city promoted a radical strategy to cope with the housing issue, also thanks to the support of a Regional Law. The *"Barcelona's Housing Right Plan (2016 - 2025)"*[100] aims to ensure the housing' social function and achieve a high quality public service. The highlights of this plan are on one hand the *co-housing program*[101], a new

[99] The Regulation for Citizen Participation was co-created with Barcelona citizens through the platform "Decidim.Barcelona". The initial text was then approved in a Municipal Council commission and subject to participatory public consultation on the city digital participatory platform. The text of the Regulation and the information on the process are available here: https://www.decidim.barcelona/processes/5?locale=es.

[100] City of Barcelona, *Pla per dret a l'habitadge 2016-2015, Plan for the right to housing of the City of Barcelona*, 2016 – 2025, approved at by the Full City Council on January 27, 2017. The plan is available at http://habitatge.barcelona/sites/default/files/documents/pla_pel_dret_a_lhabitatge_resum_executiu.pdf**.** The plan is based on a previous regional law about the right to the housing, the Law 18/2007, December the 28th, on the right to housing published in the «*Diario Oficial de la Generalitat de Cataluña*», DOGT n.o 5044, on January 9 2008. The functioning of the *Borsa d'habitatge de Lloguer* and the role of the city as a mediator is regulated by the Decree 75/2014, of May the 27 of the Plan for the Right to Housing and by the Cataluña Law Nº 24/2015, on *De medidas urgentes para afrontar la emergencia en el ámbito de la vivienda y la pobreza energética,* Urgent measures to address the housing and energy poverty emergency. Approved on 29 July and published in DOGC no. 6928, August 5, 2015.

[101] See information on the co-housing policy and the public contest here: http://habitatge.barcelona/ca/acces-a-habitatge/cohabitatge.

model that gives communities the "right of use" on buildings or brownfields for long periods and, on the other hand, it provides measures to enhance the growth of the public housing stock.

The city implemented a system of economic incentives and disincentives addressing private property in order to promote social housing.

The first pillar is the mediation into the rent market. The municipality acts as a mediator between the owners of empty apartments in the city and people that need lodging. The city offers to the owner: a) subventions to the inclusion in the "Rent Housing Stock" to houses (1.500 € if the house is empty, and until 6.000 € to cancel debts to cases in legal processes); b) subventions to rehabilitate the house (100% of the expenses up to 15.000 euro for a 5 years' minimum contract); c) subventions to pay local taxes (IBI); d) multi-risk insurance during the contract period; e) follow up of contract obligations and free legal and technical advice f) guarantee of support for rent unpaid (until 6 months since the contract starts). The city also provides guarantees for the renter: a) social rent price (Social Rent); b) mediation in the drafting of the rent contract c) legal and technical advice; c) the amount of the contract expenses and the first rent month[102].

The second pillar of this policy is the empty houses program. It is estimated that Barcelona has between 4% to 11% of empty houses in the whole city. This means that between 31.202 and 88.259 housing units are empty in Barcelona[103], against a total amount of 6.300[104] social rent apartments. For that reason, the city has a process of research for a deep understanding about the empty houses situation, creation of mechanisms to stimulate the

[102] See *Modificació Normes Reguladores de la borsa d'habitatge de lloguer de Barcelona* 2014, Modification of the Regulatory Norms of the Rental Housing Exchange, approved by *the Junta General del Consorci de l'Habitatge de Barcelona,* on July 1st, 2014, available at http://www.bcn.cat/consorcihabitatge/ca/borsa-habitatge.html. Starting in 2009, the Rental Housing Exchange is part of the powers of the Barcelona Housing Consortium and is managed through the Housing Offices Network and the Direction of Assistance for Rent And the housing stock of the City of Barcelona. It offers mediation services between owners of empty houses and potential tenants, and aims to increase the number of rental housing at affordable prices and facilitate access to coexistence units and youth between 18 and 35 years of age.

[103] City of Barcelona, *Pla per dret a l'habitadge 2016-2015,* Plan of the right to housing 2016-2025, cit. at 100, 20.

[104] Data on the housing public stock are available here: http://habitatge.barcelona/ca/acces-a-habitatge/parc-public-habitatges.

reactivation of these empty houses detected and the implementation of mechanisms to sanction that will complement the activation measures[105]. To address this problem and therefore fight against speculation on rent, the city provides a series of actions. Though the *"Unit Against the Housing Exclusion"*[106], the city is systematizing the information, checking the houses that remain empty and applies sanctions. For owners that have an empty house for more than 6 months an amount of 600€ is charged for the inspection and legal expenses and a 200€ more with every new infringement. The application of this measure particularly hits big owners such as the banking groups who owns 2.592 empty accommodations registered in the city[107]. The budget for the housing plan, approved by the *Plenari del Ajuntament* (i.e. the plenary session of the City Council of Barcelona)[108], is 3.5 billion euros[109]. The City of Barcelona is the major contributor but this policy foresees the support from other private and public actors.

Also, the *Generalitat of Cataluña* contributes to the "Housing Consortium of Barcelona". The Housing Consortium is a public body, with the purpose of which is to undertake functions and activities and provide services related to affordable housing in Barcelona. This body is comprised of Barcelona City Council and the Generalitat de Catalonia. The Consortium has its own legal status, separate from that of its members, granted through the Municipal Charter of Barcelona, and it has full capacity to act in order to achieve its aims. It also has a public participatory body called the Barcelona Social Housing Council[110].

The plan also aims at promoting co-housing through the legal category of the "right to use" as opposed to ownership. At

[105] City of Barcelona, *Pla per dret a l'habitadge 2016-2015,* Plan of the right to housing 2016-2025, cit. at 100, Section 5.2., 49.

[106] City of Barcelona, *Pla per dret a l'habitadge 2016-2015,* Plan of the right to housing 2016-2025, cit. at 100, Section 5.2., *50.*

[107] Data about the empty houses stock in Barcelona available here: http://habitatge.barcelona/ca/habitatge-un-dret-com-una-casa.

[108] City of Barcelona, *Pla per dret a l'habitadge 2016-2015,* Plan of the right to housing 2016-2025, cit. at 100.

[109] City of Barcelona, *Pla per dret a l'habitadge 2016-2015,* Plan of the right to housing 2016-2025, cit. at 100, 9.

[110] *Estatuts del consorci de l'habitatge de Barcelona*, Bylaws of the Barcelona housing consortium, approved in Barcelona on August the 31 2009 and published in the PBOPB N.o 211/3A3, on September 3, 2009.

the beginning of 2017, the City of Barcelona has assigned five urban spaces to cooperatives thought a public contest[111] to cooperatives that promote co-housing initiatives.

Together with the housing emergency, the energetic poverty was taken into consideration. The plan to achieve the energetic sovereignty (2016-2019)[112] was launched by the City of Barcelona to launch the process of transition of the city toward municipal energetic sovereignty[113]. The aim of the plan is to increase local production of electricity from renewable sources and decrease the city's energy consumption. Citizen's participation to the energy transition will be fueled through a double path. On the one hand, the reception of energy policies' proposals from organized civil society will be coordinated, starting with the creation of a Working Group on Energy and Climate Change, within the Citizenship for Sustainability Council. Also, individual and private sector participation will be stimulated. On the other hand, the direct participation of the citizens in the decision-making processes of the processes and related to the energy will be enhanced[114].

The most relevant lines of action of this policy in light of this study is the creation of a public company for energy supply, that buys energy from public and private renewable sources, called *Barcelona Energía*[115]. For its functioning, the City is studying

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[111] See information on the co housing policy and the public contest here: http://habitatge.barcelona/ca/acces-a-habitatge/cohabitatge.

[112] City of Barcelona, *Mesura de govern: Transicio cap a la Sobirania energètica,* Government Measure: transition toward the Energetic Sovereignty. Approved in July 2016, available at http://ajuntament.barcelona.cat/ecologiaurbana/sites/default/files/MesuraGovern_TransicioSobiraniaEnergetica.pdf

[113] The energetic plan is based on the Cataluña Regional Law Nº 24/2015, July, 29th on *De medidas urgentes para afrontar la emergencia en el ámbito de la vivienda y la pobreza energética*, urgent measures to address the housing emergency and the energetic poverty, in which the law provisions on the fight against energetic poverty were not suspended by the Constitutional Court of Spain. See Constitutional Court of Spain Nº 2501-2016 (May, 24, 2016). The Constitutional Court admitted the questions posed by the Government for suspending the implementation of the law provisions related to the housing available at https://www.boe.es/boe/dias/2016/06/03/pdfs/BOE-A-2016-5337.pdf.

[114] *Mesura de govern: Transicio cap a la Sobirania energètica,* Government Measure: transition toward the Energetic Sovereignty, cit. at 112, 13.

[115] T. Sust, *El ayuntamiento crea Barcelona Energia para autoabastecerse de electricidad*, The City of Barcelona creates Barcelona Enrgìs for electricity self-provision, El Periodico, (March 31, 2017), available at

different management schemes. Pursuant to these new schemes the City and citizens would establish cooperative solutions that might allow them to rent spaces, and realize other activities in order to double the power generation capacity of the City. These schemes are aimed at producing an increase of 10% in the power generation through citizen's self-production of energy[116]. Renewable energy infrastructures will be placed on both city-owned and private buildings. To this end, the city intends to promote a call for interest to place renewable energy infrastructures in private buildings and to sign collaboration agreements between the public administration and the property owners, to buy energy produced by the infrastructures in private buildings' or just rent and maintain the roofs and the renewable energy infrastructures[117]. The City will also offer tax incentives and bonuses for the voluntary incorporation of renewable energy generation facilities in private buildings or for the rehabilitation of existing facilities[118]. A "Barcelona City Laboratory" will be established for developing a shared methodology and disseminate models of renewable energy self-production that can be replicated. The goal is to increase the production of energy from photovoltaic infrastructures installed in private buildings increasing the energy production of 10%, and doubling the energy produced in municipal facilities and public spaces reaching the level of 400 kWp in buildings and 65 kWp in public spaces[119].

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http://www.elperiodico.com/es/noticias/barcelona/ayuntamiento-crea-barcelona-energia-para-autoabastecerse-electricidad-5938853. See also Europa Press, *El Ayuntamiento aprueba crear su eléctrica Barcelona Energia para ganar "soberanía energética"*, The City of Barcelona approves the creation of Barcelona Enrgìa for achieving energetic sovereignty, available at http://www.elmundo.es/cataluna/2017/03/31/58de3ba8e5fdeac2478b4582.html (last visited March 31, 2017).

[116] City of Barcelona, *Mesura de govern: Transicio cap a la Sobirania energètica,* Government Measure: transition toward the Energetic Sovereignty cit. at 112, 23.

[117] *Mesura de govern: Transicio cap a la Sobirania energètica,* Government Measure: transition toward the Energetic Sovereignty, cit. at 112, 14.

[118] City of Barcelona, *Mesura de govern: Transicio cap a la Sobirania energètica,* Government Measure: transition toward the Energetic Sovereignty, cit. at 112, 21.

[119] City of Barcelona, *Mesura de govern: Transicio cap a la Sobirania energètica,* Government Measure: transition toward the Energetic Sovereignty, cit. at 112, 23.

Regarding the economic development, the City presented the "*Social and Solidary Economy Promotion Plan 2016-2019"*[120], coordinated by the new Commission of Cooperative Economics, Social and Consumption and Solidarity[121] with different agents, companies, second level organizations, networks, federations active in the field. This plan was established after meetings with representatives of several sectors[122] such as the "*Commons Collaborative Economies: Policies, Technologies and City for the People*" which aimed to highlight the relevance of the commons-oriented approach of peer production and collaborative economy, while proposing public policies and providing technical guidelines to build software platforms for collaborative communities[123]. It also created a system of open and expandable platforms for boosting dialogue on the topic[124] with policy advisors such as the "Commons Collaborative Economies: Policies, Technologies and City for the People", promoted by the Department of Alternative Economies and Proximity of Barcelona Activa and BarCola[125] (node on collaborative economy and commons production in Barcelona that coordinate eighteen realities of collaborative economy active in the city), as well as research groups such as Dimmons (Digital Commons Research at the Internet Interdisciplinary Institute (IN3) group of the Open University of Catalonia, and the Institute of Govern and Public Policies of the Autonomous University of Barcelona (IGOP)[126]. The public

[120] City of Barcelona, *Pla d'impuls de l'economia social I solidària, 2016-2019,* Promotion of social and solidary economy Plan 2016-2019, available at http://eldigital.barcelona.cat.

[121] This new governmental office was created with the government of *Barcelona en Comù*. Avaiable online here: http://ajuntament.barcelona.cat/treballieconomia/es/inicio.

[122] City of Barcelona, *Pla d'impuls de l'economia social I solidària, 2016-2019,* Promotion of social and solidary economy Plan 2016-2019, cit. at 112, 12.

[123] The Procomù is provided in the City of Barcelona, *Pla d'impuls de l'economia social I solidària, 2016-2019,* Promotion of social and solidary economy Plan 2016-2019, cit. at 112.

[124] See the analysis of the action of the Barcelona city council to support the commons and the collaborations with commoners provided by David Bollier, *Barcelona's Brave Struggle to Advance the Commons*, D. Bollier, *News and perspective on the commons,* David Bollier (Nov. 22 2016), available at http://www.bollier.org/blog/barcelonas-brave-struggle-advance-commons.

[125] See the description of the *Barcola* available at https://wiki.p2pfoundation.net/BarCola.

[126] See the descritption of the IGOP Center here: http://igop.uab.cat/.

procurement is an issue that many Spanish cities (Barcelona, Madrid, Sevilla, Valencia, Pamplona, Sabadell y Santa Coloma de Gramenet) addressed through the sign of a "Municipal Declaration in favor of a Sustainable Public Procurement[127]". Starting from a general acknowledgement of the high degree of corruption in public procurement, the declaration claims for a more transparent, social and environmental friendly public procurement, express concerns for the draft of the law on public procurement that is not able to guarantee a responsible, efficient, transparent and sustainable public procurement and provide some measures: 1) provide a standardized set of guidelines guarantee an equal access to the public procurement to all enterprises, including SMES 2) enlarge the material object applicable for the appeal to the administrative tribunal 3) A regulation of local public services that ensures that their provision is territorial – based and accessible. 4) the concept of "most economic advantageous offer" must include environmental, social, ethical, labor parameters and must ensure gender equality. 5) simplify procedures behind public procurement. 6) establish a Regional Courts Commission that solve conflicts between businesses and ensure concurrence 7) regulate the e-procurement 8) account for the peculiarities of cities and their differences. 9) account for and regulate the peculiarities of social services 10) enhance public participation in procurement 11) establish mechanism that facilitate participation of social enterprises to the procurement process 12) regulate the relationship between public administrations and the agencies that provide for the labor and environmental inspection 13) issue norms that prohibit to the public administration to contract businesses that have headquarters in fiscal paradises. For the implementation of the Declaration, the city of Barcelona issued the *Municipal Social Procurement Guide*[128], recently supported by a Mayoral Decree[129].

[127] *Declaracion Municipalista en favor de una contrataciòn pùblica sostenible,* Municipal Declaration in favor of a Sustainable Public Procurement, signed by the Mayors of Barcelona, Madrid, Valencia, Sta. Colomna de Gratement and Sebadell on March 2, 2017, in Barcelona, available at http://ajuntament.barcelona.cat/premsa/wp-content/uploads/2017/03/DeclContractacio.pdf.

[128] City of Barcelona, *Guìa de contrataciòn pùblica social*, Guide for Social Public Procurement, (Depósito legal: B.22.295, 2016), available at http://ajuntament.barcelona.cat/contractaciopublica/pdf/guia-contractacion-publica.pdf

The Barcelona City Council promotes socially responsible public procurement by incorporating in the municipal public procurement objectives of social justice, environmental sustainability and ethical code. One of the main goals of this measure is to incentive the subcontracting to Social Economy Enterprises of Barcelona with a business model including social responsibility, in the public procurement. For guarantee social efficiency of public investment, the guide includes the possibility of incorporating specialized companies that provide efficient technical innovation and social value can be set as a condition of the contract execution outsourcing part or specific parts of the object of the contract[130].

Assuming that the model of the Rebel city also includes occupation of public or private spaces, then the case of Naples might offer a good observation point. The City of the Naples is promoting an innovative approach to the governance of the urban commons and of the public services[131]. Since 2011, under the Mayorship of Luigi De Magistris, the city introduced innovative regulatory innovations for the urban commons, through City Government and City Council resolutions. The City approved a resolution[132] that, in accordance and as an enactment of a previous resolution[133] (that provided guidelines for under-utilized public buildings, perceived from the community as commons and

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129 *Decret D'alcaldia S1/D/2017-1271, de contractació pública sostenible de l'Ajuntament de Barcelona* Mayoral decree on social public procurement of the City of Barcelona approved on Apr. 24, 2017 and published in the GMAB on April 28, 2017, available at http://ajuntament.barcelona.cat/contractaciopublica/pdf/Decreto_Contratacion_Publica_Sostenible.pdf.

130 *Decret D'alcaldia S1/D/2017-1271, de contractació pública sostenible de l'Ajuntament de Barcelona* Mayoral decree on social public procurement of the City of Barcelona, cit. at 126.

131 For an analysis of the legal principles of the Italian Constitutional and Normative framework on which an innovative management schemes for the commons and the local public services might be based, see A. Lucarelli, *Note minime per una teoria giuridica dei beni comuni*, 12 Espaço Jurídico, 11-20 (2011).

132 City of Naples, Resolution of City Government n. 446, Implementation of the Deliberation of the City Council, n. 7 2015. Identification of spaces of civic relevance to be considered as commons, approved on June 1, 2016.

133City of Naples, Resolution of City Council n. 7, Guidelines for the identification and management of goods belonging to the City Heritage, underutilized or partially utilized, perceived by the community as commons and potentially subject to collective use, Approved on March 9, 2015.

consequently potentially subject to collective fruition) recognizes seven buildings – currently occupied - as commons that are perceived from citizenship as civic environment. The resolution prescribe that the city ensures the enactment of the following steps: approval of internal regulations of civic use or other forms of civic self-organization that will be recognized in collective conventions; identification of sustainability strategies; creation of the requisites for an effective dialogue with public administration; ensure security in the spaces[134]. Through a deliberation issued few months later the same year[135] addressing specifically the Asilo Filangieri experience, the city is committed to ensure the open use of the buildings, according to the following key criteria:

> 1) the *uti cives use* (the use is open for everyone that pass through that territory and to the collectivity as a whole).
> 2) Functioning according to participatory democracy use
> 3) Pursuing of the goal of diffuse culture according to publicness and inclusiveness
> 4) Cultural, financial and intergenerational sustainability.

The City administration recognize**s** the high social and economic value created through the direct participation of citizens in the functionalization of the underutilized buildings. The positive externalities generated by the collective use impact the neighborhood and the whole city: the administration therefore collaborate**s** to the management charges and to everything needed to guarantee accessibility and protection of the building. The city also recognize**s** the power of generation of a system of self-regulation, the "*potere autonòmico*" contained in the Declaration of Civic and Collective Uses drafted by the community of the Ex Asilo Filangieri that is the product of two years of collective use of the structure *uti cives* and thanks to the close collaboration and support of the administration. The City therefore adopts the

[134] The complete text of the Declaration of civic use of Asilo Filangieri is available at http://www.exasilofilangieri.it/regolamento-duso-civico/.
[135]City of Naples, Resolution of City Government n. 893, Identification of the San Gregorio Armeno Complex as a space for civic and collective use, approved in December the 27th 2015.

Declaration of Civic Uses[136] drafted by the "ex-Asilo Filangieri" experience as an institutionalized system of rules for self-governance of the commons, transferable to similar experiences. The regulation states general principles and rules for a public good that is governed directly by the community itself through an "assembly of management" that evaluates the different proposals and coordinate the use of the space, that is limited to cultural and general interest activities. Civic uses, as stated by the Italian legal scholar Ugo Petronio[137], are provided by the Italian Law n. 1766, June the 16th 1927, from the King decree n. 332 of February the 26th 1928, from the law n. l078 of July the 10th, 1930, that contain norms on the resolution of conflicts over civic uses. For Flore Siniscalchi and Tamaburrino, civic uses are "the rights that belongs to a collectivity, organized into a public legal person or not, that concur to the creation of the constitutive element of a City or an other legal public person, and to the single citizens that are part of it, that consist in the right to extract some elementary units form lands, forests, waters of a territory (…) the content of the civic use is the use from the general collectivity and not a single or a group of singles"[138]. Giuseppe Micciarelli, theory of the law scholar and activist of the Ex Asilo Filangieri states that civic uses are the legal form that best inspired the draft of a regulation of collective use for the Asilo[139] because they are legal tools build upon a communitarian feature[140]. On one side, the strategy consisted in the drafting of a declaration of use, written by the community of the Asilo, though public tables and a constant confrontation with the practices of use generated in the reality. On the other side, the city deliberation written together by the community of the Asilo and the city administration, that adopt the declaration of use as a system of norm for the use of the space. The experience of the Filangieri represent an example of the recognition by the city of the capacity of a community to define a system of norms that are not limited to the regulation of the access

[136] The complete text of the Declaration of civic use of Asilo Filangieri is available at http://www.exasilofilangieri.it/regolamento-duso-civico/.
[137] U. Petronio, *Usi civici* [XLV, 1992], in Enc. Giur. Giuffrè, (1992).
[138] G. Flore, A. Sinischalchi E G. Tamburrino, *Rassegna di giurisprudenza sugli usi civici* (1956).
[139] See G. Micciarelli, *Introduzione all'uso civico e collettivo urbano*, (forthcoming, Munus 1, 2017).
[140] G. Micciarelli, *Introduzione all'uso civico e collettivo urbano*, cit. at 132.

but also of the management of the resource, the everyday management but also the complex management such as: provision of crucial assets, participation to public call for project to raise funds and other decisions. The civic uses regulation avoids the necessity of opening a dialogue with the administration to accomplish each of this task and that the administration is not the sole responsible for every legal relation structured. This represents both a guarantee for the administration against an excessive charge of work and a warranty of the protection of their autonomy of the community. The declaration of civic uses is a form of non-exclusive use of public spaces that envision a new role of citizens as institutions. Civic uses represent a reflective tool also for the administration, that is pushed to act not as a mediator, but more as an enabler of the capacity of the community to act as an institution[141].

2.2. The co-city

Looking back at the city of yesterday might be a lever for a comprehensive understanding of the city of today. The urban paradigms discussed in the previous paragraphs are helping us to envisage the city of tomorrow, but they are not concerned about the city of yesterday or the city of today. Khanna has suggested to look back to the middle age cities in order to understand the world of today, because it was an age where cities were a very powerful from both a political and economic perspective[142]. The cities of today won't obey to the traditional rules that characterized the Nation States, because they are more concerned by efficiency connectivity and security[143] issues. We should have a closer look at the foundation of the city in the Modern Age, in a pre-state era, when cities were built upon the idea of collaboration, cooperation and infrastructure. The research question that guides this analysis is the following: where do the cities of yesterday come from?

The Middle age city was born from the opposition of the bourgeoisie to the feudal system. It was a commune from the

[141] G. Micciarelli, *Introduzione all'uso civico e collettivo urbano*, cit. at 132.
[142] P. Khanna, *Beyond city limits*, 181 Foreign policy 120, 121 (2010).
[143] P. Khanna, *Beyond city limits*, cit. at 135.

beginning[144], and its foundation was an association of citizens, mainly the *coniurationes.* The peculiar characteristic of the city was that it was made by free men, without the protection of a feudal lord (once cities became free entities, he was just a *primus inter pares*[145]) and without slavery[146]. The main concerns of the city were the defense of citizens (security) and the protection of their freedoms, in particular the freedom of the market and the price of this freedom was to enter in what Max Weber named as the "sworn fraternity"[147]. The burghers formed *coniurationes,* and corporations for defending their economic interest, political status, autonomy and to defend themselves from invasion[148]. The strong role of corporations (but also families and monastery) in the city made civic duties very important. No security or freedom was conceivable outside those structures and the commitment to the civic duties[149],that constituted the price of the freedom that a person could conquer moving to the city[150]. Gerald Frug has analyzed the medieval city from a legal perspective, conceiving them as intermediate entity between the individual and the state, not public nor private with a certain degree of autonomy from the central state and an internal freedom, achieved through a strong sense of community within the town[151]. It was hierarchical and not democratic, with a strong social and economic distinctions among members, operated by an oligarchic elite[152]. The autonomy of the city and its inhabitants merged, because individual interest and town interest could not be conceived separately. The town

144 The fact of being funded on an association of citizens subject to a special law was the common character of Medieval cities and Greek Polies, Engin F. Isin, Bryan S. Turner *Handbook of Citizenship Studies*, (2003), 120.

145 L. Mumford, *The city in history* (1961), 356-361.

146 As Max Weber clearly points out in his historical essay on cities,

"The urban citizens then usurped the right to break with lordly law – and this was the great innovation, in fact the revolutionary innovation in the medieval cities of the West in the face of all others. In the center and north European city originated the well-known saying: 'city air makes man free". Max Weber quoted by J.M. Domingues, *The City Rationalization and freedom in Max Weber*, 26, Philosophy and Social criticism,107, 110 (2000).

147 See the Weber reconstruction of the origin of the city, in Max Weber, *The City. Translation and edited by Don Martindale and Gertrud Neuwirth,* (1966).

148 P. Les Gales, *European Cities: social conflicts and governance* (2017) , 41.

149 L. Mumford, *The city in history,* cit. at 138, 377-378.

150 L. Mumford, *The city in history,* cit. at 138, 381-382.

151 G. Frug, *The city as a legal concept,* 83 Harv. L. Rev. at. 1083 (1980).

152 G. Frug, *The city as a legal concept*, cit. at 144, 1085.

therefore emerged as an entity similar to a person, with rights and duties independent from that of its inhabitants[153]. If cities want to respond to the serious challenges that they are facing, they need to invest in new governance regimes able to restore a collaborative equilibrium in the urban context. The idea of the co-city relies upon the research efforts conducted in last years in order to investigate what kind of governance do we need for the city. The guiding research question is if, in the domain of the urban commons, in the "sharing", "peer to peer" "collaborative" age, there might be room for a new design of public institutions? Can urban assets and resources or the city as a whole be transformed into a collaborative ecosystems that enable collective action for the commons[154]? The observation of urban commons allows to understand the importance of an enabling State, that sustains collective action for the urban commons[155]. The literature on the urban commons and the existing examples of urban commons institutions such as BID's, park conservancies, community gardens suggests that a collective governance of urban commons might be employed at the urban level and we later proposed that collaborative governance strategies can be scaled up to the city level to guide decisions about how city space and common goods are used, who has access to them, and how they are shared among a diverse population. The shift from the urban commons to the city as a commons[156], analyzed using the evolving models of the sharing city and the co-city, with the major examples of Seoul (sharing city) and Bologna (collaborative city) requires a theory of collaborative governance that include a wide spectrum of agents that work together in order to co-design the governance of the city. We therefore build on the triple helix model of innovation, based on a relationship between university, industry, government and advanced the idea of a quintuple helix or pentahelix model[157]

[153] G. Frug, *The city as a legal concept,* cit. at 144, 1087.
[154] See C. Iaione, *Governing the urban commons,* 1 I.J.P.L. 170 (2015).
[155] S. Foster, *Collective Action and the Urban Commons*, 87 Notre Dame L. Rev. 57 (2011).
[156] S. Foster and C. Iaione *The city as a commons,* cit. at 62.
[157] Christian Iaione, Paola Cannavò, *The Collaborative and Polycentric Governance of the Urban and Local Commons*, 5 Urban Pamphleteer 29 (2015). See also E.G. Carayannis, D.F.J. Campbell, *Triple Helix, Quadruple Helix and Quintuple Helix and how do knowledge, innovation and the environment relate to each other? A proposed framework for a trans-disciplinary analysis of sustainable development and*

of innovation for governance of the city as a commons. The quintuple helix model is a concrete expression of the idea of the public-private-commons partnership and is designed to overcome the dichotomy between public vs private in managing the commons and to give relevance to the proactive role of knowledge institutions, that comprehend not only universities but also cultural organization, foundation and schools as the neutral driver of the governance system[158]. The civic, private, public, cognitive and social actors (universities and knowledge institutions, local businesses and enterprises that implement corporate social responsibility, single urban inhabitants, informal group and micro commoners and hyper local communities) work together in order to build the new governance of the city, experiment and re-build the foundations of social contract of the city. The concept of the quintuple helix was incorporated in the Pact of Amsterdam, The Amsterdam Pact states that

> "In order to address the increasingly complex challenges in Urban Areas, it is important that Urban Authorities cooperate with local communities, civil society, businesses and knowledge institutions. Together they are the main drivers in shaping sustainable development with the aim of enhancing the environmental, economic, social and cultural progress of Urban Areas. EU, national, regional and local policies should set the necessary framework in which citizens, NGOs, businesses and Urban Authorities, with the contribution of knowledge institutions, can tackle their most pressing challenges"[159].

For envisioning a co-city, we should have a deeper understanding of the commons, envisaging them as *commoning*[160], which means as a dynamic process, with a social and relational value. The co-city is able to capture the true essence of

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social ecology, 1 Int. J. of Soc. Eco. Sust. Dev. 41–69 (2010) (proposing a quintuple helix system of innovation that comprehend environmental systems).

[158] S. Foster and C. Iaione *The city as a commons,* cit. at 62.

[159] *Urban Agenda for the EU, Pact of Amsterdam,* Agreed at the Informal Meeting of EU Ministers Responsible for Urban Matters on 30 May 2016 in Amsterdam, The Netherlands, available at http://urbanagendaforthe.eu/pactofamsterdam/.

[160] Prominent public intellectuals talk in the field of the commons about "commoning" as a powerful dynamic process able to create social value and relation. D. Bollier and S. Helfrich, *Patterns of commoning* (2015).

collaboration: while the perspective of a co-city as a collaborative idea of the city and a model that encompass them all and the commons as the "*elementary particle*". To conceive the co-city it is important to work across the boundaries, building upon the main elements of the model analyzed above, introducing elements of environmental awareness, technology and putting collaboration as a cross cutting methodology to govern the city, with a special attention to the issue of rights, since the co-city model emerges from the right to the city approach. Benjamin Coriat and Antoine Dolcerocca reminded that the issue of rights in the commons is crucial[161] and that an understating of public goods and services through the lenses of the commons is crucial. This approach requires to consider relationality as an organizing principle[162], and to promote, as Yochai Benkler suggested, the opportunities provided by sharing and peer production as the emergence of a new form of economic production[163]. Other prominent scholars have highlighted that the idea of the commons imply the transformation of public goods into commons and this shift might create new rights of protection for commoners[164].

If the metaphor of the knowledge – based city calls for a vision of the city as a market place, the nature-based city envisions it as an ecological system and the technology based city as a technological platform, the morphology of the co-city is the one of the city as a commons[165], which is to say that the city must be reconceived as an infrastructure that enables social and economic pooling to use, access, manage, produce material and immaterial resources in common. For conceiving a co-city, we need to think

[161] See A. Dolcerocca and B. Coriat, *Commons and the Public Domain: A Review Article and a Tentative Research Agenda*, 48 Rev. Radical Political Econ 127– 139 (2016).

[162] D. Bollier, *Beyond Development: The Commons as a New/Old Paradigm of Human Flourishing*, David Bollier, (June 25 2016), available at http://bollier.org/blog/beyond-development-commons-newold-paradigm-human-flourishing.

[163] Y. Benkler, *The wealth of networks. How social production transform markets and freedom* (2006).

[164] D. Bollier, *State power and commoning*, a report on a Deep Dive Workshop convened by the Commons Strategies group in cooperation with the Heinrich Boll Foundation, available at http://bollier.org/blog/new-report-state-power-and-commoning.

[165] S. Foster and C. Iaione ,*The city as a commons,* cit. at 62.

about the commons as a *process*[166] rather than a *set of resources*[167] in the city, to focus on the multi-dimensional character of the commons[168] and to consider many different kind of commons[169] that coexist and interact. The concept of the commons has also been addressed in this perspective by the legal anthropologist

[166] Bollier has highlighted that the commons are a new cultural form, and the discourse on the commons help the people to identify new mental maps to represent the current time. D. Bollier, *Growth of the Commons Paradigm*, in E. Ostrom & C. Hess (Eds) *Understanding Knowledge As A Commons* 12 (2007).

[167] E. Ostrom defined common-pool resource as a "natural or man-made resource that is sufficiently large as to make it costly (but not impossible) to exclude potential beneficiaries from obtaining benefits from its use". E. Ostrom, *Governing the commons*, 30 (1990). She later stated with Hess that shared resource systems, the so-called common-pool resources, are "types of economic goods, independent of particular property rights". E. Ostrom and C. Hess, *Understanding Knowledge As A Commons,* cit. at 159.

[168] Tine de Moor has argued that we should look at the commons from a three-dimensional approach, because a commons is at the same time: a resource, a commons property regime (the ownership regime is neither public nor private and a common pool institution, which is the institution set up to make that cooperation possible. T. De Moor, *Avoiding tragedies: a Flemish common and its commoners under the pressure of social and economic change during the eighteenth century,* 62, Econ. Hist. Rev.1, 10 (2009) and T. De Moor, *What Do We Have in Common? A Comparative Framework for Old and New Literature on the Commons,* in 57 IRSH (2012), 269–290.

[169] Moving the analysis from natural commons and Common Pool Resources to the knowledge, commons, Ostrom and Hess has underscored that knowledge is a highly complex resource, with a dual functionality as a human need and an economic good. E. Ostrom and C. Hess, *Understanding knowledge as a commons*, cit. at 223, 4. Madison, Strandburg and Frischmann define knowledge commons as "an institutional approach (commons) to governing the production, use, management, and/or preservation of a particular type of resource (knowledge)". For them, the term commons does not denote the resource or the community, the commons is the institutional arrangement of these elements and their coordination. M. J. Madison, K.J. Strandburg and B. M. Frischmann, *Knowledge commons*, in P. Menell & D. Schwartz, eds. 1 (2016), *Research Handbook on the Economics of Intellectual Property Law* (Vol. II – Analytical Methods). Benkler's work is mainly focused on conceptualization of the growth-oriented, open commons in the networked economy. Y. Benkler, *The Essential Role of Open Commons in Market Economies,* 80 U. Chi. L. Rev. 1499, (2013). Bollier has highlighted that the commons are a new cultural form, and the discourse on the commons help people to indentify new mental maps to represent the current time. To Bollier, the commons are "not a manifesto, an ideology, or a buzzword, but rather a flexible template for talking about the rich productivity of social communities and the market enclosures that threaten them". D. Bollier, *Growth Of The Commons Paradigm*, in E. Ostrom and C. Hess, *Understanding knowledge as a commons*, cit. at 159, 38.

Etienne Le Roy, who observed that "law is not so much what the texts say, but rather what the actors do with it"[170], so it doesn't matter what the law says, what is relevant is what you do with it. Therefore, he assumes the centrality of the creation of the commons. The struggle of the conventional law in managing the commons can be better understood is one looks at how much commons are grounded in social practices, in social relations: "it is precisely these practices that we need to use if we are to enable people to "be commoners" and to take paths that are secured in a different way – not purely through the legality of laws and property rights"[171]. Etienne Le Roy conclude that the making commons that comes alive again in economic and legal system can be interpreted in a double manner, as a return to the pre-capitalist and pre-state organizational principle, or as a groundbreaking moment with the current state. Radical political economics Benjamin Coriat help us framing the question about the commons as a larger question about how we might "commonify" our understanding of public services and goods. The idea of the commons is not merely a question of avoiding privatization of assets and services, but is also about the transformation of public goods into commons, a new conceptual category, and this shift creates new rights of protection for commoners[172].A conceptualization of the commons that focus on the central role of commoners and social movement, and operationalize the legal basis of the commons is provided by Ugo Mattei[173], Maria Rosaria Marella[174] and the Italian scholars of the Constituent of the commons experience[175].

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170 É. Le Roy, *How I Have Been Conducting Research on the Commons for Thirty Years Without Knowing It*, in D. Bollier and S. Helfrich, *Patterns of commoning* (2015).

171 É. Le Roy, *How I Have Been Conducting Research on the Commons for Thirty Years Without Knowing It*, cit. at 163.

172 D. Bollier, *State power and commoning*, a report on a Deep Dive Workshop convened by the Commons Strategies group in cooperation with the Heinrich Boll Foundation, available at http://bollier.org/blog/new-report-state-power-and-commoning.

173 U. Mattei, *Protecting the Commons: Water, Culture, and Nature: The Commons Movement in the Italian Struggle against Neoliberal Governance* 112 South Atlantic Quarterly 2 (2013).

174 M. R. Marella, *The commons as a legal concept*, L. critique, (2016).

175 U. Mattei and S. Bailey, *Social Movements as Constituent Power: The Italian Struggle for the Commons* Ind. J. Global Legal Stud. (2013).

In the city one can encounter different kind of commons. This paragraph will roughly discuss the three main situations and characteristics that can occur in the city. The idea of the co-city as a commons-based city bring us to a reflection on the distinction between several kinds of urban commons with their needs and peculiarity, that request different governance strategies. After a brief overview on the different situation that can occur to the commons Cooperation emerges as a cross cutting design principles for different situations, and it will be outlined as a key factor for a pooling strategies, in order to enable sharing and collaboration. Modern cities can be conceived as a multi-layered composition of highly complex resources that contain all degrees[176] of tragedy and comedy[177] of the commons. The history of contemporary scholarship on the commons is marked by mainly three conceptions of the commons: the tragedy of the commons, user-managed commons and the comedy of the commons[178]. Those two situations might occur also depending on the kind of commons involved.

2.2.1. The tragedy of the commons: scarcity and congestion

The phenomenon of the tragedy of freedom in the common has been identified by Garrett Hardin with his well-known article "The tragedy of the commons"[179]. The idea behind his theory is that when there is a commons with an open access, a tragedy will occur and the resource will be over-exploited and destroyed. The example used by the author is an open access pasture. Every herdsman seeks to maximize his utility by adding more animals to it. This utility has a positive component, the revenues for the herdsman of selling more animals and a negative component, the additional overgrazing created by one more animal. But since the negative component is shared, this negative utility is lower. Hardin argues that "each man is locked into a system that compels

[176] This is an analogy to what Jane Jacobs wrote in 1961 while discussing successful and unsuccessful neighborhoods: "our cities contain all degrees of success and failures". See J. Jacobs, *The death and life of great American Cities,* 112 (1989).

[177] See generally C. Rose, *The tragedy of the commons: commerce, customs and inherently public property,* 53 U. Chi. L. Rev.3 (1986).

[178] B. Daniels, *The tragicomedy of the commons*, BYU L. Rev. 1347, 1371-1373 (2014).

[179] G. Hardin, *The tragedy of the commons*, Science, 3859, 1243-1248 (1968) at 1244.

him to increase his herd without limit--in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons[180]", therefore "freedom in a commons brings ruin to all"[181].Hardin concludes that since "individuals locked into the logic of the commons are free only to bring on universal ruin; once they see the necessity of mutual coercion, they become free to pursue other goals[182]" and finally state that the only solution possible is relinquishing the freedom to breed. In introducing her major empirical research work Governing the commons, Elinor Ostrom outline the research design and explains that the study is focused on small-scale Common Pool Resources, with a limited number of individuals affected from the resources (from 50 to 50.000 people are dependent from it, and consequentially highly motivated to solve problems[183]). Elinor Ostrom also highlights the limits of the types of Common Pool Resources:

> (1) renewable rather than nonrenewable resources, (2) situations where substantial scarcity exists, rather than abundance, and (3) situations in which the users can substantially harm one another, but not situations in which participants can produce major external harm for others[184].

The main characteristics of these commons that are subject to tragedy are rivalry in use and non-excludability. These features trigger or incentivize or simply allow phenomena of overconsumption of the resource beyond its capacity of renewability. The tragedy is basically the tale of a crowding or congestion phenomenon in the use of a given resource. Such tragedy brought forward by the crowding or congestion phenomenon generates scarcity, because it hampers the renewability of the resource, and ultimately may lead to the destruction of the resource if the limit beyond which the resource cannot renew itself by itself is overcome. Those kinds of commons,

[180] G. Hardin, *The tragedy of the commons* cit. at 172, 1244.
[181] G. Hardin, *The tragedy of the commons* cit. at 172, 1244.
[182] G. Hardin, *The tragedy of the commons* cit. at 172, 1248.
[183] E. Ostrom, *Governing the commons* cit. at 167. 26.
[184] E. Ostrom, *Governing the commons* cit. at 167.

that Benkler labels as the "Ostrom School commons"[185], and Hess refers to as the traditional commons[186], are the object of study of Elinor Ostrom in her major empirical research which proves that the tragedy can be avoided by fostering cooperation among users in the sharing of the resource. Building governance regimes that govern the cooperation in the sharing of the resource may guarantee the sustainability or renewability of the resource.

2.2.2. The comedy of the commons in the city: abundance and participation.

An opposite tale to the tragedy of the Ostrom congestible commons, the so-called comedy of the commons, was introduced in the legal scholarship thanks to the intuition of Carol Rose[187] and it might appear in case of non-tragic commons, open commons, or productive/growth-oriented commons[188]. The comedy of the commons can be described as a situation where congestion and agglomeration of users is needed in order to raise the value of the commons, and the commons have an expansive capacity, so the value increase as far as people participate. It seems that they are not users of the commons, but also producers of the commons. Carol Rose was retracing the doctrine of "inherent publicness"[189], and described cases of goods, such as roads or waterway, that must be open to the general public, not subject to private property nor to a specific community of users. Rose uses the example of recreational activities, like dance, in which each added dancer that participates, makes the value of participating higher, because "each added dancer brings new opportunities to vary partners and share the excitement"[190]. The value of those activities relies

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185 Y. Benkler, *The Essential Role of Open Commons in Market Economies* cit. at 162, 1520.

186 C. Hess, *Mapping the New Commons,* Presented at The Twelfth Biennial Conference of the International Association for the Study of the Commons, Cheltenham, UK, (July 14-18 2008) http://surface.syr.edu/cgi/viewcontent.cgi?article=1023&context=sul.

187 C. Rose, *The comedy of the commons: commerce, customs and inherently public property,* cit. at 170.

188 Y. Benkler, *Commons and Growth: The Essential Role of Open Commons in Market Economies,* cit. at 162, 1511.

189 C. Rose, *The comedy of the commons: commerce, customs and inherently public property,* cit. at 170, 770.

190 C. Rose, *The comedy of the commons: commerce, customs and inherently public property,* cit. at 170, 767. Those are activities where "Increasing participation enhances the value of the activity rather than diminishing it" at 768.

upon the fact that they reinforce solidarity and fellow-feeling of the whole community. She points out how this is "the reverse of the "tragedy of the commons": it is a "comedy of the commons"[191].As also Fennell has highlighted, there are some aspect of life in the city where the abundance of participants allows the creation of more value, also relying upon agglomeration benefits[192]. The comedy of the commons in the city might therefore be expressed by those situations where the abundance of participant does not create congestion crowding or over-consumption. It instead produces an added value and reinforces the commons.

2.2.3. The tragicomedy of the commons: capacity.

We will focus here on the analysis and literature[193] that framed infrastructure as commons to explain why and how we need to talk about also the tragicomedy of the commons in the city. Fennell underscored that, in the city, the tragedy and the comedy of the commons might potentially come together[194] also because there is both a risk of under-cultivation[195] (when the city doesn't succeed in generating the agglomeration benefits) and overconsumption/overcrowding or congestion as negative effects related to urbanization[196]. Infrastructure commons are highly complex resources, because they share some characteristic with the tragic congestible commons (risk of congestion and over-usage) and some features of the open, non congestible commons (infrastructure of the city is a commons of crucial importance due to the high degree of complexity of urban environments). Physical infrastructure and online infrastructure are crucial for the city. As Parag Khanna has recently stated "no matter which way we connect, we do so through infrastructures"[197]. Frischmann helps

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[191] C. Rose, *The comedy of the commons: commerce, customs and inherently public property,* cit. at 170, 779.
[192] L. A. Fennell, *Agglomerana,* BYU U. L. Rev. 1373 (2015) at 1382.
[193] See. C. Iaione, *The Tragedy of Urban Roads*, Fordham U. L. J. (2009) and B. Frischmann, *Infrastructure* (2012).
[194] L. A. Fennell, *Agglomerana,* cit. at 185.
[195] L. A. Fennell, *Agglomerana,* cit. at 185, 1375.
[196] L. A. Fennell, *Agglomerana,* cit. at 185.
[197] Khanna, cit. at 199, 7. For a critical analysis of Khanna's Connectography, see D. W. Drezner, *Connectography by Parag Khanna*, The New York Times, available at http://www.nytimes.com/2016/05/01/books/review/connectography-by-parag-khanna.html (last visited April 29 2016).

us to conceive infrastructure (both traditional - transportation and communication- and non-traditional (environmental and intellectual- infrastructures)[198]as commons. He considers that infrastructures have a social value that exceeds the private market value, and open commons management is therefore a very attractive strategy for infrastructure commons, because it offers opportunities for users to generate public and social goods, although with a range of complications, such as congestion management[199]. Following Benkler's suggestion to consider the wide range of approaches for dealing with commons dilemmas[200], avoiding the risk of a too narrow approach to the topic, we will need to envision a scalar and flexible governance strategy for infrastructure commons in the city. Therefore, we can assume that the main situations that can occur are scarcity and congestion in a tragic commons, a call for agglomeration in a constructed commons and a third, more complex situation, that of the infrastructure were you might need to both prevent congestion and expanding the capacity of the resource.

From the literature on the commons, we can see that a tension emerges from the opposition between scarcity and agglomeration/abundance. If we conceive the whole city as a commons, we can conceive it as an open commons with different degrees of capacity. The concept of *capacity* could be the element that bridges the space between these two opposite poles on the spectrum. When we are dealing with inherently tragic commons, or natural resources commons, we should build a regulatory governance strategies that aims at enabling of cooperation through sharing. For overcoming scarcity of the natural resource commons, cooperation through sharing is needed. Ostrom demonstrated that, through cooperative strategies, commons users can avoid the tragedy and maintain the value of the commons for the community. In an urban or metropolitan context[201], congestion

198 B. Frischmann, *Infrastructure*, cit. at 186, 189-253.

199 B. Frischmann, *Infrastructure*, cit. at 186, 116.

200 Y. Benkler, *Commons and Growth: The Essential Role of Open Commons in Market Economies*, cit. at 162, 1520.

201 Hardin highlighted the difference between resources in a natural context and in an urban context, although from a moral standpoint. He adopts a definition of morality that is context based: *the morality of an act is a function of the state of the system at the time it is performed.* Therefore, he argues, "Using the commons as a cesspool does not harm the general public under frontier conditions, because

is very likely to happen and produces different and relevant outcomes. As Sheila Foster has explained, urban commons can share the same rivalry and free-rider problems that leads to the tragedy of the commons[202], particularly through the phenomena of regulatory slippage[203]. For dealing with the need of generating or producing abundance/construction/agglomeration for the artificial/constructed commons, we should enable cooperation through collaboration. The open commons branch of studies, as Benkler[204] highlights, is focused on the limits of particular mechanisms to overcome collective action problems and emphasize the necessity of symmetric access rules and reduced power to appropriate through exclusion, allowing for a flexible and dynamic use[205]. As Madison, Strandburg and Frischmann has pointed out, the conventional theory of the tragic commons has been put into question by the study of collaborative institution for the generation of knowledge and innovation[206]. Fennel has stressed the positive effect of urban proximity, that can generate "energy"[207] and provided suggestions about policy instruments that are supposed to be designed in order to assemble participants optimally[208]. This might be applied to the urban cultural or knowledge commons, a kind of constructed commons[209].

there is no public; the same behavior in a metropolis is unbearable." G. Hardin, *The tragedy of the commons*, cit. at 172, 1245.

[202] S. Foster provides several examples in which rival and degraded common urban resources are being collectively restored and managed by groups of users in the absence of government coercion, and without transferring the ownership to the private. Sheila Foster, *The city as an ecological space: social capital and land use* , cit. at 42.

[203] S. Foster, *The city as an ecological space: social capital and land use,* cit. at 42.

[204] Y. Benkler, *Between spanich huertas and the open road. A tale of two commons?* In M. Madison B. Frischmann, and K. Strandburg, *Governing knowledge commons* (2014).

[205] Y. Benkler, *Commons and Growth: The Essential Role of Open Commons in Market Economies*, cit. at 162, 1555.

[206] M. J. Madison, K.J. Strandburg & B. M. Frischmann, *Knowledge Commons,* Forthcoming, Research Handbook on the Economics of Intellectual Property Law (Vol. II – Analytical Methods), Peter Menell & David Schwartz, eds. Edward Elgar Publishing, (2016).

[207] L. A. Fennell, *Agglomerana,* cit. at 185, 117.

[208] L. A. Fennell, *Agglomerana* cit. at 185, 125.

[209] For Madison et al, cultural commons are "constructed" in the sense that their "creation, existence, operation and persistence are matters not of pure accident or random chance, but instead of emergent social process and institutional design". M. J. Madison, B. M. Frischmann & K. J. Strandburg, *Constructing*

Collaboration between different actors is the strategy through which agglomeration, constructed/knowledge commons creation and innovation[210] is generated, paying attention to balance impact and consequences, taking into account that the same ingredients that produce agglomeration benefits might also bring congestion[211]. Cooperation through collaboration could be the strategy through which agglomeration is generated in those commons, With artificial or constructed commons in the city, cooperation through collaboration is the path through which create abundance or agglomeration, promoting activities where a greater participation produces exponentially positive externalities, in a virtuous circle[212]. Finally, for preventing congestion and/or generate expansion of the capacity of the infrastructure commons, we should enable cooperation through pooling. This third category of commons, infrastructure commons, is in fact an appropriate example to tell us something more about the idea of the city as a commons and the co-city. With infrastructures, both prevention of congestion and capacity generation are needed and the concept of scarcity can be substituted by the concept of capacity. The three different situations envisioned above have elements that link them one another, and is possible to find elements of tragedy and comedy that coexist[213], particularly in the city, and this makes it hard to govern them. In the infrastructure commons, this situation of tragicomedy can be emphasized. Frischmann consider that, although openness should be the baseline principle for public social and mixed infrastructure, there might be cases where commons management come with congestion management, depending on the characteristic of the

commons in the cultural environment, in D. Bollier and S. Helfrich (eds), *The wealth of the commons,* (2010).

[210] Benkler has explained how innovation and knowledge commons generation could emerge from collaboration between different actors. Y. Benkler, *Peer Production and Cooperation,* forthcoming in J. M. Bauer & M. Latzer (eds.), *Handbook on the Economics of the Internet,* (2016).

[211] See the reasoning followed by Fennel in explaining the relation between positive and negative externalities of urban proximity. L. A. Fennell, *Agglomerana,* cit. at 185, 1374.

[212] C. Rose, *The comedy of the commons: commerce, customs and inherently public property,* cit. at 170, 769.

[213] Daniels identified several situations where tragedy and comedy of the commons overlaps. B. Daniels, *The tragicomedy of the commons*, cit. at 171, 1371-1373.

infrastructure. I have already highlighted that traffic congestion represent a typical situation of tragedy of the commons, and that the best response to the tragedy of road congestion has to rely on market-based regulatory techniques and public policies aimed at controlling the demand-side of transportation congestion. Quantity instruments, such as tradable permits of road usage and real estate development, can better internalize all the externalities that road congestion produces[214], and I argued that the use of commons should be regulated at the level of individuals, urban inhabitants (the lowest level possible) who are facilitated by the government in taking on the challenge to pursue the general interest in their everyday lives[215]. In case of infrastructure commons, cooperation might be a demand-side strategy to enhance capacity and efficiency of the existing network, while fighting congestion (car-pooling). Infrastructure both realize and create social value for individuals who obtain access to them[216] and through pooling practices, a process of creation of new infrastructures occurs, in a sort of network effect with the aim of both preventing road congestion and expanding resource capacity.

The research question that this paper wants to ultimately investigate is in fact whether urban commons might be re-conceptualized as infrastructures, reverting Frischmann's theoretical framework of infrastructures as commons. In such a way, urban commons are re-conceptualized as means to enable the production of "urban knowledge as a commons" through continuous experimentation processes that bring together the actors of the quintuple helix urban co-governance approach[217]. Conceiving commons as infrastructures means to identify their main role of the commons for the pooling paradigm, as it's been exposed above. Infrastructures, in the co-city, have a triple meaning: 1) enabling collective action for the commons, 2) preparing the transition to the pooling paradigm 3) redistribution of crucial urban resources such as urban energy[218].

3. Pooling in the city

3.1 Pooling as a fourth mode of exchange

[214] C. Iaione, *The tragedy of urban roads,* cit. at 186, 893.
[215] C. Iaione, *The tragedy of urban roads,* cit. at 186, 949-950.
[216] B. Frischmann, *Infrastructure*, cit. at 186, 141.
[217] C. Iaione, *The CO-city,* 75 The Am. J. Econ. Soc, 2 (2016).
[218] H.J. Wiseman, *Urban Energy,* 40 Fordham Urb. L. J. 5 (2013).

The co-city paradigm understands the city as a commons which is a metaphor to describe the morphology of the city as an infrastructure that enables the collective action. The co-city relies heavily upon the social paradigm of collaborating, sharing, cooperating and therefore represents a shift from the paradigm where competition is dominant. The co-city paradigm represents a fourth way to deal with the commons dilemma in the urban context, that coexists with the previous, the State/Leviathan solution, the market economy / privatization solution and reciprocity.

Kojin Karatani recently proposed a classification of the evolution of societies through four types of mode of exchange: reciprocity, plunder and redistribution, commodity exchange and a fourth type of exchange, still emerging, named X, an enhanced expression of the first mode of exchange, re-emerged after being repressed for centuries. It could be pooling, as the very first mode of exchange of the nomadic societies, and it would co-exist with the other modes of exchange. Pooling is described as a principle of equality achieved through redistribution[219], typical of the nomadic small bands, before the rise of clan society arise through the "sedentary revolution", that allowed the emergence of inequality and the principle of reciprocity, where unable to storage, therefore spoils were pooled and equally distributed[220] in a form of pure gift without obligation for reciprocity. The co-city paradigm can create a framework that enables the cohesion/alignment of geographic and content interest through a methodological approach that favors pooling techniques. Pooling therefore allows to rethink the city as a myriad of communities/urban pools, with an open and collaborative design in order to avoid ossification and the formation of a strong and sectarian group identity. As complex system theorist Yanerr Bam Yam states, "to be successful in a high complexity challenges requires teamwork"[221] and "the search for partners and coalescence is into team is an essential dynamic of society today[222]". The element of urban pools in the co-city paradigm relies upon the generative potential of the commons. The relational characteristic of the collective governance of resources, the peer to peer activities or the sharing economy

[219] K. Karatani, *The structure of world history* 42 (2014).
[220] K. Karatani, *The structure of world history*, cit. at 212, 43.
[221] Y. Bar Yam, cit. at 26, 2.
[222] Y. Bar Yam, cit. at 26, 2.

teaches us that the commons are a process rather than a certain type of good. A pooling strategy is an iterative and dynamic activity of mixing and matching[223] governance structures. Poolism means cooperation in both sharing and collaboration, as we can assume from the observation of infrastructure, where both situations can occur and a scalar and adaptive strategy is needed. One should avoid too narrowed or dichotomous views in terms of congestion or abundance, and start reflecting on the concept of *capacity*, focusing the attention also on the *demand-side* of the problem. We can therefore conceive the commons as the infrastructures in the city that foster cooperation enabling pooling economies. The idea of pooling economy is rooted in the sharing economy matrix, introduced in the Opinion "The local and regional dimension of the sharing economy", approved by the Committee of the Regions of the European Union[224]. The reasoning starts from the assumption that the sharing economy has an innovative and dynamic nature, encompassing phenomena presenting the following features:

> (i) its main agent does not act as the standard economic agent, the homo oeconomicus;
>
> (ii) the sharing economy adopts a platform approach whereby relations, reputation, social trust and other non-economic motives within a community become one of the main drivers;
>
> (iii) on a large scale the sharing economy makes intensive use of digital technologies and data collection. Data becomes primary raw material. Fixed costs are mostly externalized;
>
> (iv) on a smaller, local scale some sharing economy initiatives might be limited to the common use or management of physical assets (e.g. co-working spaces, urban commons, etc.) or to new forms of peer-to-peer, sometimes street or building level, welfare systems.

Sharing economy seems to question the model of *homo*

[223] Y. Benkler, *Commons and Growth: The Essential Role of Open Commons in Market Economies*, cit. at 162, 1553.

[224] See the Opinion of the European Committee of the Regions, *The local and regional dimension of the sharing economy*, available at http://cor.europa.eu/en/activities/opinions/Pages/opinion-factsheet.aspx?OpinionNumber=CDR%202698/2015.

oeconomicus, as the main economic agent[225] and might give rise to a new economic identity. As Ostrom and Janssen[226] has highlighted, empirical research on social dilemma has pointed out that the model of the individual that seek *only* short-term, material benefits, outside of competitive situations (including competitive political situations) is no longer a good foundation, although one shouldn't assume that all individuals are willing to contribute to collective benefits[227]. The individual that constitute the heart of this new economic identity is an individual not guided by the perpetual quest to maximize its own material interests, an individual unwilling to act alone[228]. It is an archetype of individual who, while not giving up the pursuit of her passions and interests, understands that her individual freedom is nothing if it is not associated with a commitment to the community, if the "acting alone" is not paired with the "acting in common"[229]. Sharing economy main agent might be thus framed more as a *"mulier activa",* able to act in the public – social, economic, political – arena and to place herself in relation to others for taking care of the general, common interest which is the main of the three pillars of a *"vita activa"*[230].A distinction between the various forms of sharing economy is however needed[231], for clarifying the argument of the urban pooling. The typology is based on a first distinction between "sharing economy in the strict sense" and collaborative forms of sharing economy: 1) "sharing economy in the strict sense composed of: access economy, for sharing economy initiative whose business model implies that goods and services are traded on the basis of access rather than ownership. It refers to renting things temporarily rather than selling them permanently;

[225] Encyclical Letter *Laudato si'* of the Holy Father Francis on care for our common home (24 May 2015). See paragraphs 13, 14, 90, 211. See also L. Trotsky, Attention to small things, (1 October 1921).

[226] M. Janssen and E. Ostrom, *Empirically based, agent-based models,* 11 Ecology and Society 37 (2006) .

[227] M. Janssen and E. Ostrom, *Empirically based, agent-based models*, cit. at 284, 3.

[228] For an archetype of individual willing to collaborate or "reciprocate" see for instance the "homo reciprocans" of S. Bowles, H. Gintis, *Homo reciprocans*, (2002).

[229] A. de Tocqueville, *Democracy in America,* (1835).

[230] H. Arendt, *The human condition,* (1958).

[231] Opinion of the European Committee of the Regions, *The local and regional dimension of the sharing economy,* available at http://cor.europa.eu/en/activities/opinions/Pages/opinion-factsheet.aspx?OpinionNumber=CDR%202698/2015.

Gig economy, for sharing economy initiatives based on contingent work that is transacted on a digital marketplace. 2) Pooling economy is composed of: collaborative economy, sharing economy initiatives that foster peer-to-peer approach and/or involve users in the design of the productive process or transform clients into a community; "commons-based economy", "open cooperativism", "open platform cooperativism"[232] for sharing economy initiatives that are collectively owned or managed, democratically governed, do not extract value out of local economies but anchor jobs, respect human dignity and offer new forms of social security.

3.2 Forms of urban pooling

The concept of pooling[233] advanced above will be better articulated in this section through three concrete examples of forms of urban pooling for the commons situations. The current social and economic transitions might envisage a new morphology of the State: the enabling, relational, entrepreneurial[234] State. This would require a reconfiguration of the core categories of public law and administrative law. Public law scholar Jean Bernard Auby has already highlighted that the "law of cities" is one of the groups of realities on which scholars should concentrate research and reflections in order to keep up with the transformations which

[232] J. Schor, *Debating the sharing economy,* (2014).

[233] Pooling may be considered part of a broader institutional shift at the urban as much as the regional, national, and international level toward networks of governmental actors. *See* C. N. Stone, *Regime Politics: Governing Atlanta* 1946-1988 at 222-29 (1989) (rejecting a model of urban governance oriented around "the difficulty of maintaining a comprehensive scheme of control" and arguing that "[i]n a world of diffuse authority, a concentration of resources is attractive. The power struggle concerns, not control and resistance, but gaining and fusing a capacity to act-power to, not power over"); A-M. Slaughter, *A New World Order 1*-3 (2005) (arguing networks of government officials, such as police investigators, financial regulators, and legislators are "key feature of world order in the twenty-first century"); C. P. Gillette, *The Conditions of Interlocal Cooperation*, 21 J.L. & Pol. 365 (2005) (proposing changes to legal and institutional structure to facilitate cross-subsidies from one locality to another); D. Renan, *Pooling Powers*, 115 Colum. L. Rev. 211, 219 (2015).

[234] M. Mazzucato, *The entrepreneurial state: debunking public vs. private sector myths,* (2013); S. Foster, *The city as an ecological space: social capital and land use,* cit. at 42; G. Cook, R. Muir, *The relational State. How recognizing the importance of human relations could revolutionize the role of the state,* cit. at 253.

affect public law in the current era[235]. In the age of the modern state, local autonomy at the urban level has been increasingly comprised, of course with differences among the countries. It has already been highlighted above that pooling at the level of the executive and central administration destabilize administrative law, because it breaks down the rigid separation of authority and expertise on which it is based[236].

3.2.1. Regulatory tools for the urban commons

The Regulation on the Urban Commons for the City of Bologna, Italy, approved in 2014 by the city as the result of a process of experimentation[237]designed a structure by which citizens and local administration can collaborate to develop and manage the city's "urban commons," which can include public space, urban green spaces, abandoned buildings, and other infrastructure. Citizens and the public administration can sign a "pact of collaboration", the central regulatory tool provided by the Bologna Regulation[238], which contains the object of the collaboration, which can consist of a long-term or punctual shared care intervention or a regeneration project of an urban commons (public spaces, buildings). The Bologna Regulation is been approved in several cities in the Italian context, whom engaged in a sort of "race" to the regulation of the urban commons, often underestimating the key feature of the success of Bologna's model, which is the process of experimentation conducted before the approval of the Regulation and the high degree of adaptivity of its implementation. Observers has highlighted the example of the Chieri approach to the Regulation of civic collaboration for the

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[235] J.B. Auby, *The Role of law in the legal status and powers of cities*, 2 IJPL 302, 305 (2013).

[236] D. Renan, *Pooling powers,* 115 Col. L. Rev. 211, 249 (2015).

[237]According to the analysis of Ugo Mattei and Alessandra Quarta, the Bologna regulation and the other city regulations for the commons represents a reaction of city governments to the wave of occupations and reclaiming of the right to the city. The regulations for public collaboration for the urban commons might achieve a significant impact, in terms redistributive effects, only if there is an activation of the communities affected and there is a real devolution of power, therefore the authors suggest a strong monitoring activity. U. Mattei and A. Quarta, *From the right to the city to urban commoning? Thoughts on the generative transformation of property law*, 1 The Italian Law Journal, 2 (2015) at 320-324.

[238] The model of the collaborative city, of which the Bologna experimental process is an example, is explained deeply in Foster and Iaione, *supra note* 14 and C. Iaione, *The CO-city,* cit. at 210.

urban commons[239]. Also the case of Turin, as explained earlier in the article. Also the case of Turin represents a good example in this line. The Turin City Council approved the Regulation on January 11th of 2016, at the end of the mayoral term of Piero Fassino. The Turin Regulation[240] took inspiration from the Bologna version. Therefore, it governs the forms of collaboration among citizens and administration for the care, shared management and regeneration of urban commons, requested by city inhabitants or responding to the solicitation of the City, pursuant to articles 114 paragraph 2, 117 paragraph 6 and 118 of the Italian Constitution through the adoption of non-authoritative administrative acts, based on a participatory approach, the so called 'pacts of collaboration'. It nevertheless applied some peculiar adaptations to the Bologna version, such as the following: it provides an articulated spectrum of types of interventions on the commons (article 6): cure and co-management can be short term or long term, while regeneration can be temporary or permanent and it might address a complex system of goods and activities (article 6). It also empowers the City to directly take the economic responsibility for realizing actions and interventions provided by the pacts of collaboration (article 16). The city cannot transfer direct economic contributions to active citizens, unless the pact of collaboration provides for interventions that the City considers of relevant public interest and provided that the resources used by active citizens are appropriate for the scale of the intervention. In the latter case, the city can provide direct economic contribution, such as: a) free use of public buildings; b) utilities taken care of by the City c) maintenance expenses taken care of by the city; d) free availability of materials that are necessary to realize the intervention (article 16). Finally, what is particularly innovative about the Turin approach to the Regulation on civic collaboration for the urban commons is the administration's effort to build an infrastructure internal to the City Bureaucracy that coordinates different departments of the City in order to push them to work in synergy on the collaboration proposals. This model avoids the

[239] C. Angiolini, *Possibilità e limiti dei recenti regolamenti comunali in materia di beni comuni*, in A. Quarta (eds.), *Beni comuni 2.0* (2017).

[240] Regulation of the City of Turin n. 375 on civic collaboration for the care, shared management and regeneration of the urban commons, approved through deliberation of the City Council on January the 11th 2016 (mecc. 2015 01778/070), executive since 25 January 2016.

classical problem of fragmentation in public-policy making and in implementation processes. To create such an integrated and synergic structure, the administration created a Working Group, established by the Regulation at article 7, second paragraph of the Regulation[241]. The working group has a key role in the process that leads toward the signature of pacts of collaboration as it will be the first recipient and evaluator of citizen's proposal. It works closely with the Council Committee, referred to by the Regulation at article 25, second paragraph, that provides guidelines for those pacts which aim at intervening on public buildings or other city owned properties, and evaluates the necessity of providing corrections to the pacts. Innovative in this approach is the fact that the Working Group is composed by civil servants from different areas of action of the City.

Indeed, the Working Group can be composed of different combinations of service departments depending on the project to be analyzed. In general, the departments that will work on the pacts of collaboration are: Infrastructure and Mobility; Culture, Education and Youth; Municipal Buildings, Heritage and Green Spaces; Commerce, Labor, Innovation and Information System; Directional and Strategic Control; Facility and Subcontracts; Social Policies and Relations with Health Agencies, and finally, the Urban Regeneration, Integration and Design. It is then through the «Co-city » Urban Innovative Actions (UIA) project that the City managed to invest in the urban commons as a lever for addressing key urban governance issues such as poverty, and target the most vulnerable communities in the city. UIA is a EU program aiming at supporting European cities' initiatives to tackle urban intricacies and challenges, experimenting innovative tools. In Turin the UIA Co-City project is carried out through a partnership with the Computer Science Department of the University of Turin, the National Association of Municipalities (ANCI) and the Cascina Roccafranca Foundation. It aims at coordinating the efforts of different urban actors in promoting the implementation of the Turin Regulation. The project provides the renewal of real estate and public spaces considered as urban commons, as instrument of social inclusion and against poverty in many deprived areas of the

241 The Working Group was established through an administrative determination, n. 14, approved on March the 3rd 2016, available at http://www.comune.torino.it/benicomuni/bm~doc/determina-dir-gen-istituzione-gdl-2.pdf.

City. The project is coordinated by the City Department for Decentralization, Youth and Equal Opportunities. The Neighborhood's homes network, a policy that the city of Turin is implementing since 2006[242] that promotes the diffusion of community spaces all over the city represent a key platform for the project's implementation. In the Neighborhood's homes, in fact, urban inhabitants will find information on the Co-city projects and the different opportunities it offers and they will find support for drafting proposals of pacts of collaboration. The first step of the UIA Co-city project is the public call launched by the City in June 2017 aimed at collecting citizens' proposals for pacts of collaboration. Thanks to the public call framework[243], the City involves urban communities starting from the initial phase of the regeneration process. The Public Notice lays down the conditions for the submission of proposals aimed at the co-designing process to define pacts of collaboration between the City and active citizens. Adding to the Bologna framework, such a legal device is constructed to improve the resolution of local communities issues, involving city inhabitants without requiring a particular level of expertise and accepting inhabitants' group even if not assembled in associations or organizations. The Notice specifies the objectives that the proposals of collaboration must have in order to be taken into consideration. In particular, such proposals should imply: actions of territorial monitoring and community development, urban cultural production, job opportunities, social innovation and social enterprises, process of social inclusion, cultural diversity, dialogue, equal opportunities and contrast of discriminations, environmental sustainability, urban agriculture and circular economy, and finally, the availability of spaces, services and public initiatives. For each area the city provides a list of streets or building where the intervention is possible or suggested. Proposals must be related to the three type of action of the UIA Co-City project : 1) Peripheries and urban cultures. Through this measure, the city intends to promote regeneration processes of abandoned buildings in peripheries. This is the area

[242] G. Ferrero, *Welfare urbano e case del quartiere,* in 242 *Urbanistica informazioni* (2012).

[243] The public call was launched by the administrative determination no 30 of May 23rd, 2017, available at http://www.comune.torino.it/benicomuni/bm~doc/determina-approv-avvisi-atti.pdf. See also C. Iaione, *The co-city in Turin*, on www.labgov.it.

on which most of UIA's financial resources are concentrated to trigger the regeneration of the buildings or areas (1.100.000 euros), while 600.000 euros are provided for securing the diffusion of the activities on the ground. 2) Underutilized infrastructures for public services. The proposals for this measure are intended to enhance and bring value to the use of urban infrastructures - such as schools, libraries, public offices – whose current use is under their capacity. For this measure, 500.000 euros are allocated for the regeneration activities and 200.000 for securing the communication of activities on the ground. 3) Cure of public space. This measure is aimed at promoting interventions of cure and co-management of public spaces such as gardens and parks, streets or squares that are at risk of decay or under-utilized. 100.000 euros are allocated for the regeneration activities and 15.000 for securing the diffusion of the activities on the ground[244].

3.2.2. Collaboratories to produce knowledge commons and enable collective action

Ostrom and Hess have highlighted that there are two intellectual history of the commons, the narrative of enclosures that talks about privatization and the history of openness democracy and freedom, "the narrative of digital interoperability, open science, collaboratories and scholarly networks, voluntary associations, and collective action[245]". The idea is that of a *collaboratory* as the heart of a methodological process to enable collaboration[246] for the creation of knowledge commons and enabling collective action. Collaboratories[247] were conceived in the late eighties in the field of scientific research on computer science and found application in several fields such as environmental or

[244] Detailed information on the project's measures and about the areas suggested for interventions by the City are available on the institutional plaftorm, «First Life» that is also a key part of the project. The First Life platform aims at building a civic social network for urban regeneration processes: https://cocity.firstlife.org/#/.

[245] E. Ostrom & C. Hess (Eds) *Understanding Knowledge As A Commons* cit. at 159.

[246] The key idea behind the development of collaboratories in scientific research is that knowledge is an activity inherently collaborative. T. Finholt, *Collaboratories*, 36 Ann. Rev. Info. Sci. Tech 73-107 (2002).

[247] T. Finholt, *Collaboratories*, cit. at 238, 13 and 327,.

energy research[248]. In the context of the urban pooling, *collaboratory* plays the function of a living lab for innovation in the design of policy solutions at the urban level, which aggregates different actors (social innovations, enterprises, public institutions, knowledge institutions) for making them co-design together and syntesyse the approach of the city to collaborative economy, social innovation and commons. In the *collaboratory*, a process of knowledge and skills agglomeration is triggered. The key idea behind the development of collaboratories in scientific research is that knowledge is an activity inherently collaborative[249]. The collaboratory is a physical or virtual setting where innovative and cultural forces of the city converge, share resources and knowledge and join efforts for generating cognitive commons. It ultimately acts as a catalyst that foster mutual learning and co-creation[250].

3.2.3. Community cooperatives for neighborhood infrastructures.

The production and governance of infrastructure commons at the neighborhood level could be performed through several structures. More specifically, with regards to the energy self-production, the neighborhood community could set up a micro-grid[251] that will make the district self-sufficient. This might happen through different forms of financing, for instance national and international incentives for energy efficiency. Through incentives, therefore, the community will be able to install photovoltaic systems that will be owned and managed by the community itself. The energy produced might also be able to support the creation of a Community network so that the local community can self-manage and share the wireless mesh network.

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[248] H.D. Grimes, *Creating a collaboratory environment to transcend traditional research barriers: insights from the United States,* 19 Energy Research & Social science 37-38 (2016).

[249] T. Finholt, *Collaboratories*, cit. at 238.

[250] E. Ostrom & C. Hess (Eds) *Understanding Knowledge As A Commons* cit. at 159, 13 and 327.

[251] For an overview on the regulatory options and innovative solutions for community infrastructure, see the strategy card text by J. Duda, T. Hanna and M. Burke, *Building Community capacity for energy democracy: a deck of strategies*, Democracy Collaborative, available at http://prototypes.democracycollaborative.org/energydemocracy/fullscreen.html.

In this model, no one owns the entire infrastructure (open and free access), but everyone who wants to access can contributes with its own resources to run the network which, in turn, is controlled only by the community (community governance). In addition, the management of the WiFi network from the local communities would facilitate the of the digital collaborative platform (therefore facilitating the dialogue between the actors in the local community), the carriage of information regarding the consumption / energy impact of technological innovations implemented by the community itself and free internet access inspired to the principle of the Net equality, as outlined by Sylvain[252].The mesh wireless network is been implemented in some cases[253] at the EU level, and might find its own regulatory framework in European and national legislation. Another interesting case of open wireless network, with a focus on the educational approach with the purpose of contributing to the reduction of the digital divide is the Red Hook Wifi Initiative[254]. The collective production and management of energy and communication infrastructure could be the first ground for the development of neighborhood cooperatives, or community cooperatives as legal and governance structure for urban pooling. The governance arrangement on which the community cooperative is grounded must be inspired by the principle of the public-private-commons partnership, one of the basic lines of intervention aimed at the creation of forms of public-private nonprofit partnerships for urban commons governance.

4. Concluding remarks on the right to social and economic pooling

The fourth urban vision, the rights-based vision of the city, built either on a rebel city or on a collaborative city approach, seems to rely heavily on a sort of "right to social and economic pooling" as part of a vision of the city based on the right to the city

[252] O. Sylvain, *Network Equality,* 67 Hastings L. J. 443 (2016).

[253] Guifi, Spanish community network: www./guifi.net; Germany, Freifunk: https://freifunk.net/en/; AWMN, greek community network: ww.wind.awmn.net/; In Italy, the Neco Project; www.progettoneco.org/la-rete/ and Ninux: http://map.ninux.org/. For an analysis of the functioning of those network, see the Horizon 2020 research project based at the University of Trento NetCommons. Deliverables are available at http://netcommons.eu/.

[254] See the description of the Red Hook Community WiFi project available at http://redhookwifi.org/ (last visited 19 October 2016).

framework. This right to social and economic pooling should be therefore the defining element of a co-city. There are four main pillars around which the right to pooling and therefore the co-city should be structured.

The first one is an urban constitutional claim for urban co-governance[255]. This implies the recognition of the emerging role played by the collectivity and therefore of legal, political, institutional subjectivity to the fifth actor of the quintuple helix or pentahelix model[256], the civic actor (composed of collectives, active citizens, social innovators, city makers, digital artisans, urban farmers, co-workers, digital collectives, etc.), represents a novelty and a challenge urban constitutional lawyers and urban governance scholars should take on. Urban constitutionality[257] requires a rethinking of the urban democratic and policy making process and involves an internal reorganization of public administration, both structurally and mentally, in order to develop a new kind of relationship with citizens, based on coordination and distribution of power instead of limitations, restrictions, and separations of powers.

The notion of pooling applied to the urban context envisions the emergence of a "last mile" democracy. This requires the building of a governance strategy able to strengthen the capacity to cooperate of the five urban / local actors (public, private, social, cognitive, and, above all, the civic) to carry through co-design techniques the co-production of community commons and services and the co-creation of institutions and rules to govern the co-city. The pooling governance might be expressed through an urban co-governance matrix, bases on an incremental multi-layered principle. The main cleavage on which the urban co-governance matrix is based is the distinction between *sharing* and *collaboration,* as design principles for the governance schemes. At the very first level, we might encounter shared governance, i.e. a governance scheme in which small scale intervention are governed through bilateral pact of collaboration for the care and management of the urban commons; at the second and third level,

[255] C. Iaione, *Governing the urban commons,* 1 I.J.P.L. 170 (2015).
[256] C. Iaione & P. Cannavò, *The Collaborative and Polycentric Governance of the Urban and Local Commons*, 5 Urban Pamphleteer 29 (2015).
[257] T. Haller, G. Acciaioli & S. Rist, *Constitutionality: Conditions for Crafting Local Ownership of Institution-Building Processes',* 1 *Society and Natural Resources* 68-87 (2016).

we find cooperative and collaborative governance. This kind of arrangements are activated when the scale of the resource becomes more complex, in a constructed environment where sharing is not enough and production is needed. In this layer, new resources and institutions are generated through cooperation and collaboration, until you get to *polycentricity*[258], the last and most complex layer. In the latter case co-production of services of general interest and commons is implemented in a hyper-politicized, hyper-heterogeneous and diversified context, the complexity of which entails the need to formulate new rules with new actors. The principle of polycentrism, as outlined elsewhere[259], envisions a myriad of autonomous self-organizing centers from decision point of view that are coordinated and connection between them and with the external environment. On the base of this matrix, the five actors of pooling governance can come together and work together at the neighborhood level or at the small/medium size city level.

The transition to the city as a commons implies a transition from the Leviathan/Gargantua[260] form of State, which dominated the modern statehood model, to a Plaftorm State. There are, in fact, several theoretical models to describe the different forms taken in the course of history by the State (Leviathan; Welfare State; Regulatory State), overlapped over time, and resulted in a very complex situation. The constant need for reform of the form of State was first interpreted through the "new public management" in the eighties and then through the perspective of the new public governance[261]. The current social and economic transitions might envisage a new morphology of the State: the enabling, relational, entrepreneurial[262] State. The hypothesis that

[258] S. Foster and C. Iaione, *The city as a commons,* cit. at 62.
[259] S. Foster and C. Iaione, *The city as a commons,* cit. at 62.
[260] The clarification of the notion of polycentric governance, first introduced by V. Ostrom, C. Tiebout and R. Warren, *The Organization of Government in Metropolitan Areas: A Theoretical Inquiry,* Am. Pol. Sci. Rev., Vol. 55, No. 4 (1961), and later by E. Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic System*, 100 Am. Econ. Rev. 3, 641-72 (2010). The application of the notion of polycentricity to the governance of the city as a commons is been discussed in S. Foster and C. Iaione, *The city as a commons,* cit. at 62.
[261] S. Osborne, *The New Public Governance,* 8 Pub. Mgmt. Rev. 3 (2006).
[262] M. Mazzucato, *The entrepreneurial state: debunking public vs. private sector myths,* cit. at 227; S. Foster, *The city as an ecological space: social capital and land use,* cit. at 42; G. Cook, R. Muir, *The relational State. How recognizing the importance of*

this paper is advancing is that there is an additional characteristic of the current form of State, that makes it a platform State, where traditional functions of the Leviathan State and the Welfare state still remains, accompanied by new challenges.

The introduction of the Platform State must imply the re-scaling of the State. The most appropriate scale at which the State can operates in cooperation with the collectivity is the urban/local level. It is the most adequate level for the promotion of an experimental and applies co-governance. This form of State might only emerge from the local experimentation of institutional, social and economic innovations and therefore from the process and the methodology on which the co-city is based. The Platform State is therefore a relational, enabling, facilitating State, that plays a central role in incentivizing and supporting the efforts of the other actors in taking care of shared resources[263], engage itself in a collaborative/polycentric approach to urban governance, facilitates[264] the conditions for which actors can develop social relationship[265]. The starting point of the Platform State need to inspire also the next-generation of administrative action, which overcomes the traditional administrative schemes, based on authority and hierarchy or service provision and outsourcing, to embrace collaboration with different actors in which government plays a pivoting role.

Within a Platform State framework, the government seeks to initiate stable partnerships between the "public as a person" (public institutions, the state as an apparatus) and the "public as a community" or "communities" (composed by the four other actors of co-governance). The Platform State is therefore *unionizing*, meaning that it aims at forming civic unions or urban assemblies[266]. The impact of the widespread phenomena of the sharing economy is bringing out the debate on work protection

human relations could revolutionize the role of the state, 23 (Institute for public policy research, London, 2012).

[263] S. Foster, *The city as an ecological space*, cit at 42.

[264] G. Cook, R. Muir, *The Relational State. How Recognizing The Importance Of Human Relations Could Revolutionize The Role Of The State,* cit. at 253.

[265] G. Cook, R. Muir, *The Relational State. How Recognizing The Importance Of Human Relations Could Revolutionize The Role Of The State* cit. at 253.

[266] T. Scholtz, *Platform cooperativism,* 14-16 (2016).

and unionization[267]. Scholtz argued that a model of platform cooperativism is emerging from the ground[268], with cooperatively owned/democratically governed digital platform might constitutes an alternative to the model of value creation embraced by the dominant sharing economy corporations[269]. Building on this approach, the right to pooling would require the formation of civic unions, divided accordingly to the urban clusters (in terms of content or commons) that would represent a network of organization and protection in order to coordinate the activities.

The third pillar is the recognition of urban pooling rights. Urban pooling rights are the main pillars of a co-city. The right to co-live (e.g. co-housing, community land trusts), the right to co-produce (e.g. collaborative economy, collaborative services such as micro grids, wireless community networks, neighborhood community infrastructure and social innovation such as social impact bonds; Culture, through the implementation of the Faro Convention on the value of cultural heritage for society, signed by Italy in 2013), the right to co-develop (co-management of urban commons, with tools such as the Regulation for Public Governance of the Urban Commons introduced above or the approach recently followed by Italian Cities such as Naples and Palermo of the Declaration of Civic and Collective Urban Uses) should be injected in the urban regulatory framework and become one of the key features of the "law of cities" or "urban law".

Finally, a fundamental characteristic of the co-city paradigm should be experimentalism. For implementing an appropriate methodology, the development of a *CO-City Applied Research Protocol* is needed[270]. The conceptual baseline is grounded in the literature on field[271] and experimental applied research[272],

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[267] G. Spencer, *The Union Economy Doesn't Work In A Sharing Economy,* FORBES available at http://www.forbes.com/sites/realspin/2016/02/17/unions-uber-economy/#7ca69fa66a99 (last visited February 12th, 2017).

[268] T. Scholtz, *Platform cooperativism* cit. at 257.

[269] Some example already exists, such as Cooperatively Owned Online Labor Brokerages and Market Places, such as Coopify or Fairmondo, or City-Owned Platform Cooperatives. T. Scholtz, *Platform cooperativism* cit. at 257.

[270] See S. Foster and C. Iaione*, The city as a commons*, cit. at 62.

[271] The approaches that study the city as a socio-ecological system has highlighted that a scientific approach to the city inevitably results as applied, experimental and local, and suggest the implementation of multiple low-cost experiment of governance innovation, in order to maximize the possibilities that the urban context might offers of a real-time laboratory in the real world, in

and research action/participatory action research[273], with a trans-disciplinary approach that would allow us to overcome the challenges and obstacles that every methodology brings, and take advantage of the synergies that would be created. The experimentation should be conducted through a methodological process centered on the implementation of the CO-city protocol, deeply grounded in the local context. This would means that the standardization would involve the process and the method, not the tools/instruments/output applied in the several contexts. The analysis presented here provides an introduction to the theoretical framework for the conceptualization of the pooling city and suggests the main trajectories for the definition of the pooling city as a rights-based urban model/vision. A proposal to study/develop/adapt/test/measure should be build on three main components: 1) the design principles to bring the Commons in the City and transform the City into a Commons and their gradient. 2)the process, process to bring the Commons in the City and transform the City into a Commons. The local-experimental approach requires the necessity of a methodological tool that guides the action of local institutional actors for the development of an appropriate urban co-governance strategy. 3) the tools for the pooling city. The creation of a toolbox and/or a certifying voluntary standard setting institution like those that work in the networked information economy (3GPP, Wifi Alliance, ETSI, WRC, IEEE, IETF and other standard setting bodies).

The main aim of future research on governance of the city as a commons is to explore the possibility to understand some features of public law operating in the urban context as the "urban law of society". This approach brings necessary reflections in the field of local public law, and should be investigated with an attention to the innovative insights provided by democratic experimentalism[274]. Davidson[275] outlines that there is not a simple

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which one can observe the processes and work with the subject of the policy at the same time. J.P. Evans, *Resilience, ecology and adaptation in the experimental city,* Transactions of the Institute of Brit. Geographers, 230 (2011).

[272] A. Poteete, M.A. Janssen, E. Ostrom, *Working togheter: collective action, the commons, and multiple methods in practice*, 17-30 (2010).

[273] E. Ostrom, *In pursuit of comparable concepts and data about collective action*, 82 Agric. Syst. 215–232 (2004). See also F. Baum, C. MacDougall, and D. Smith *Participatory action research,* 60 J Epidemiol. Community Health 854–857 (2006).

[274] C. Sabel and M. Dorf, *A Constitution of Democratic Experimentalism,* 98 Colum. L. Rev. 267 (1998).

definition of urban law, taking into account that the subjects that matter for it are fragmented in different disciplines and left to different legal categories; (public, constitutional and administrative, local government property, public contracts, local public services, environmental law). The study of the commons in the city and the city as a commons offers a good observation point for the purpose of defining the borders and baseline objective of an urban law, precisely because of the crucial role played in cities by social norms, social institutions, and social duties. In order to enrich the understanding about the process of transformation in which public law finds itself, according to Auby, legal scholars need to start from the observation of concrete realities such as cities[276], were urbanization is shaping what Eric Biber identifies as the law in the Anthropocene[277].

The approach presented in this paper conceptualizes the commons as infrastructure for urban pooling. Further research will be needed to analyze in depth what is the baseline of a co-city, starting from an exhaustive explanation of the background theories, the theoretical framework and the design principles, methodological process and the institutional/legal/policy tools. This approach combines theoretical and applied research. The task to articulate, explore, test and analyze this framework is a multiyear project. The ultimate goal is to understand whether and how a transnational, cross-cutting and cross-border body of law can be produced by society in urban areas.

[275] N. Davidson, *What is urban law today?* 40 Fordham Urb. L. J. 1579 (2013).
[276] J.B. Auby, *The role of law in the legal status and power of cities. Droit de la ville. An introduction*, 2 I.J.P.L. 302 (2013).
[277] E. Biber, *Law in the Anthropocene epoch,* UC Berkeley Public Law Research Paper No. 2834037 (2016).

THE REFORM OF LEGISLATIVE DECREE NO. 33/2013 IN ITALY: A DOUBLE TRACK FOR TRANSPARENCY*

*Marco Lunardelli***

Abstract

This Article is aimed at analyzing the evolution of the concept and regulation of transparency in the Italian public administration, especially in light of the amendments brought to the so-called transparency decree by Legislative Decree No. 97/2016. Since the first interpretations of the concept of transparency were advanced in literature, scholars have pinpointed various instruments related to administrative activity that are capable of implementing transparency. The main ones are publicity and access to records. As far as the former is concerned, the concept of transparency has a broader meaning than publicity, which in recent years, has been embodied mostly by obligations of publications established by legislative provisions. As for the latter, the 2016 reform of transparency decree marked the passage from restricted to generalized access. However, traditional access – the one provided for by Law No. 241/1990 – is still effective. Furthermore, the scope of exceptions to the new right of civic access has not yet been defined clearly. Therefore, the Author suggests caution about arguing that the 2016 reform of transparency decree resulted in the adoption of an actual freedom of information act in the Italian legal system.

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1. Introduction

The aim of this Article is to analyze the evolution of the concept and regulation of transparency in the Italian public administration, particularly in light of a recent reform. In the Italian legal system, administrative transparency is historically related to the image of a glass house. Hon. Filippo Turati coined this lucky metaphor[1] in 1908. During a parliamentary debate[2], he

1 See G. Arena, *Administrative Transparency and Law Reform in Italy*, in A. Pizzorusso (ed.), *Italian Studies in Law. A Review of Legal Problems*, 108 (1994) (underlining the "lucky turn" of the phrase). This phrase, indeed, was still used in the 1990s – when Arena wrote his essay – and so is today.

made the following statement: "Where a higher, public interest does not impose a temporary secret, the house of the Administration is to be made of glass."[3] It is interesting to note that in the United States, a corresponding image – that of sunlight meant as implying a need for openness in the public sector – took shape almost simultaneously[4]. In that country, indeed, usage of the term "transparency" in the sense at hand has become widespread only over the last two decades[5].

Turati's metaphor embraces the essential terms of the issue: Secrecy is just the other side of transparency[6]. As it has been sharply observed, in strict terms, transparency is simply "a property specific to a physical body," and thus the very phrase "administrative transparency" is actually a metaphor, susceptible of different interpretations[7]. Indeed, both scholars and the

2 The debate was about the later-to-be Law June 25, 1908, No. 290 on the legal status of state civil servants. See R. Villata, *La trasparenza dell'azione amministrativa*, 5 Dir. proc. amm. 534 (1987).

3 G. Arena, *Administrative Transparency*, cit. at 1, *ibid*. I see it proper to specify that I made a slight adjustment to the translation of the statement as provided by Arena. The original statement of Turati is found in Atti parl., Camera dei deputati, session 1904-1908, June 17, 1908, 22962.

4 Justice Brandeis, to whom the creation of the metaphor is to be ascribed, related "sunlight" to the concept of publicity, thereby making it clear the way he meant the image of sunlight. When referred to the public sector, indeed, "publicity" substantially ends up being just a synonym for "openness." See F.E. Rourke, *Secrecy and Publicity* (1961), 149-181 (pointing out that courts have to strike a balance between disclosure of activities carried out by the three branches of the Federal Government and secrecy, as unlimited publicity may cause to people involved in such activities damage that is hard to determine in advance). The entire statement of Justice Brandeis reads as follows: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." L.D. Brandeis, *What Publicity Can Do*, 58 Harper's Weekly 10, 10 (1913), reprinted in Id., *Other People's Money and How the Bankers Use It*, 92 (1914 and 1932).

5 See D. Metcalfe, *The Nature of Government Secrecy*, 26 Gov't Inform. Quart. 305 note 1 (2009) (noting that the term "transparency" – referred to public administrations – migrated from Europe to the United States, where it has applied to federal agencies, at the beginning of the twenty-first century).

6 See R. Villata, *La trasparenza dell'azione amministrativa*, cit. at 2, 538.

7 G. Arena, *Administrative Transparency*, cit. at 1, 109.

legislator have filled the concept of transparency with various contents over time. In light of the amendments Legislative Decree May 25, 2016, No. 97 brought to Legislative Decree March 14, 2013, No. 33 [hereinafter – transparency decree], it may be argued that, finally, the Italian legal system has taken a path towards a freedom of information act (FOIA). The main model thereof is the U.S. FOIA, signed into law by President Lyndon B. Johnson on July 4, 1966,[8] and entered into force exactly one year later[9].

The Article proceeds as follows. Section 2 is concerned with the relation between Law No. 241/1990, the innovative significance of which is stressed, and secrecy. Section 3 dwells on the main interpretations of the concept of transparency advanced in literature both prior to the enactment of Law No. 241/1990 and with the original version of the law being effective. Section 4 starts off by providing an overview of legislation on transparency adopted by the Italian Parliament over time. It then focuses on the arrangement transparency decree ensured to the numerous obligations of publication established by unsystematic legislative provisions in the period 2005-2012. This purpose of legislative decree was laudable, as it inserted the subject matter of transparency into a more rational, coordinated system. It does not mean that such a system has since been unchanged. Other than providing for a generalized access to records, indeed, Legislative Decree No. 97/2016 altered this system by adding new obligations of publication and amending some of the provisions contained in the original version of transparency decree. Despite the amendments, however, transparency keeps having the function to prevent corruption and maladministration, a function that is closely intertwined with the widespread control over administrations carried out by citizens. Section 5 is divided into two sections. Subsection 1 deals with the relation between the concepts of transparency and publicity, and is aimed at putting emphasis on the broader meaning of the former than that of the

8 Pub. L. No. 89-487, 80 Stat. 250 (July 4, 1966).

9 The entry into force of the statute occurred on July 4, 1967, by virtue of Pub. L. No. 90-23, 81 Stat. 54 (June 5, 1967) – "An Act to amend section 552 of title 5, United States Code, to codify the provisions of Public Law 89-487."

latter. Subsection 2 is devoted to the main instrument of transparency other than publicity/publication – access to records. It is underlined that access to administrative documents was capable of implementing transparency from the outset, even though Law No. 241/1990 opted for a model of restricted access. Section 6 is concerned with the right of civic access. Firstly, it highlights the evolution of civic access: Established as a mere enforcement instrument towards the fulfillment of obligations of publication, it has become a form of access to records as a result of the 2016 reform of transparency decree. Secondly, the paragraph deals with such exceptions to the right of civic access as transparency decree as amended in 2016 enumerates. Section 7 analyzes a special form of access, inserted by the 2016 reform of transparency decree. Researchers working at universities and other institutions are entitled to exercise this form of access to obtain statistical data for purposes of scientific research. In the conclusions, I suggest caution about considering the current version of transparency decree as an actual FOIA.

2. Law No. 241/1990 and the Overcoming of the Rule of Secrecy

Law August 7, 1990, No. 241[10] – namely, chapter V, devoted to access to administrative documents – marked the passage from secrecy to accessibility of administrative action. This law, which contained – and still does – the general regulation of administrative procedure in the Italian legal system, determined

10 This law was the result of a "long and tormented" legislative path. *Relazione conclusiva sull'attività della commissione di studio per l'attuazione della legge 7 agosto 1990, n. 241, recante "Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi"*, Atti parl., X leg., doc. XXVII, n. 7-*bis* (April 6, 1992), p. 17. On the legislative history in the Italian Parliament that led to passing the law, see D. Moro, *Illustrazione degli atti preparatori della legge 241*, in Aa.Vv., *Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi. Aspetti generali e di attuazione nell'amministrazione regionale. Atti del Convegno Milano, 21 marzo 1991* (1991), 25.

"a change of course"[11] from the set of rules that previously governed participation and access to documents. Among scholars, someone even welcomed the regulation brought in by the new law as capable of realizing a Copernican revolution[12]. As a result of this regulation, indeed, administrative action, which had always "taken refuge behind a mantle of impermeability, [became] all of a sudden penetrable by the individual."[13] Prior to 1990, special legislation provided for the publicity of certain categories of administrative acts – *rectius*, the publicity of acts and documents that were concerned with certain subject matters or adopted by certain administrations[14]. The general rule governing the public administration and its activity, however, was the "privacy of documentary public property."[15] At the time, secrecy was a corollary of the supremacy of public powers over citizens, who established contact with administrations for the release of

11 F. Cuocolo, *Articolo 22 (Commento all')*, in V. Italia & M. Bassani (eds.), *Procedimento amministrativo e diritto di accesso ai documenti (Legge 7 agosto 1990, n. 241)* (1995), 531.

12 For the reference to a Copernican revolution as the consequence of the right of access to administrative documents provided for by Law No. 241/1990, see F. Caringella, R. Garofoli & M.T. Sempreviva, *L'accesso ai documenti amministrativi. Profili sostanziali e processuali* (1999), 2. Frattini, too, used the phrase "Copernican revolution," but referred it to the impact of the entire statute on the Italian legal system. See F. Frattini, *Una rivoluzione normativa ormai quasi compiuta ma resta il problema dell'applicazione reale*, in Aa.Vv., *Trasparenza amministrativa: i regolamenti e la giurisprudenza*, Guida al dir. – 4 Il Sole 24 ore, special issue, (1995).

13 F. Caringella, R. Garofoli & M.T. Sempreviva, *L'accesso ai documenti amministrativi*, cit. at 12.

14 Law July 8, 1986, No. 349 – the law that instituted the Ministry of Environment – already provided for a dichotomy between dissemination of information and access to records. Article 25 of Law December 27, 1985, No. 816, instead, recognized to all citizens the right to gain access to any adjudication adopted by municipalities, provinces, and other local authorities. For an accurate analysis of legislative precedents of Law No. 241/1990 in the subject matter of access to records, see L.A. Mazzarolli, *L'accesso ai documenti della pubblica amministrazione. Profili sostanziali* (1998), 10-22.

15 G. Paleologo, *La legge n. 241: procedimenti amministrativi ad accesso ai documenti dell'amministrazione*, 1 Dir. proc. amm. 11 (1991).

adjudications[16]. Since it determined a break with an age-long tradition[17], the passage from administrative secrecy to a right to access to administrative documents represented an important change in Italy's legal culture[18].

Article 24 of Law No. 241/1990 identified the limits to the right to access, and – accordingly – Article 28 of the law rewrote Article 15 of the Consolidation Law on State civil servants[19] to turn office secrecy from rule – as it was in the past – to exception. It was prescribed that from then onwards; office secrecy should apply "only in cases legislatively engraved."[20] Since the entry into force of Law No. 241/1990, the public administration has been entitled to invoke secrecy whenever secrecy is aimed at ensuring the care of interests – whether public or private – that are worthy of protection by the legal system. It is required that they are recognized by the Constitution, because only such interests may justify the imposition of a sacrifice to the right to know[21]. In this regard, chapter V of Law No. 241/1990 (articles 22-28) resulted in realizing a scholarly theory advanced in the 1980s. This theory advocated the passage from personal secrecy, related to the

16 See P. Alberti, *L'accesso ai documenti amministrativi*, in Aa.Vv., *Lezioni sul procedimento amministrativo* (1992), 121.

17 For a reconstruction of how secrecy was meant and applied in the states preceding the unification of Italy and during the Reign of Italy – i.e., from the Middle Ages to the first half of the twentieth century – see G. Arena, *Il segreto amministrativo. Profili storici e sistematici*, I (1983). The tradition of secrecy as the rule governing the relations between public administrations and individuals was common to the great majority of Western countries until the seventies of the twentieth century. Before then, indeed, only Sweden and the United States had adopted legislation recognizing freedom of information and generalized access to administrative records. See I.F. Caramazza, *Dal principio di segretezza al principio di trasparenza. Profili generali di una riforma*, 4 Riv. trim. dir. pubbl., 944-946 (1995).

18 *Id.*, 944.

19 Decree of the President of the Republic January 10, 1957, No. 3 – "Consolidation Law of provisions concerning the statute of State civil servants."

20 F. Caringella, R. Garofoli & M.T. Sempreviva, *L'accesso ai documenti amministrativi*, cit. at 12.

21 R. Villata, *La trasparenza dell'azione amministrativa*, cit. at 2, 539.

position of public employee, to real secrecy, based on the nature of the interests protected[22]. Indeed, the limits to access to administrative documents – which Article 24 of Law No. 241/1990 established and transparency decree first essentially confirmed, and later specified and broadened[23] – imply the protection of interests having constitutional underpinning[24]. Whenever indiscriminate disclosure of records may cause harm to those interests, secrecy has the function to prevent the production of the harm. Therefore, not only is secrecy *per se* compatible with the democratic principle; it is even essential to protecting the legal system and such interests as the legal system considers capable of prevailing over the interest in transparency of administrations[25].

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22 Arena deemed the "normal functioning" of public administration an "ambiguous and generic" notion, which could not be invoked to justify the application of secrets. G. Arena, *Il segreto amministrativo. Profili teorici*, II (1984), 161-162. The ability to deny the release of administrative records – the Author observed – is not an inherent feature of any civil servant whatever the situation. On the contrary, secrecy always serves the purpose to protect an interest, of which a given administration has to take care. Therefore, it is necessary the existence of a real secret – i.e., a secret, wherein "the objective element consisting in the information that is the subject of the secret and, indirectly, in the interests that form the actual content of [the secret itself] prevails." *Id.*, at 184. The Council of State followed this theory in a 1997 Plenary decision. See Council of State – Plenary decision, February 4, 1997, No. 5, in Foro it., III (1998), and in 11 Giorn. Dir. Amm. (1997), with notes of M. Bombardelli (1017) and A. Sandulli (1022), *La riduzione dei limiti all'accesso ai documenti amministrativi*.

23 See, *infra*, section 6.2.

24 See R. Villata, *La trasparenza dell'azione amministrativa*, cit. at 2, 539 (arguing that secrets have always to ensure constitutionally protected interests, as only such interests may "justif[y] and balanc[e] the sacrifice to the need for knowability").

25 See G. Ferrari, *L'avventura del segreto nell'Italia Repubblicana negli anni tra il '60 e l'80*, in Aa.Vv., *Il segreto nella realtà giuridica italiana* (1983), 77. The Author stigmatizes the opinion that, by moving from the assumption that secrecy is indicative of an authoritative regime, ends up "demonizing each secret, characterizing it as a sort of deadly sin, and opposing to it rhetorically the model of the glass house." Secrets – the Author continues – may well exist in a democratic system, provided that they are used in defense of interests that are considered worthy of being protected. *Id.*, at 78. See, also, R. Laschena – A. Pajno, *Trasparenza e riservatezza nel processo amministrativo*, 1 Dir. proc. amm. 5

3. First Interpretations of Administrative Transparency

Prior to the passage of Law No. 241/1990, scholars had already inspected about a possible definition of transparency, a definition that lacked for a long time within positive law. During the 1986 edition of the Varenna conference – an annual conference that has been held for decades and every year is devoted to a subject matter concerning public administration and its law – Villata sought to determine the meaning of administrative transparency. In his opinion, transparency did not consist in a specific legal institution, but it was rather "an attitude of administration, an objective or a criterion, to which the carrying out of [administrative] action by public subjects should be adapted."[26] Furthermore, Villata correctly understood that access to administrative documents was not the only institution within – or related to – the administrative procedure that was capable of implementing transparency. The further instruments of transparency, in his view, were the following[27]: the ability to be present when the administration was carrying out administrative action and forming a record, and – in more general terms – the participation to the administrative procedure; the publicity of administrative records, in its various forms; the motivation[28] of the adjudication – i.e., of the act that concludes an administrative procedure and embodies the decision of the administration[29]. By

(1990) (observing that even though it confers a broad discretion, the secrecy power – i.e., the power of a public administration to impose a given secret – is legitimate and inevitable, as it enables the administration to carry out its functions and thus to take care of one or more public interests provided for by law).

26 R. Villata, *La trasparenza dell'azione amministrativa*, cit. at 2, 528.

27 *Id*., 528-529.

28 To simplify things, I prefer to use the literal translation from the Italian term "*motivazione*," instead of the phrase "statement of reasons." This phrase is found, for instance, in the translation of Law No. 241/1990 into English provided by C. de Rienzo and amended up to July 1, 2010. See *The Italian Administrative Procedure Act – Law No. 241 dated 7 August 1990*, 2 IJPL 373 (2010).

29 R. Villata argued that since it was capable of revealing the reasons and purposes – at least, the stated ones – of the administrative action, motivation carried out a function of defense of the individual involved in an

the time Law No. 241/1990 was enacted, therefore, the ability of multiple institutions of the administrative procedure to be instrumental in realizing transparency had already been grasped in literature. Villata also expressed doubts about the possibility to give actual implementation to the metaphor of the glass house referred to administrations[30].

By taking up Villata's stance after the enactment of Law No. 241/1990, some scholars meant transparency as a concept capable of bounding the entire public administration to achieving an objective of openness. Chieppa considered transparency as "[a] rule of conduct of public administration."[31] By making administrations' decision-making process more visible than it was in the past, Law No. 241/1990 – the Author observed – sought to cope with people's general disaffection towards public powers[32]. Transparency, indeed, fosters public participation[33] and is essential to detecting any wrongdoing in the exercise of power by administrations[34]. Furthermore, Arena proposed two possible

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administrative procedure and made it possible the exercise "of the so-called democratic control of citizens over the administration." *Id*., 529. See also A. Cassatella, *Il dovere di motivazione nell'attività amministrativa* (2013); B. Lubrano, *Recenti orientamenti in tema di motivazione degli atti amministrativi*, in F.G. Scoca – A.F. Di Sciascio (eds.), *Il procedimento amministrativo ed i recenti interventi normativi: opportunità o limiti per il sistema Paese?* (2015), 31.

30 Villata characterized the metaphor as a "slogan" and criticized it for the misleading message it conveyed. R. Villata, *La trasparenza dell'azione amministrativa*, cit. at 2, 534. Since secrecy is at times necessary for the protection of the legal system, Villata borrowed an image created by Meloncelli a few years earlier – the image of a glass house "with many windows that are screened or may be screened." *Id*., at 535 (referring to A. Meloncelli, *L'informazione amministrativa* (1983), 35 nota 39).

31 R. Chieppa, *La trasparenza come regola della pubblica amministrazione*, 3 Dir. econ. 616 (1994).

32 *Ibid*.

33 *Ibid*. (arguing that increasing the transparency of administrations' decision-making process means increasing the chances for participation, and participation – in turn – "means not separating with barriers and screens the management of public affairs from citizens, [but rather] bring them back closer to public affairs.")

34 R. Chieppa, *La trasparenza come regola della pubblica amministrazione*, cit. at 31, 619 (pointing out that imposing transparency upon administrations results

acceptations of the concept of transparency. The first one enjoyed an extension that proved being extremely broad, as it embraced "practically the entire administrative activity."[35] This acceptance of transparency, therefore, spans a series of administrative procedure institutions, which have in common the ability of implementing transparency[36]. The institutions Arena pinpointed were more numerous than those mentioned by Villata. In addition to the latter, the list included the following institutions[37]: circulation of information among administrations[38]; the officer responsible for a procedure[39]; the notice (or communication) of the commencement of a procedure[40]; the obligation for the administration to conclude a procedure with an explicit adjudication within a time limit established by the law[41]; the preliminary determination of criteria and methods administrations have to follow in granting subventions, allowances, and other measures consisting in economic advantages[42]. Arena added two instruments of transparency that fell within the function of communication entrusted to administrations: the establishment of a public relation office

in bringing to light "anomalous situations of usurpation of powers or inaction by public administrations.")

35 G. Arena, *Trasparenza amministrativa*, in XXXI Enc. giur., (1995), 2.

36 *Ibid* (contending that according to this interpretation, transparency constitutes "*l'elemento «trasversale»* […] underlying the analysis of institutions that are very different but share the fact of being, in various ways, factors of greater administrative transparency").

37 *Ibid*. As for translation of the institutions contained in Law No. 241/1990 into English, I mainly rely upon the English version of the law provided by C. de Rienzo that I already mentioned. See *The Italian Administrative Procedure Act*, cit. at 28, 369.

38 See M.P. Guerra, *Circolazione dell'informazione e sistema informativo pubblico: profili giuridici dell'accesso interamministrativo telematico*, 2 Dir. pubbl. 525 (2005).

39 Articles 4-6, Law No. 241/1990. See A.F. Di Sciascio, *Il responsabile del procedimento tra d.lgs. 163 del 12 aprile 2006 (Codice dei Contratti Pubblici) e legge 190 del 6 novembre 2012 (Legge "anticorruzione")*, in F.G. Scoca & A.F. Di Sciascio (eds.), *Il procedimento amministrativo ed i recenti interventi normativi*, cit. at 29, 99.

40 Article 7, Law No. 241/1990.

41 Article 2, Law No. 241/1990.

42 Article 12, Law No. 241/1990.

within every administration[43], and the set of communications directed to users in the provision of public services[44]. Even though the present Article is focused on the trilateral relation between transparency, access to administrative records, and publicity, I have deemed it proper to point out that a series of institutions related – more or less directly – to the administrative procedure contribute to realizing transparency[45].

4. The Regulation of Transparency

4.1. The Evolution of the Principle of Transparency in Legislation

Since its entry into force, Law No. 241/1990 recognized a dichotomy between access to records and publicity, two institutions that have in common the feature of being instrumental in ensuring transparency. The 1990 legislator appealed to transparency and participation to realize the passage from the concept of administration-bureaucracy to that of participated administration[46]. The right to access has been traditionally deemed to contribute significantly to increasing not only the efficiency and effectiveness of administrative activity[47], but also – and above all – the level of democracy of a legal system. By resulting in overcoming a relation between the administration and citizens based upon the strict supremacy of the former over the latter, the right to access to administrative documents implied the adoption

43 See D. Borgonovo Re, *L'organizzazione per la comunicazione: gli URP*, in G. Arena (ed.), *La funzione di comunicazione nelle pubbliche amministrazioni* (2001), 129. See, also, G. Pizzanelli, *L'amministrazione colloquiale e gli uffici per le relazioni con il pubblico*, 6 Ist. fed. 991 (2004).

44 See G. Piperata, *La comunicazione nei servizi pubblici*, in G. Arena, *La funzione di comunicazione nelle pubbliche amministrazioni*, cit. at 43, 165.

45 For an analysis of the various institutions that are capable of implementing transparency within the administrative procedure, see P. Tanda, *Le molteplici espressioni del principio di trasparenza*, 2 Nuove aut. 329 (2007).

46 See T. Miele, *Il procedimento amministrativo e il diritto di accesso. Lo stato di attuazione della legge 7 agosto 1990, n. 241 con ampia rassegna di giurisprudenza* (1995), 181.

47 See F. Cuocolo, *Art. 22*, cit. at 11, 532.

of "organizational models usually participated and thus […] democratic."[48] The original version of the law on administrative procedure explicitly identified access to records as an instrument of transparency, but it assigned nature of general principle only to publicity. Transparency was not included among the general principles of administrative activity, either. However, the 1990 legislator was well aware that access to records had to be combined with the publication of records on administrations' initiative, and thus without a previous request filed by an individual. Indeed, an article that is found within chapter V of Law No. 241/1990 – Article 26 – is devoted to publication, and originally was concerned with the publication of the categories of administrative acts with general content expressly mentioned. Transparency decree properly repealed Article 26, paragraph 1, which prescribed the publication of a series of general administrative acts concerning the organization and functioning of administrations[49], to prevent a patent duplication of legislative provisions[50]. The other two paragraphs of the article, instead, are still in force. Even so, the publicity as meant in Article 26, too, contributes to making administrative action more democratic[51].

Law February 11, 2005, No. 15 reformed Law No. 241/1990 as a whole. Article 1, paragraph 1, letter a), of Law No. 15/2005 inserted the principle of transparency into Law No. 241 and

48 *Id.*, 532-533.

49 See P. Alberti, *Articolo 26*, in V. Italia (ed.), *L'azione amministrativa* (2005), 1095 (noting that the scope of the obligation of publication established by Article 26 covered most of administrative acts with general content). For a deep theoretical analysis of general administrative acts in the Italian legal system, see G. della Cananea, *Gli atti amministrativi generali* (2000).

50 Article 53, paragraph 1, letter a), transparency decree.

51 See M. Spagnuolo, *La comunicazione negli enti locali* (2001), 24. For a stance criticizing the non-fungibility between access to records and publications of acts pursuant to Article 26, see M. Mazzamuto, *Sul diritto d'accesso nella L. n. 241 del 1990*, 6 Foro amm. 1578 (1992). See also D. Corletto, *Pubblicità degli atti amministrativi*, in XXV Enc. giur. (1991), 1 (arguing that publicity as provided for by Article 26 of Law No. 241/1990 ensures "potential, both practical and legal, [of the categories of administrative acts identified by the article] to be subject of knowledge, apprehension, perception by individuals, whether determinate or not.")

assigned it the status of general principle governing administrative activity. In literature, however, it has been argued that inserting this principle into the law was tantamount to a merely formal operation, since transparency was already implicitly included among general principles under the original version of the law on administrative procedure[52]. This addition brought in by the 2005 reform, therefore, did not have a significant impact on the regulation of administrative action and ended up being "superfluous."[53] Furthermore, Article 15 of Law No. 15/2005 rewrote entirely Article 22 of Law No. 241/1990, which contains – *inter alia* – the main definitions relevant to the subject matter of access to records, as well as the requirements of eligibility to exercise the right of access. Pursuant to the new paragraph 2 of Article 22, access to administrative documents is a general principle aimed at fostering participation and ensuring impartiality and transparency of administrative action.

In 2009, the legislation referred to as a whole as Brunetta reform entailed "a genetic mutation" of the concept of transparency[54]. Article 4, paragraph 7, of Law March 4, 2009, No. 15 – delegation law – and Article 11, paragraph 1, of the legislative decree that implemented the delegation – Legislative Decree October 27, 2009, No. 150 – prescribed "total accessibility" of information held by administrations. Such accessibility was ensured by the publication of information on administrations' official websites. A series of obligations of publication imposed upon administrations were comprised in a broader reform of administrative structures, which ranged from the establishment of new mechanisms for measuring and assessing public employees'

52 See V. Cerulli Irelli, *Osservazioni generali sulla legge di modifica della L. n. 241/90 – I parte*, Giustamm.it 1-2 (2005). The Author has found proof of his assertion in the fact that Law No. 241/1990 was at times referred to as "law on transparency," as a series of institutions it contains are aimed at making administrative action knowable – and actually known – outside the administrative apparatus, and thus at realizing transparency. *Id.*, 2.

53 *Ibid*.

54 F. Patroni Griffi, *La trasparenza della pubblica amministrazione tra accessibilità totale e riservatezza*, 8 Federalismi.it 3 (2013).

performance to the modification of the control system[55]. Transparency, therefore, gained a new meaning. In addition to the traditional procedural transparency, which carried out the function of defense of the individual involved in an administrative procedure, transparency was directly linked up to organizational aspects of administrations.

In its original version, transparency decree was titled "Reorganization of the regulation concerning the obligations of publicity, transparency and dissemination of information by public administrations." It implemented a delegation entrusted to the Government by Article 1, paragraph 35, of Law November 6, 2012, No. 190, better known as anticorruption law. Transparency decree enhanced the scope of obligations of publication incumbent on administrations. While the Brunetta reform had related total accessibility to information and data on administrations' organization and personnel, transparency decree added a considerable series of obligations of publication concerning administrative activity[56].

In 2014, a limited reform resulted in altering the scope of transparency decree. A decree-law – i.e., a legislative instrument, to which the Government is constitutionally entitled to resort only to meet needs of extraordinary necessity and urgency – extended the direct, total application of the provisions of transparency decree to independent administrative authorities. In this regard, I see it proper to start off by pointing out that establishing such an extension by decree-law seems to clash with the purposes of rationalization and coordination transparency decree pursued. Apart from that, the reform at issue forced administrative authorities to stop implementing the decree in its original text and abide by it as amended. Under Article 11, paragraph 3, of the

55 For an analysis of both such aspects, see F.G. Grandis, *Luci ed ombre nella misurazione, valutazione e trasparenza della performance*, 1 Giorn. dir. amm. 23 (2010).

56 On extension of mandatory disclosure to the domain of administrative activity, see E. Carloni, *I principi del codice della trasparenza*, in B. Ponti (ed.), *La trasparenza amministrativa dopo il d.lgs. 14 marzo 2013, n. 33. Analisi della normativa, impatti organizzativi ed indicazioni operative* (2013), 33-34.

original version of the decree, independent authorities of guarantee, oversight and regulation had to apply the decree in conformity with the provisions contained in their own regulations, and thus they were granted a certain level of discretion in implementing the decree itself[57]. As a result, those authorities' overall regulatory framework turned out to be not only – as was predictable – rather ragged, but also characterized by a tendency of partial compliance with transparency decree and – especially – with its general principles[58]. Article 24-*bis*, paragraph 1, of Decree-Law June 24, 2014, No. 90, converted with amendments into Law August 11, 2014, No. 114, rewrote Article 11 of transparency decree and shifted the reference to independent authorities from paragraph 3 to paragraph 1. The new formulation of paragraph 1 prescribed that authorities of guarantee, oversight, and regulation equate to public administrations as defined in Article 1, paragraph 2, of the 2001 consolidation law on civil servants[59]. The direct consequence was the mandatory application of transparency decree in its entirety by independent authorities. To put it differently, the privileged regime they enjoyed in comparison to other administrative bodies – a regime that appeared to be hardly justifiable both logically and systematically[60] – ceased.

The legislator addressed transparency once again – but, unlike the previous one, this legislative intervention turns out to be very significant – with Law August 7, 2015, No. 124, also known as "Madia Law." In general, this law provided for a large-scale reorganization of State administrations, as well as a revision and rearrangement of some regulatory sectors by deploying the instrument of legislative delegation. Among the subject matters subject to revision was transparency as regulated by Legislative Decree No. 33/2013. Article 7, paragraph 1, of the law conferred

57 See C. Raiola, *La trasparenza nelle Autorità indipendenti*, 2 Giorn. dir. amm. 166 (2015).
58 *Id.*, 166-167.
59 Legislative Decree March 30, 2001, No. 165.
60 See F. Giglioni, *L'ambito di applicazione (artt. 1, comma 3, 11, 48, 49, commi 2 e 4)*, in B. Ponti, (ed.), *La trasparenza amministrativa dopo il d.lgs. 14 marzo 2013, n. 33*, cit. at 56, 136.

upon the Government a delegation to enact, by six months from entry into force of the law itself, one or more legislative decrees aimed at bringing integrations and corrections to transparency decree. The same provision also established eight leading criteria implementation of the delegation should follow. The criterion pinpointed by letter h), first part, had a pivotal value and prevailed over the others on a substantial level. After clarifying that the obligations of publication already contained in transparency decree were confirmed and thus remained effective, this criterion instructed the Government to introduce freedom of information by recognizing to anyone the right of access to administrative records, regardless of the existence of a qualified interest.

Legislative Decree May 25, 2016, No. 97 implemented the delegation. The new Article 2, paragraph 1, of transparency decree identifies as subject of the decree anyone's freedom of access to data and documents held by public administrations, unless one of the limits established to protect some essential public or private interests applies. Civic access and the publication of documents and data – as well as information[61] – concerning organization and administrative activity realize the freedom of access. Article 2-*bis*, paragraph 1, of transparency decree establishes the scope of it by referring to the definition of public administration provided by the consolidation law on civil servants, but extends it to independent authorities, on which Decree-Law No. 90/2014 had already intervened, and to port authorities. Accordingly, Article 11 of transparency decree was repealed. Furthermore, Article 2-*bis*, paragraph 2, includes into the scope of the decree the following entities: economic public bodies; professional associations; private law bodies that meet the requirements set down in letter c). Those requirements are concerned with three different aspects of their activities or structure: amount of budget; funding; composition of the management or direction body.

61 See, *infra*, section 6.1.

4.2. Transparency Decree and the Systematic Arrangement of Obligations of Publication

Over time, there has been a reversal of the trend featuring the frequency of the resort to access to records and publicity at legislative level to ensure transparency of administrations. More generally, technological progress – namely, the development of ICT technologies – determined the emersion of new methods and instruments to make information in possession of administration knowable. Such methods and instruments use the Internet for dissemination of information and documents, while they do not imply the exercise of the traditional right of access[62]. Consequently, the Italian legislator was forced to deal with a new concept in this subject matter – the concept of availability of documents, data, and information. This concept refers to a form of publicity that targets an indiscriminate mass of people – *rectius*, users. The online availability of information differs markedly from access to administrative documents, traditionally provided for in the Italian legal system as a right conferred only upon those, who possessed a qualified interest and thus could claim its violation.

The 2005 legislation confirmed – and even strengthened – such a difference. Indeed, on the one hand, in reforming the general law on administrative procedure, Law No. 15/2005 restricted individual entitlement to exercising the right of access. In this regard, by taking up the traditional metaphor of the public administration's glass house, an authoritative scholar created the telling image of "[a] house with darkened glasses"[63] to describe the impact of such an amendment on administrative transparency. In addition, the same reform law codified into Article 24, paragraph 3, of Law No. 241/1990 an entrenched opinion of administrative courts, according to which the filing of access requests aimed at conducting only a generalized control over the

62 See E. Carloni, *Nuove prospettive della trasparenza amministrativa: dall'accesso ai documenti alla disponibilità delle informazioni*, 2 Dir. pubbl. 586 (2005).

63 A. Sandulli, *La casa dai vetri oscurati: i nuovi ostacoli all'accesso ai documenti*, 6 Giorn. dir. amm. 669 (2007).

functioning of administrations is forbidden[64]. On the other hand, Article 54 CAD (Italian acronym standing for Code of Digital administration)[65] pinpointed the contents of public administrations' official website for the first time in the Italian legal system. This provision, which enumerated a series of "public data"[66] administrations had to insert onto their websites, was completely rewritten by transparency decree. Article 52, paragraph 3, of the decree deprived Article 54 CAD of any substantial content, thereby turning it into a reference provision – i.e., a provision that limits itself to referring to transparency decree for determination of the content of those websites. The legislator gradually established an enormous number of obligations of publication, thereby forcing administrations to broaden the content of their own institutional websites.

For a decade from 2005, publicity meant as fulfillment by administrations of obligations of publication prescribed by statutory law turned out to be the cardinal institution of administrative transparency in Italy[67]. Until the reform of transparency decree prescribed in 2015 and accomplished in 2016, obligations to publish documents, data, and information constituted the core of the "peculiar Italian way to transparency […]."[68] In the period 2005-2012, legislative provisions containing obligations of publication imposed upon administrations proliferated to an extraordinary extent[69]. The legislator, however,

64 Article 24, paragraph 3, of Law No. 241/1990 reads as follows: "Access applications made with the aim of generally monitoring the work of public authorities shall not be admissible." As for court decisions mentioning this provision, see, e.g., TAR (Italian acronym standing for Regional Administrative Tribunal) Sicily – Palermo, section II, March 24, 2015, No. 725; Council of State, section III, March 4, 2015, No. 1009, available on www.giustizia-amministrativa.it.

65 Legislative Decree March 7, 2005, No. 82.

66 Article 1, paragraph 1, letter n), CAD defines public data as data that are "knowable by anyone."

67 See M. Savino, *La nuova disciplina della trasparenza amministrativa*, 8-9 Giorn. dir. amm. 797 (2013).

68 *Ibid*.

69 The Author underlines the existence of a sort of "legislative euphoria," which led in the period under consideration to adopting roughly one hundred

had inserted all these provisions without creating simultaneously an organic framework capable of keeping them together[70]. By assigning the Government delegation to draw up and adopt transparency decree, the legislator pursued the commendable purpose to ensure rationalization and coordination to the unsystematic multitude of legislative provisions that had gradually added obligations of publication. Ensuring that the set of rules governing a certain sector be systematic means improving the coherence of that sector through operations of regulatory technique capable of correcting mistakes and remedying the inaccuracy of legislation[71]. Because of that, the entire legal system is set to become more systematic.

Transparency decree, however, did not limit itself to furnishing a systematic arrangement to the myriad of obligations of publication imposed by diverse laws upon administrations over the years. It also provided the subject matter of transparency with an innovative regulation, which started by establishing a new definition of the principle of transparency itself. The recent reform brought in by Legislative Decree No. 97/2016 amended both the principle of transparency and some of the obligations of publication[72], thereby demonstrating that the impressive

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provisions establishing many obligations of publication. Those provisions were endowed with "emphatic principled statements [and with] weak enforcement mechanisms." M. Savino, *La nuova disciplina della trasparenza amministrativa*, cit. at 67, 797-798.

70 In 2012, the CIVIT (Italian acronym standing for Commission for the Evaluation, Transparency, and Integrity of public administrations) – later replaced by the ANAC (standing for National Anticorruption Authority) – conducted a public consultation among administrations and found 35 cases of obligations of publication overlapping. M. Savino, *La nuova disciplina della trasparenza amministrativa*, cit. at 67, 798 note 16 (referring to CIVIT, *Per una semplificazione della trasparenza. Esiti della consultazione sugli obblighi di pubblicazione previsti in materia di trasparenza e integrità*, December 2012).

71 See M. Savino, *Le norme in materia di trasparenza amministrativa e la loro codificazione (art. 1, commi 15-16 e 26-36)*, in B.G. Mattarella & M. Pellissero (eds.), *La legge anticorruzione. Prevenzione e repressione della corruzione* (2013), 114.

72 Article 12, which is concerned with the publication of regulatory and general administrative acts, and article 42, which lays down rules on the

operation of arrangement realized in 2013 just boiled down to a step – albeit fundamental – of a broader process of rationalization. Therefore, it may well happen that the legislator makes other adjustments – whether more or less significant – to obligations of publication in the next future. On the contrary, it does not seem to be very likely that the Parliament will make further substantial amendments to the content of the principle of transparency.

4.3. The Principle of Transparency and Prevention of Corruption

Article 1, paragraph 1, of transparency decree as amended by Legislative Decree No. 97/2016, defines administrative transparency as total accessibility to documents and data held by public administrations. The new version of the definition differs from the previous one on three counts. Firstly, the new principle of transparency does not include an express reference to the notion of information, which is also missing in the scope of the freedom of access as pinpointed by Article 2[73]. Secondly, the legislator shifted the distinction between administrations' organization and activity as the two components of the scope of obligations of publication into Article 2, paragraph 1. Thirdly, the definition of the principle of transparency that was effective in the period 2013-2016 established a unique purpose of transparency itself – to foster a widespread control by citizens over administrations in carrying out institutional functions and in

publication of contingent and urgent orders and other extraordinary measures adopted to tackle emergencies, respectively open and close the enumeration of obligations to publish. Among the amendments made in 2016 to this enumeration is the addition of Articles 15-*bis* and 15-*ter*. The former requires companies controlled by public authorities to publish not only adjudications, by which cooperation and advisory assignments or professional assignments are conferred, but also data related to assignments judicial or administrative bodies entrust either to administrators or to experts. Furthermore, Legislative Decree No. 97/2016 rewrote Article 31, which contains obligations of publication concerning a set of controls over organization and administrative action. Article 37, which regulates mandatory disclosure in the field of public procurement, was also rewritten.

73 See, *infra*, section 6.1.

using public resources. This purpose was and still is at the heart of the concept of transparency. It recognizes citizens – whether or not they have an ongoing relation with a given administration – an active role in overseeing public authorities' conduct. Had the legislator not envisioned such an active role, the principle of transparency would have been characterized by frail content. Therefore, even though the 2016 reform added two purposes into the definition of transparency – to protect citizens' rights and to further participation in administrative action[74] – the exercise of a widespread control over administrations remains the main purpose. The reform has even favored the achievement of this purpose by providing for a generalized access to administrative records. Such access, indeed, results in overcoming – in the cases, in which the new civic access is set to apply – the clash that Article 24, paragraph 3, of Law No. 241/1990 brought about by forbidding access applications aimed at conducting the widespread control mentioned above[75].

Article 1, paragraph 2, encompasses a plurality of contents. Firstly, the provision refers to various forms of public law secrecy existing in the legal system and to the protection of personal data, which have to be ensured. It also mentions the democratic principle, which transparency decree contributes to realizing. The core of transparency, indeed, is closely intertwined with the need

74 Actually, the latter purpose was already inscribed in the scope of the one consisting in the oversight of public administrations. Such an oversight, indeed, constitutes one of the forms participation in administrative activity may take. To put it differently, carrying out control over administrations by using the set of instruments the regulation of transparency offers means participating in administrative organization and activity. The opposite, instead, is not true: Participation in administrative activity does not necessarily entail anyone's ability to conduct an oversight over the way administrations act in performing their institutional functions. The regulatory framework existing in the Italian legal system until a few years ago was an example thereof. As a result, the regulation of transparency in Italy had not reached yet an advanced development back then.

75 See A. Simonati, *La trasparenza amministrativa e il legislatore: un caso di entropia normativa?*, 4 Dir. amm. 762 (2013.

for democracy[76]. Secondly – and above all – the provision identifies the constitutional principles transparency decree is capable of realizing[77]. Transparency as meant in the decree, however, may well be unable to realize all such principles at the same time in a given situation and thus force to choose which ones to implement and which to sacrifice[78]. Thirdly, the last part of Article 1, paragraph 2, embraces – in turn – diverse contents. It starts off by highlighting that transparency is instrumental in ensuring "individual and collective freedoms, as well as civil,

76 See P. Tanda, *Trasparenza (principio di)*, III Dig. disc. pubbl. 887 (update, 2008) (arguing that "the democracy rate of a legal system, which is based on the so-called information society, necessarily depends on the amount of information that circulates within and, thus, on the degree of transparency of the legal system").

77 The constitutional principles Article 1, paragraph 2, enumerates are the following: equality (Article 3 Const.); impartiality and good functioning of public administration (Article 97 Const.); responsibility (Article 28 Const.); civil servants' integrity and loyalty in serving the nation (Article 54 Const.). The decree also entrusts transparency the function to ensure that administrations be efficient and effective in using public resources. Economy and effectiveness constitutes expressions of the constitutional principle of good functioning of administration that are codified at Article 1, paragraph 1, of Law No. 241/1990 as general criteria administrations have to conform to in laying down their own organization and in carrying out administrative action. See, e.g., V. Cerulli Irelli, *Lineamenti del diritto amministrativo* (2010), 258. Efficiency and effectiveness in the usage of public resources may contribute to increasing the degree of accountability of administrations, which has been traditionally modest in the Italian experience. See D.U. Galetta, *Transparency and Access to Public Sector Information in Italy: A Proper Revolution?*, 6 IJPL 235 (2014). The obligation incumbent on administrations to account for the usage of such resources has acquired an autonomous, peculiar value since the recent reform. Legislative Decree No. 97/2016, indeed, added Article 4-*bis* into transparency decree. This article implements the principle of transparency in the usage of public money by providing for the creation of a website, whose denomination is "Public Money." It enables anyone to consult data concerning payments made by administrations. See, in general, E. D'Alterio, *I controlli sull'uso delle risorse pubbliche* (2015).

78 It has been noted, for instance, that implementation of publicity and transparency in carrying out administrative action may occur to the detriment of needs for readiness and quickness of such action. See F. Caringella, *Manuale di diritto amministrativo* (2015), 1073; E. Casetta, *Manuale di diritto amministrativo* (2015), 55.

political, and social rights." Such a statement, actually, appears to be somewhat grandiloquent. Especially the reference to civil and political rights, indeed, could have already been inferred from paragraph 1, where the democratic principle is mentioned[79]. Transparency, indeed, fosters individuals' participation in administrative activity and – more generally – in the decision-making process affecting society as a whole[80]. Literature has long acknowledged the existence of a direct relation between transparency, on the one hand, and participation in public powers and rights and freedoms guaranteed by the Constitution, on the other hand[81]. The core of the last part of Article 1, paragraph 2, however, lies in the remainder of the provision, where transparency is assigned both the function to realize the right to good administration[82] and that to contribute to creating an "open administration at the citizen's service," i.e., to ensuring open government[83].

Finally, Article 1, paragraph 3, points out that by enacting transparency decree, the legislator exercised the State's exclusive

79 By the same token, the principle of equality mentioned in the previous part of Article 1, paragraph 2, may be meant as already including an implicit reference to social rights.

80 See F. Cuocolo, *Il diritto di accesso ai documenti amministrativi (presupposti costituzionali)*, 3 Quad. reg. 1041 (2004).

81 See G. Abbamonte, *La funzione amministrativa tra riservatezza e trasparenza. Introduzione al tema*, in Aa.Vv. (eds.), *L'amministrazione pubblica tra riservatezza e trasparenza – Atti del XXXV Convegno di Studi di scienza dell'amministrazione, Varenna, 21-23 settembre 1989* (1991), 19.

82 On this right, see, e.g., F. Trimarchi Banfi, *Il diritto ad una buona amministrazione*, in M.P. Chiti & G. Greco, I *Trattato di diritto amministrativo europeo* (2007), 50; L. Perfetti, *Diritto ad una buona amministrazione, determinazione dell'interesse pubblico ed equità*, 3-4 RIDPC 789 (2010); D.U. Galetta, *Diritto ad una buona amministrazione e ruolo del nostro giudice amministrativo dopo l'entrata in vigore del Trattato di Lisbona*, 3 Dir. amm. 601 (2010); Id., *Riflessioni sull'ambito di applicazione dell'art. 41 della Carta dei diritti UE sul diritto ad una buona amministrazione, anche alla luce di alcune recenti pronunce della Corte di giustizia*, 1 Dir. Un. eur. 133 (2013.

83 The phrase "open administration" found in transparency decree, indeed, is substantially nothing else than the literal translation into the Italian language of the concept of open government. See E. Carloni, *L'amministrazione aperta. Regole strumenti limiti dell'open government* (2014).

legislative power recognized by the Constitution in the two following subject matters: determination of the essential level of benefits concerning civil and social rights to be ensured on the entire national territory (Article 117, paragraph 2, letter m), Const.); coordination of statistical information and information on data of state, regional and local administration (Article 117, paragraph 2, letter r), Const.). Article 1, paragraph 3, adds that by establishing the essential level of benefits that has to be ensured uniformly over the whole Italian soil, the provisions of transparency decree also pursue the purpose to prevent and fight corruption and maladministration[84]. In this regard, however, the Italian legislator limited itself to implementing provisions and standards that had been stipulated at international and supranational levels a decade before transparency decree was enacted[85].

Legislative Decree No. 13/2013, in its original version, explicitly assigned transparency realized through the publication of documents, data, and information on administrations' official websites the purpose to prevent corruption. The dissemination of records and data as a means for the prevention of corruption and maladministration is not a novelty ascribable to transparency decree, as the Brunetta reform was already driven by such intention. Only under transparency decree, however, the prevention of corruption became the predominant purpose. As

84 The same provision also considers the determination of the essential level of benefits instrumental in achieving transparency, but transparency is the subject of the decree. The meaning of this specific clause is that by pinpointing the essential level of benefits, the provisions of transparency decree realize transparency. It is quite evident that this clause ends up laying down a sort of tautology and thus could have been omitted.

85 Article 1, paragraph 1, of Law No. 190/2012 noted that this law implemented provisions contained in two different multilateral conventions: Article 6 of the United Nations Convention against Corruption (UNCAC), adopted by the United Nations General Assembly on October 31, 2003; Articles 20 and 21 of the Criminal Law Convention on Corruption of the Council of Europe, adopted on January 27, 1999. The Italian Parliament ratified and executed the former convention with Law August 3, 2009, No. 116, and the latter with Law June 28, 2012, No. 110.

already noted, Legislative Decree No. 150/2009 was mainly aimed at ensuring an improvement in the degree of efficiency of public administrations through a complicated system of evaluation of personnel's performance. In order to achieve this objective, the decree prescribed the online dissemination of data concerning administrations' organization. By adding a conspicuous series of obligations of publication concerning administrative activity, transparency decree strengthened significantly the purpose to prevent corruption[86].

Citizens may play a pivotal role in prevention of corruption. Since transparency decree was enacted, indeed, they have had at their disposal a broad framework of documents, data, and information pertaining to administrations' organization and activity. Citizens, therefore, are able to perform an oversight function over every aspect of the powers exercised by administrations, and this function acts – at least potentially – as deterrent against any abuse of such powers and – more generally – against any lawbreaking[87]. The prevention of corruption is still at the heart of the transparency system after the 2016 reform. By equating the new right of civic access to obligations of publication, Legislative Decree No. 97/2016 resulted in splitting the subject of transparency decree, whose title, too, was broadened with an explicit reference to the right of civic access. Article 5, paragraph 2, of transparency decree, added by Legislative Decree No. 97/2016, entrusts a generalized access to records the purpose to foster forms of widespread control over the carrying out of institutional functions and the usage of public resources by administrations. Those forms of widespread control are – or, at least, should be – capable of preventing corruption or contributing to exposing cases of corruption within public administration.

86 See G. Gardini, *Il codice della trasparenza: un primo passo verso il diritto all'informazione amministrativa?*, 8-9 Giorn. dir. amm. 883 (2014).

87 See F. Merloni, *La trasparenza come strumento di lotta alla corruzione tra legge n. 190 del 2012 e d.lgs. n. 33 del 2013*, in B. Ponti, *La trasparenza amministrativa dopo il d.lgs. 14 marzo 2013, n. 33*, cit. at 56, 18.

5. Transparency, Publicity and Access to Records

5.1. Publicity and Transparency

The original version of transparency decree generated doubts about a possible coincidence between the concept of transparency and that of publicity. According to Article 2, paragraph 1, the former consisted in a series of obligations of publications, which the provision called "obligations of transparency," enumerated in chapters II to V of the decree. Article 2, paragraph 2, which was not amended by the recent reform, specifies that the fulfillment of those obligations occurs through the publication of documents, data, and information held by administrations on their own official websites. The consequence seemed to be a substantial overlapping between the two concepts[88]. In this regard, transparency decree turned out to be consistent with the approach to transparency that the legislator followed in the period 2005-2012 and actually maintained until Madia law was enacted. As already noted, this approach focused on publicity in the form of obligations to publish, while it placed access to administrative records in a marginal position[89]. Actually, even though first the Brunetta reform, then transparency decree appeared to bring about a correspondence between transparency and publicity, the two notions kept their own autonomy, as the recent reform confirmed.

Marrama drew a quite precise line of distinction between the concepts of transparency and publicity before Law No. 241/1990 entered into force. An administration is transparent – the Author argued – when it is able to meet needs "of clearness, of comprehensibility, of non-equivocality" in organizing its structure and carrying out administrative action[90]. By meeting such needs, the concept of transparency protects citizens' legitimate

88 See A. Simonati, *La trasparenza amministrativa e il legislatore*, cit. at 75, 761.

89 See M. Savino, *Le norme in materia di trasparenza amministrativa e la loro codificazione*, cit. at 71, 113.

90 R. Marrama, *La pubblica amministrazione tra trasparenza e riservatezza nell'organizzazione e nel procedimento amministrativo*, Dir. proc. amm. 419 (1989).

expectation[91] and ensures compliance with the constitutional principles established by Article 97 Const. Transparency consists in "a *quid pluris*"[92] compared with both access to administrative records and publicity.

Publicity represents the mere static condition of a record. Therefore, on the one hand, the concept of publicity has a neutral character and lacks "autonomous axiological pregnancy;"[93] on the other hand, ensuring publicity may not suffice to realize transparency. As a result, publicity may be deemed eligible to meet the need for transparency only according to a case-by-case analysis. Such a reasoning leads up to conclude that transparency consists in the substantial, dynamic aspect of publicity. While the latter ensures the knowability – i.e., the merely potential knowledge – of a record, transparency requires not only that a record be knowable, but also that the substantial content of the record may be grasped in its entirety. To be more precise, it has been contended that documents, data, and information published on administrations' official websites – or made otherwise available to the universality of citizens – are able to implement transparency only if they jointly possess three features. Those features are the following: the subject of the record to be divulged has to be complete; the record has to be published or otherwise released, so that the full comprehension of its content – as already noted, from a substantial perspective – be possible for anyone; disclosure of the record has to reach an indefinite mass of individuals[94].

91 On the legitimate expectation that administrative information – i.e., information coming from administrations and related to administrative activity – generates in citizens, see F. Merusi, *L'affidamento del cittadino* (1970), 161-174.

92 F. Manganaro, *L'evoluzione del principio di trasparenza amministrativa*, 22 Astrid Rassegna 3 (2009).

93 R. Marrama, *La pubblica amministrazione tra trasparenza e riservatezza*, cit. at 90, 421.

94 See F. Merloni, *Trasparenza delle istituzioni e principio democratico, in* Id. (ed.), *La trasparenza amministrativa* (2008), 11. The last requirement just mentioned has a different application with respect to the two components of transparency. As far as online publication is concerned, the very fact of an administration publishing a record on its own official website meets the

Therefore, publicity *per se* may be unable to meet an individual's demand for knowledge. In such a case, publicity – by means of publication – boils down to a mere intermediate step towards the final goal – achieving the actual knowledge of documents, data, and information through the comprehension of their core meaning[95].

To explain the distance existing between the concepts of publicity and transparency, it has been proposed the telling example of the budget of a local government, namely the budget of a municipality[96]. Indeed, the mere online publication of such a budget is quite likely not to suffice to ensure transparency, as the data it contains – normally of aggregate nature – are hard to comprehend for ordinary people. National or local authorities' budgets, indeed, usually tend to take a mere picture of active and passive posts. In this regard, Article 3, paragraph 1-*bis*, of transparency decree, added by the 2016 reform, vests the ANAC the power to pinpoint documents, data, and information that have to be published in a summarizing, aggregate form, instead of integral form[97]. The purpose of this power is to protect the privacy of individuals that would suffer a damage if their personal data should be subject to indiscriminate disclosure. Therefore, the legislator envisioned a conflict between opposing interests and opted for a possible sacrifice of the interest in fully comprehending records in favor of the need to safeguard the privacy of those, whose personal data are included in the records.

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requirement, as anyone having Internet connection may consult it by simply opening the website – namely, by opening the section of the website called "Transparent Administration." This section is requisite, pursuant to Article 9 of transparency decree. As regards access to records, instead, the requirement at issue entails that a model of generalized access must be preferred to a model of restricted access.

95 See G. Arena, *Trasparenza amministrativa*, in S. Cassese (ed.), *Dizionario di diritto pubblico* 5947 (2006).

96 *Ibid*.

97 In particular, according to the provision, by exercising this power, the ANAC prescribes that "the publication in integral form" of documents, data, or information subject to mandatory disclosure be replaced by the publication "of summarizing information, elaborated by aggregation."

At the same time, Article 14, paragraph 1-*quater*, of transparency decree, added by Legislative Decree No. 97/2016, addresses the very comprehensibility of public administrations' budgets. The provision requires that the acts conferring public manager assignments and the relative contracts establish transparency objectives, the achievement of which is imposed upon the appointed managers. Such objectives are aimed at ensuring that data subject to publication may be understood by ordinary people, especially with regard to budget data on expenses and costs for personnel. The publication of these data have to occur not only in aggregate form, but also in analytic form.

5.2. Access to Records as Instrument of Transparency

Access to administrative records has been traditionally considered an instrument capable of implementing transparency[98], despite having a different structure – i.e., different functioning – from publicity[99]. The original version of Law No. 241/1990 expressly recognized such a feature of access. The flaw – a sort of original sin – that marked the Italian legal system was the adopted of a restricted access to records instead of a generalized one[100]. Since its entry into force, indeed, Law No. 241/1990 has codified access to administrative documents as a conditioned right, which only those possessing a qualified interest were entitled to exercise. Despite formally recognizing the right of access to "anyone," the original text of Article 22, paragraph 1, required the existence of the requester's need to protect legal positions that were relevant to the legal system[101]. Therefore, the so-called *quisque de populo* – i.e., a person that is totally unrelated

98 See R. Villata, *La trasparenza dell'azione amministrativa*, cit. at 2, 531.

99 See M. Occhiena, *I principi di pubblicità e trasparenza*, in M. Renna – F. Saitta (eds.), *Studi sui principi del diritto amministrativo* (2012), 145.

100 See F. Merloni, *Trasparenza delle istituzioni e principio democratico*, cit. at 94, 9.

101 See G. Arena, *La trasparenza amministrativa ed il diritto di accesso ai documenti amministrativi*, in Id. (ed.), *L'accesso ai documenti amministrativi* (1991), 32 (observing that by referring to such a need, the portion of the provision following up the term "anyone" resulted in lessening the innovative significance of the provision itself).

to the administration holding the records she would like to obtain or that may not invoke anyway a qualified interest – was not allowed to exercise the right of access. Moreover, as already noted above, the 2005 reform of the general law on administrative procedure brought about a further restriction of individual entitlement to this right. Nonetheless, the right of access to administrative documents has always constituted an instrument capable of implementing transparency.

It seems to me questionable at least an opinion emerged in literature over the last decade. By relying on the existence of a model of restricted access in the Italian legal system, it has refused to define access to records as an instrument of transparency. Access to records as regulated in Italy – this opinion has argued – did not manage to reverse the traditional rule of secrecy but, on the contrary, ended up confirming it[102]. Therefore, access to administrative documents did not have any involvement in the relation between transparency and publicity[103]. In other words, this theory has interpreted the traditional regulation provided for in Italy in the subject matter of transparency as characterized by the existence of two separated relations that did not interact with each other: the relation between transparency and publicity, on the one hand, and the relation between secrecy and access to records, on the other hand.

The Italian regulation of access to administrative documents disappointed from the outset those who hoped for the adoption of a model of generalized access. Actually, in 1990, when

102 See C. Marzuoli, *La trasparenza come diritto civico alla pubblicità*, in F. Merloni, *La trasparenza amministrativa*, cit. at 94, 45 and 50; C. Cudia, *Trasparenza amministrativa e pretesa del cittadino all'informazione*, 1 Dir. pubbl. 99 (2007). Bonomo has clearly explained this theory by pointing out that the right of access to administrative documents "did not place itself in [the Italian] legal system as reversal of the rule of secrecy, but as an additional remedy recognized only to someone, to overcome at times a situation that kept maintaining a character of persisting secrecy." A. Bonomo, *Il Codice della trasparenza e il nuovo regime di conoscibilità dei dati pubblici*, 3-4 Ist. Fed. 729 (2013).

103 See C. Cudia, *Trasparenza amministrativa e pretesa del cittadino all'informazione*, cit. at 102, 132-135.

the general law on administrative procedure was passed, opting for such a solution would not have been as far-fetched as it might appear *prima facie*. A generalized access, indeed, would have come to light long ago had the Italian Parliament turned into law without any amendments the draft bill on access to administrative documents elaborated by the Nigro Commission in 1984[104]. Article 1, paragraph 1, of the draft bill, indeed, recognized to "anyone" the right of access to administrative documents, entitlement to exercising which was not subject to any individual limitations[105]. The legislator, however, appealed to practical reasons to exclude the acceptance of a generalized access. Such a form of access – it was pointed out – would have undermined the efficiency and effectiveness of administrative activity. Individuals, indeed, may have filed an excessive amount of access applications, thus causing administrations' paralysis[106]. Actually, administrative courts have used analogous argumentations – based on the need to safeguard administrations' efficiency and effectiveness – to justify the prescription laid down in Article 24, paragraph 3, of Law No. 241/1990, which prevents individuals from filing access applications solely aimed at carrying out a widespread control over the conduct of public administrations[107].

I argue that at least two reasons lead to objecting to the theory mentioned above. Firstly, even though it was instrumental in meeting only needs for defense of an individual somehow

104 The text of the draft bill can be found in G. Corso & F. Teresi, *Procedimento amministrativo e accesso ai documenti* (1991), 173 and in Quad. reg. 1349 (1984).

105 Therefore, unlike the provision that was finally inserted into Law No. 241/1990, the 1984 draft bill meant the term "anyone" not just formally, but substantially. See, *supra*, note 101.

106 See P. Alberti, *L'accesso ai documenti amministrativi*, cit. at 16, 128. For an analysis of concerns about the impact of a generalized access on administrations' organization, as expressed by members of Parliament when the prevision for a right of access to administrative documents was under consideration, see A. Cingolo, *Dal diritto di accesso al diritto alla curiosità: breve storia di una involuzione*, 2 Rass. avv. Stato 311 (1994).

107 See, e.g., TAR Lazio – Rome, section II, December 13, 2011, No. 9709; Council of State, section VI, January 12, 2011, No. 116, in www.giustizia-amministrativa.it.

related to the administration holding the sought records, the restricted access constituted all along an important remedy for public administration' secrecy[108]. The etymological meaning of transparency – i.e., to make something visible[109] – suggests that access to administrative documents marked – albeit in cases where the applicant proved her position to be privileged by virtue of a qualified interest – the starting point of an openness path that has reached a considerable degree of advance just recently. Secondly, drawing a rigid line of demarcation between access to records, on the one side, and the relation transparency-publicity, on the other side, may lead up to advocating a misleading coincidence between the concepts of transparency and publicity. The fact that this coincidence emerged in literature after the enactment of transparency decree[110] appears to prove my assumption.

Furthermore, I argue that the coincidence just mentioned may not be championed any longer after the 2016 reform of transparency decree. By assigning the same value to the set of obligations to publish documents, data, and information and to access to records – in the new form of a generalized access – the reform overcame the peculiar Italian way to transparency existing previously[111]. By equating access to records to the publication of documents, data, and information administrations accomplish on their own initiative pursuant to a legislative provision – the so-called proactive disclosure – Legislative Decree No. 97/2016

108 See F. Caringella, R. Garofoli & M.T. Sempreviva, *L'accesso ai documenti amministrativi*, cit. at 12 (underscoring that since Law No. 241/1990 was enacted, access to administrative documents has constituted an indispensable "picklock [instrumental in] the democratic guarantee of transparency of public powers' *agere*") (italics in original).

109 See G. Arena, *Administrative Transparency*, cit. at 1, 111 note 12 (noting that "transparency" is a compound word of Latin origin, which puts together two Latin terms – "*trans*" and "*apparent*" – and literally means "that which is seen-through […].") Similarly to Arena, R. Chieppa pointed out that "transparency" derives from Latin terms "*trans*" and "*parere*," and means "to make appear, i.e., to let see, to let know." Chieppa, *La trasparenza come regola della pubblica amministrazione*, cit. at 31, 615.

110 See, *supra*, section 5.1.

111 See M. Savino, *IL FOIA italiano: la fine della trasparenza di Bertoldo*, 5 Giorn. dir. amm. 594-596 (2016).

created an actual double track for transparency. Since such a double track turns out to be essential to any FOIA legislation worldwide, it represented a major step towards the adoption of a FOIA regime in the Italian legal system.

6. The Right of Civic Access

6.1. The New Right of Civic Access: From Enforcement Instrument to Sheer Right of Access to Records

The most prominent novelty the original version of transparency decree brought in consisted in civic access, provided for by Article 5. Legislative Decree No. 97/2016 amended this institution significantly. Apparently, Article 5, paragraph 1, may indicate that the institution maintain the nature it undoubtedly had when transparency decree was enacted – the nature of enforcement instrument[112]. Civic access, indeed, was aimed at enforcing obligations of publication, as anyone was entitled to invoke it to demand that a given administration fulfill one or more of those obligations when the administration was failing to do so. This function to remedy administrations' inaction towards obligations imposed by law still exists today. However, paragraph 2 of Article 5, added by Legislative Decree No. 97/2016, patently vests the new civic access with the character of a generalized access. Pursuant to the provision, anyone has the right to gain access to administrations' documents, data, and information other than those already subject to mandatory publication. The 2016 reform removed any restriction to individual entitlement to access provided for by the general law on administrative procedure. The only limitations to the exercise of the right of access consist in such exceptions as the new transparency decree establishes to protect some essential interests. Previously included within the framework of sanctions the original text of transparency decree was endowed with, therefore, civic access became a sheer right of

112 See M. Savino, *La nuova disciplina della trasparenza amministrativa*, cit. at 67, 804; F. Merloni, *Istituzioni di diritto amministrativo* (2016), 301.

access to documents and data held by administrations[113]. Even before the reform, actually, the scope of civic access could be meant as being broader than a formal interpretation of Article 5 suggested by envisioning an application of the institution beyond the cases in which complete fulfillment of obligations of publication was demanded[114].

By rewriting Article 5 and – in particular – by inserting a new paragraph 2 into it, Legislative Decree No. 97/2016 implemented the leading criterion established by Article 7, paragraph 1, letter h) of Law No. 124/2015. This criterion required – *inter alia* – that freedom of information be realized and all restrictions to individual entitlement to the right of access erased. As far as the subject of the new right of civic access is concerned, Article 5, paragraph 2, identifies it as including documents and data held by administrations and by authorities equating to them pursuant to transparency decree itself, but not also information. Such a provision proves consistent with Article 2, paragraph 1, of transparency decree, which by the same token excludes information from the subject of freedom of access.

In literature, the legislator's choice to leave information out of the scope of civic access has been welcomed as proper[115]. I do not agree. Firstly, as the same scholar taking a stand in favor of the solution adopted by the legislator has acknowledged, the notions of data and information do not coincide[116]. Therefore, a specific mention of the latter, which enjoys autonomy on a theoretical level, would have been proper. Secondly – unlike the provisions contained in articles 5, paragraph 2, and 2, paragraph 1 – Article 5,

113 See D.U. Galetta, *Accesso civico e trasparenza della Pubblica Amministrazione alla luce delle (previste) modifiche alle disposizioni del D.Lgs. n. 33/2013*, 5 Federalismi.it 9 (2016).

114 See B. Ponti, *Il regime dei dati oggetto di pubblicazione obbligatoria: i tempi, le modalità ed i limiti della diffusione; l'accesso civico; il diritto di riutilizzo*, in Id., *La trasparenza amministrativa*, 99-101.

115 See D.U. Galetta, *Accesso civico e trasparenza della Pubblica Amministrazione*, cit. at 113, 8-9 (arguing that the inclusion of information among the subjects of civic access as provided for in the original text of transparency decree was misleading).

116 *Id*., at 9.

paragraph 1, includes information in the subject of obligations of publication, the fulfillment of which anyone may demand. An objection to this argument may underline that access to records – in the form of the new right of civic access – and proactive disclosure by administrations fulfilling obligations established by law are two different institutions, and thus they may well be assigned a different scope. However, since these institutions have in common the purpose to realize transparency, the discrepancy just mentioned appears to be noteworthy. Thirdly, adding information to the scope of civic access would have improved the systematic character of the legal system in the subject matter of transparency. In particular, it would have ensured a better coordination – at least on a regulatory-formally level – with special forms of access such as access to environmental information[117] and access to records and information in possession of local authorities[118].

Unlike Article 5, paragraph 2, the following paragraph of the same article includes information in its scope. In addition to excluding any restrictions to individual entitlement to exercising the right of civic access, paragraph 3 provides that a civic access application does not require a motivation but has to pinpoint the documents, data, and information the requester wishes to obtain. In light of what I explained above, since it explicitly comprises information in the possible subject of a civic access application, Article 5, paragraph 3, turns out to be more inclusive than the previous paragraph, as well as than Article 2, paragraph 1, and Article 1, paragraph 1, of transparency decree[119].

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117 Legislative Decree August 19, 2005, No. 195 – "Implementation of Directive 2003/4/EC on public access to environmental information."

118 Article 10 of Legislative Decree August 18, 2000, No. 267 – "Consolidated text of laws on the legal system of local authorities," better known as Consolidation law of local authorities or TUEL (the relative Italian acronym). Article 43, paragraph 2, TUEL is concerned, instead, with the right of access recognized to local authorities' councilmen and councilwomen.

119 See M. Bombardelli, *Nuove questioni relative alla legittimazione soggettiva e all'oggetto del diritto di accesso*, 8 Giorn. dir. amm. 1114-1115 (2010) (stressing that the concept of information is broader than that of administrative document).

Article 5, paragraph 4, establishes a rule that exempts applicants from paying almost any fees for the exercise of civic access. This rule applies whether the requested records are electronic or paper-based. However, the release of a copy of such records is subject to the payment of duplication costs if the records are reproduced "on material supports." The provision specifies that the burden to prove the sustained cost shall lie on the administration. There is no exception to the rule excluding fees, instead, whenever a civic access application is aimed at gaining not a copy of the requested records but just their mere exhibition.

Paragraph 5 and the following ones of Article 5 deal with procedural aspects. First of all, paragraph 5 is concerned with a traditional institution related to access to records – the notice of an access application directed to counter-interested persons[120]. Prior to the adoption of a model of generalized access, obviously, the regulation of such an institution was tailored to the traditional form of access – the one provided for in Law No. 241/1990[121]. The counter-interested persons the proceeding administration pinpoints have a ten-day period to file a reasoned opposition. The timeframe within which the administration has to process and respond to a given access application is stayed during these ten days just to enable counter-interested persons to intervene in the administrative procedure and state their case.

120 As I already did with respect to the term "motivation," by using the terms "counter-interested persons," I opted for a literal translation from Italian instead of using a circumlocution. C. de Rienzo, for instance, translated the Italian terms "*soggetti controinteressati*" with the following circumlocution: "parties with conflicting interests." See *The Italian Administrative Procedure Act*, cit. at 28, 396.

121 Article 3 of the regulation adopted by the Government to implement Law No. 241/1990 as reformed in 2005 in the subject matter of access to administrative documents – Decree of the President of the Republic April 12, 2006, No. 184 – is devoted to the notice to counter-interested persons towards access applications. For an analysis of this institution, see S. Morrone, *Notifica ai controinteressati*, in R. Tomei (ed.), *La nuova disciplina dell'accesso ai documenti amministrativi* (2007), 129; S. Secci, *Art. 3 (Notifica ai controinteressati)*, in Aa.Vv., *Il regolamento sull'accesso ai documenti* (2006), 214.

Paragraph 6 assigns the proceeding administration a thirty-day timeframe to decide on an access application by adopting an explicit adjudication. The officer responsible for prevention of corruption and transparency has the power to gain information on the progress made by administrative procedures pertaining to access applications. Pursuant to paragraph 7, this officer is also the authority the requester may turn to for a review of the decision if the access application has been denied – in whole or in part – or if the administration has not processed the application by the deadline established by law. Substantially, the review consists in an administrative remedy, on which the officer responsible for prevention of corruption and transparency has to adopt a final determination within twenty days from the filing of the review request[122]. If the right of civic access has been exercised at regional or local level – i.e., if a civic access application has been filed to a regional or local authority – the administrative remedy may also be directed to the civic defender (ombudsman) having territorial competence[123]. The requester may challenge the decision of the proceeding administration on the civic access application or that on the application review adopted by the officer responsible for prevention of corruption and transparency before the administrative judge pursuant to Article 116 of the code of administrative process[124].

122 The situation at issue differs significantly from the one in which an individual files an application aimed at obtaining the re-examination of an affair already decided by the competent body of the administration through an explicit adjudication. In such a case, by filing the application, the individual intends to obtain a new exercise of the administrative power on the affair by seeking to have an administrative court ascertain the administration's inaction on the re-examination application. The individual, however, possesses a merely factual interest, and the administration that has received the application is not obliged by Article 2 of Law No. 241/1990 to adopt a new determination on the affair. The administration, indeed, enjoys discretion about "*an*" (Latin term standing for "whether") to carry out a new administrative procedure and conclude it with an explicit adjudication. See TAR Lazio – Rome, section II-*ter*, March 20, 2015, No. 4401.

123 Article 5, paragraph 8, transparency decree.

124 Legislative Decree July 2, 2010, No. 104 and subsequent amendments.

As far as the enforcement of the provisions of transparency decree, the 2016 reform maintained the overall framework of sanctions but made some amendments to it. The main ones are the following. Two different amendments were concerned with Article 43, devoted to the officer responsible for transparency. Firstly, Legislative Decree No. 97/2016 repealed Article 43, paragraph 2, which assigned to this officer the power to update the three-year program for transparency and integrity, now replaced by the three-year plan for prevention of corruption. Secondly, paragraph 4 was amended. While previously only the officer responsible for transparency had an oversight function and was responsible for ensuring "the regular implementation of civic access," the 2016 reform entrusted the same function and responsibility to the managers in charge of administrations. Furthermore, Legislative Decree No. 97/2016 markedly strengthened the enforcement character resulting from Article 45 of transparency decree. Firstly, prior to the reform, a more generic formulation featured paragraph 1 of this article. The provision assigns the anticorruption authority an oversight function over the fulfillment of obligations of publication. In addition to the power to prescribe the removal of conduct or deeds contrasting with plans and rules on transparency, which has remained unchanged, the original version of transparency decree provided for the authority's generic power to order the adoption of acts or adjudications required by law. This power, too, still exists, but the 2016 reform added a more pregnant power of the ANAC to order that administrations fulfill obligations of publication contained in legislative provisions within a thirty-day timeframe. Secondly, paragraph 4 was subject to some amendments. In particular, now the provision explicitly clarifies that failing to fulfill one of those obligations of publication constitutes a disciplinary tort. Furthermore, as regards the anticorruption authority's duty to communicate any violations of such obligations to the appropriate office of the inspected administration, Legislative Decree No. 97/2016 removed any reference to the seriousness of the violations

committed[125]. Finally, the 2016 reform intervened on Article 46, paragraph 1, to make it consistent with the new, broader subject of transparency decree. Under the original version of the provision, failing to fulfill obligations of publication constituted an element to consider in evaluating managerial responsibility, as well as a possible reason for liability for the relevant administration's image damage, and it was also taken into consideration for the granting of benefits to managers. The reform linked the same consequences to cases in which civic access is denied, put off, or limited absent application of one of the exceptions to openness established by transparency decree.

In light of the overall regulation provided for in transparency decree, there exist two issues, the implications of which will probably be clearer after some time has passed from the entry into force of the 2016 reform[126]. Those issues are the following: the room that is left to the form of access provided for by chapter V of Law No. 241/1990, i.e., the form of access that I have referred to as traditional access; the actual scope of the exceptions to the new civic access. As far as the first issue is concerned, in reforming transparency decree, Legislative Decree No. 97/2016 confirmed the force of the traditional access by expressly referring to it[127]. As a result, it is likely that administrative practice and administrative courts' decisions will bring about the formation of categories of situations in which – *a priori* – there should be no doubt about the application of

125 The original version of the provision, instead, began with the following clause: "In consideration of their seriousness," where the adjective "their" was referred to all cases in which there was either default of or only partial compliance with obligations of publications by administrations.

126 Article 42, paragraph 1, of Legislative Decree No. 97/2016 required that all authorities to which transparency decree applies conform to the provisions of the decree itself and ensure implementation to the new civic access within six months from the entry into force of the reform, which occurred on June 23, 2016.

127 Article 5, paragraph 11, of transparency decree – added by Legislative Decree No. 97/2016 – indeed clarifies that "the different forms of access of interested persons provided for by chapter V of Law August 7, 1990, No. 241" are still effective.

traditional access. While the original version of transparency decree was effective, the Council of State, in decision No. 5515/2013[128], excluded – on a theoretical level – any possible overlapping between transparency decree and chapter V of Law No. 241/1990, thus between their respective scope. The two regulations – the Council of State argued – have different purposes and a different subject, despite the "common inspiration to the principle of transparency."[129]

What position will the Council of State take after the reform? Where exactly will the border between the two regulations be drawn? At the moment, it does not seem to be easy to answer these questions. In the decision mentioned above, the Council of State reformed the first-degree decision, the one adopted by the regional administrative court[130], which had meant civic access more extensively than the original text of Article 5 of transparency decree allowed by referring to the FOIA model. Because of the amendments brought in by Legislative Decree No. 97/2016, transparency decree has gotten much closer to this very model. Therefore, in determining the actual relation between the right of civic access and the traditional access, the administrative judge – namely, the Council of State – will have to take into adequate consideration that the former embodies a model of generalized access. To put it differently, any possible attempt to enhance traditional access excessively would end up frustrating the spirit of the 2016 reform.

6.2. The Exceptions to the Right of Civic Access Established by Article 5-*bis*

Article 5-*bis* of transparency decree, added by Legislative Decree No. 97/2016, establishes exceptions to the right of civic access and thus to openness. The original version of transparency decree pinpointed limits to the exercise of civic access in a

128 Council of State, section VI, November 20, 2013, No. 5515, in www.giustizia-amministrativa.it.

129 *Ibid*.

130 TAR Lombardy – Milan, section IV, July 18, 2013, No. 1904, in www.giustizia-amministrativa.it.

somewhat generic fashion. The legislator, indeed, substantially limited itself to referring to the limits to access to administrative documents laid down by Article 24, paragraphs 1 and 6, of Law No. 241/1990[131]. Article 5-*bis*, too, uses general clauses to identify exceptions to civic access, but enumerates them more precisely than the law on general procedure did. In this regard, the legislator appeared to give significance to theoretical classification. It divided exceptions into two categories: those instrumental in protecting public interests and those relating to cases, in which disclosure of documents, data, and information would cause harm to individuals as such – i.e., absent implications for the community of people. Such a distinction corresponds to a different location within the article: Paragraph 1 contains exceptions aimed at safeguarding public interests, while paragraph 2 is devoted to exceptions concerning private interests. Furthermore, paragraph 3 provides for some traditional limitations to access to records and publicity – namely, state secret and other cases of secrecy established by legislative provisions. This provision is manifestly modeled upon Article 24, paragraph 1, of Law No. 241/1990, which indeed is mentioned in the provision.

In particular, Article 5-*bis*, paragraph 1, enumerates as limitations to the new right of civic access the following interests – *rectius*, the following matters and underlying interests: a) public security and order; b) national security; c) defense and military issues; d) international relations; e) state financial and economic policy and stability; f) law enforcement proceedings; g) the regular carrying out of investigations. All these matters and interests embody the typical sovereign functions of a state. The other category of exceptions is composed of interests aimed at protecting individuals' personal data (letter a)), at ensuring freedom and secrecy of correspondence (letter b)), and at safeguarding economic and commercial interests of natural or legal persons (letter c)). Privacy and individuals' property related to their business appear to be the two main values underpinning

131 Article 4 of transparency decree, repealed by Legislative Decree No. 97/2016.

this category of exceptions. As far as the third subcategory is concerned, Article 5-*bis*, paragraph 2, letter c), specifies its scope by expressly referring to intellectual property, copyright, and commercial secrets. In its opinion on the draft legislative decree aimed at amending transparency decree, the Council of State pointed out that the large number of exceptions the new civic access is subject to might induce administrations to mean them extensively. If that should happen, the significance of transparency decree as reformed could be at least compromised[132]. The ANAC is assigned the power to adopt operational guidelines on the content of exceptions[133]. Only practice, however, may show whether administrations will tend to interpret exceptions in an extensive or strict fashion.

7. Access for Scientific Purposes to Data Gathered in the Carrying Out of Statistical Activities

Article 5-*ter* of transparency decree, added by Legislative Decree No. 97/2016, provides for a special form of access for scientific purposes that is concerned with elementary data gathered by entities of the National statistic system[134] in carrying out their institutional functions. The provision confers entitlement to exercising this form of access upon researchers belonging to universities, research entities, and public or private institutions included in a list drawn up by Eurostat or deemed eligible for access. The same entitlement lies in such research institutions as the authority empowered to release the sought data deem eligible

132 See Council of State, Advisory section for regulatory acts, opinion of February 24, 2016, No. 515/2016, par. 11.14, www.giustizia-amministrativa.it.

133 Article 5-*bis*, paragraph 6, of transparency decree specifies that the ANAC establishes the guidelines in accord with the Authority for the protection of personal data (Italian Data Protection Authority – DPA) and after the Unified Conference has expressed its opinion thereupon. The direct involvement of this independent authority is proper in consideration of the importance that the value of privacy has, especially within the category of exceptions provided for in Article 5-*bis*, paragraph 2.

134 See M.P. Guerra, *Ordinamento statistico*, in S. Cassese, *Dizionario di diritto pubblico*, cit. at 95, 3977.

for the access. It is this very authority, therefore, that assesses the existence of entitlement to access. The university or other entity filing an access application has to subscribe, by means of a representative, a statement identifying methods of using the requested data. Such methods are supposed to ensure the privacy of individuals involved in carrying out statistical activities. A further condition for exercising the special form of access at issue is the approval of a research proposal by the authority holding the data. The proposal advanced by the applicant has to provide the following information: the purpose of the research; the reason for the access application and – thus – the need to know in the specific case; the names of researchers participating in the research; the methods employed to conduct it; "the results that are meant to be disseminated."

The rules laid down by Article 5-*ter* lead to considering this special form of access extraordinarily burdensome for the institution resorting to it. As a result, a paradox emerges. On the one hand, transparency decree as reformed in 2016 provides for a generalized access, which is meant to realize freedom of information and whose restriction is possible just to protect some essential interests. On the other hand, the access for purposes of scientific research to data gathered in carrying out statistical activities is subject to such strict requirements that its usage appears to be discouraged. A paradoxical effect derives from the regulations contained – respectively – in Articles 5 and 5-*ter*. Researchers – whose access to data ought to be eased, as it is instrumental in the conduct of scientific research – end up being penalized because of burdens that prove excessive if compared to those to which the ordinary civic access is subject.

8. Conclusions

The evolution of legislation leads to deeming outdated the first interpretations of the concept of transparency that sprang up prior to Law No. 241/1990 and when its original text was effective. However, they already grasped the broad scope of transparency and pinpointed various institutions capable of

implementing transparency itself. The Brunetta reform essentially meant transparency as total accessibility to information and data concerning administrations' organization. Transparency decree then enhanced the scope of the definition considerably by extending it to records concerning administrative activity. The Brunetta reform and transparency decree certified a reversal of the trend, which legislation had fostered from 2005, in the relation between access to administrative documents and publicity as instruments of transparency. The latter – in the form of obligations to publish documents, data, and information on administrations' official websites – prevailed markedly over the former in the decade 2005-2015.

The concepts of transparency and publicity do not coincide, as the former has a broader meaning. It implies not only accessibility to records and information, but also the need that their content be comprehensible and clear. Only if all these requirements are met, knowability may turn into actual knowledge. Since fulfilling obligations of publications on administrations' official websites does not ensure *per se* that what is published possesses these requirements, it is proper to keep distinguishing – on a theoretical level – between publicity and transparency. This distinction has found confirmation in transparency decree as amended by Legislative Decree No. 97/2016.

The 2016 reform of transparency decree resulted in equating civic access to obligations of publication imposed upon administrations as to the function to implement transparency. Civic access is not just an instrument aimed at enforcing such obligations anymore, but constitutes now a generalized access manifestly modeled upon typical FOI (freedom of information) legislation[135]. Such legislation requires a double track for transparency – access to records recognized to anyone with limited exceptions, on the one hand, and proactive disclosure of documents and information by administration, on the other hand

135 Actually, such legislation has a scope much broader than access to records, data, and information, which is only a component of it. See T. Mendel, *Freedom of Information: A Comparative Legal Survey* (2008), 29-41.

– and that is exactly what the 2016 reform realized. The traditional access provided for by Law No. 241/1990, however, is still effective and is destined to act whenever the new right of civic access will not apply. Only practice will determine the relation between the two forms of access. Practice will also show the actual scope of the exceptions to the new civic access – and to obligations of publication – established by Article 5-*bis* of transparency decree.

Overall, the current regulatory framework of transparency leads to formulating two final observations. On the one hand, it is probably better not to be too enthusiastic – and thus to discuss with due caution – about the adoption of an actual FOIA in the Italian legal system[136]. On the other hand, it is undeniable that the house of the administration is finally starting to have walls made of glass.

136 See M. Savino, *IL FOIA italiano*, cit. at 111, 594. The Author argues that in reforming transparency decree, Legislative Decree No. 97/2016 embraced the FOIA model. On the one hand, the new right of civic access is consistent with a FOI regime. On the other hand, however, the fact that the 2016 reform of transparency decree did not repeal traditional access should not be overlooked. At the moment, indeed, there is no practical evidence supporting the Author's assertion that traditional access will become "superfluous" over time. *Ibid*.

SHORT ARTICLES

"PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES". A CONSTITUTIONAL ANALYSIS OF PRESIDENT TRUMP'S EXECUTIVE ORDERS*

*Davide De Lungo***

Abstract

Through the implementation of two Executives Orders, the recently instated US President Donald Trump has temporarily suspended the admission onto US soil of aliens from seven Muslim-majority countries, as well as refugees across the board.

The backlash across both the national and international public debate has been severe, as the resulting political struggle instantly translated into a legal dispute.

Several issues arose within the legal debate regarding the Executive Orders. First and foremost, attention has been called to equality and non-discrimination concerns; secondly, yet not less importantly, the interactions between the executive, legislative and judicial branches of the US Government have come to be challenged, potentially leading to a sort of "constitutional showdown".

This paper aims to appraise the consistency of President Trump's Executive Orders with existing legislation on immigration; their compliance with the First Amendment (with regards to the Establishment Clause), and Fifth Amendment (with regards to both the Equal Protection Clause and Due Process Clause); and how the Executive Orders fit within the habitual functioning of the US Federal system.

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Within the intricate panorama of the law, it is rather difficult to predict the outcome of the decision of the Supreme Court on President Trump's Executive Orders. A decisive role will certainly be played by the political cleavage

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1. Introduction

On the 27th of January 2017, a few days after being sworn in, the 45th President of the United States, Donald Trump, signed an Executive Order entitled "Protecting the Nation from foreign terrorist entry into the United States". This Order enforced some of the most significant measures promised during the electoral campaign: on the one hand, it suspended for 90 days the entry of foreign nationals born in or holding a passport from Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen; on the other, it halted the entry of refugees of any nationality for 120 days, and indefinitely for Syrian refugees.

The backlash across both the national and international public debate has been severe, as the resulting political struggle instantly translated into a legal dispute. The case was brought before the Courts – such as the Federal Court of Seattle and the US 9th Circuit Court of Appeals –, that temporarily suspended the ban nationwide, albeit having yet to examine its apparent unconstitutionality in depth. At long last, on the 26th of June, the Supreme Court decreed, on a provisional basis before the matter would be discussed in the coming fall, that the 90-day ban on visitors from Iran, Libya, Somalia, Sudan, Syria and Yemen, along

with the 120-day suspension of the US refugee resettlement program, could be enforced against those who lack a "credible claim of a bona fide relationship with a person or entity in the United States". Thus, the ruling now paves the way for parts of the ban to come into effect.

In order to bypass the Courts' suspension of the first Executive Order – before the Supreme Court announced its provisional decree – on the 6th of March 2017, the President adopted a new Executive Order, to take effect as of the 16th of March 2017. The new Executive Order retains key elements of the previous one, including its title. However, a number of adjustments were introduced to attempt to evade the issues on which the Courts based their suspension. Namely: Iraq no longer features on the list of banned nationalities, though still being subjected to strict controls; Syrian nationals have been included in the 120-day ban on refugees; and, allowance has been made to waive the ban for certain individuals based on a case-to-case evaluation. Moreover, the new Executive Order provides a detailed justification for each provision, predominantly in relation to the threat of terror attacks. It is evident that the Executive Order was revised to withstand any further judicial review, its main concern being to demonstrate beyond rebuttal that the provisions are reasonable and justified by a compelling logic of public interest.

Several issues arose within the legal debate regarding the Executive Orders. First and foremost, attention has been called to equality and non-discrimination concerns; secondly, yet not less importantly, the interactions between the executive, legislative and judicial branches of the US Government have come to be challenged, potentially leading to a sort of "constitutional showdown".

The controversial issues which have arisen within the US national debate regarding these provisions may be categorised as follows: the Executive Orders' consistency with existing legislation on immigration; their compliance with the First Amendment (with regards to the Establishment Clause), and Fifth Amendment (with regards to both the Equal Protection Clause and Due Process Clause); and how the Executive Orders fit within the habitual functioning of the US Federal system.

Consequently, the constitutionality, or lack thereof, of these two Presidential Executive Orders is now open to debate. In view of the similarity of their contents, they may be analysed in conjunction.

2. The legal and constitutional basis of the Executive Orders

To begin with, the Executive Orders need to be evaluated in terms of their consistency with the Immigration and National Act (INA), which was adopted by Congress in 1952 (and later amended) in order to regulate immigration.

As stated in their preamble, these Presidential orders have been expressly adopted on the basis of the powers granted to the White House by the INA. Therefore, first and foremost it should be verified whether the aforementioned Presidential power has been exercised in compliance with the law, in itself a challenging endevour.

In fact, the 8 U.S. Code § 1152 establishes that: "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence" – with the exception of certain cases such as family reunification, special qualifications or merit. Nevertheless, § 1182 states that: "whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or non immigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate".

Therefore, the general principle of non-discrimination contained in §1152 is waived in § 1182, by the Presidential power to reduce or prevent the entry of all aliens or classes of aliens when the interests of the United States are considered to be at stake.

Furthermore, a directive of §§ 1182, 1226A and 1227 qualifies as "inadmissible aliens" or "deportable aliens" those suspected of terrorism[1].

In conclusion, the INA entitles the President to intervene at his own discretion, allowing for – albeit in exceptional scenarios – with special measures, especially in the case of a potential terrorist threat. Consequently, it appears that it would be complicated to revoke President Trump's Orders based on the INA.

A similar conclusion is reached when taking into account that the INA, despite its relevance in relation to this issue, is not the only legal basis for defining Presidential power over immigration. In fact, the US Constitution – rooted in a rigid principle of separation of powers – bestows the President with executive power (art.2, Sec I), with the responsibility to ensure that laws be faithfully executed, to govern all public officials and the

[1] A broad jurisprudential and doctrinal consultation has emerged with regards to "enemy aliens", elucidating many of the issues brought to light by President Trump's Executive Orders. Among the most recent contributions – also with reference to the pertinent literature – see D. Cole, *Enemy Aliens*, in 54 Stan. L. Rev. 953 (2002), 983-984: "the Court has always treated the rights of "enemy aliens" as categorically different from the rights of citizens, and indeed of all other aliens. The Court has upheld the constitutionality of the Enemy Alien Act, which authorizes the President in a declared war to detain, deport, or otherwise restrict the freedom of any citizen 14 years of age or older of the country with which we are at war. And in Johnson v. Eisentrager, the Court held that enemy aliens captured on the battlefield abroad had no right to seek habeas corpus in a United States court to challenge their subjection to military trial. The Court noted that at common law, an enemy alien had no rights during a time of war, and that the United States "regards him as part of the enemy resources." But these principles apply only in a time of declared war to citizens of the country with which we are at war. Thus, they should not be generalized to justify treatment of aliens when, as now, no war has been declared, and there is no identifiable enemy nation. The Supreme Court was careful to note in Eisentrager that the power to treat enemy aliens is "an incident of war and not ... an incident of alienage." It is critical to honor that distinction, the Court warned, because '"[m]uch of the obscurity which surrounds the rights of aliens has its origin in this confusion of diverse subjects". In case law, in addition to Johnson v. Eisentrager, 339 U.S. 763 (1950), see also Zadvydas v. Davis, 533 U.S. 678 (2001); Foucha v. Louisiana, 504 U.S. 71, 80 (1992); Ludecke v. Watkins, 335 U.S. 160 (1948).

administrative system (art 2, Sec III), as well attributing to him the role of Commander in Chief of the Armed Forces (art. 2, Sec. II)[2].

Thus, Executive Orders are a tool used by US Presidents to exercise their authority: the power to adopt them comes directly from the Constitution. Although they cannot contradict the law, they provide the White House with significant room for political manoeuvre to enforce the law, or intervene on issues which are yet to be regulated by Congress[3].

In light of this, it is by no coincidence that the preamble of the Executive Orders – particularly the second one – makes reference to the INA, as well as calling upon the powers that the Constitution bestows upon the President: this is to underline that the provisions are based on, not only existing legislation on immigration, but also – in addition to and notwithstanding – on Presidential prerogatives related to the handling of public administration, security and defence.

3. Executive Orders, Equal Protection Clause and Establishment Clause.

The following issue to be taken into account is the content of the Executive Orders under scrutiny. Within the public debate, as well as throughout scientific deliberations, the question has been outlined as follows: is it legitimate to ban the entry of immigrants and refugees based on their originating from Muslim-majority countries? Nonetheless, such an approach could be considered as incorrect, when shifting away from a political

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[2] With regards to Presidential power and the Executive branch see: A. Hamilton, J. Madison & J. Jay, *The Federalist Papers*, Essays 69-74; C. Rossiter, *The American Presidency* (1956); H. Finer, *The Presidency. Crisis and Regeneration. An Essay in Possibilities* (1960); R.E. Neustad, *Presidential Power and The Modern President: The Politics of Leadership from Roosevelt to Reagan* (1960); T. Lowi, *The Personal President. Power Invested, Promise Unfulfilled* (1985); S. Fabbrini, *Il presidenzialismo degli Stati Uniti* (1993); S.G. Calabresi, K.H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev. 1153 (1992); R.A. Dahl, *Toward Democracy: A Journey* (1997); L. Tribe, *American Constitutional Law* (2000).

[3] Among the most recent studies on the topic see: P.J. Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action* (2002); K.R. Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* (2002); A.L. Warber, *Executive Orders and the Modern Presidency: Legislating from the Oval Office* (2006).

perspective and towards an analysis of the literal contents of the Executive Orders. Although President Trump promoted a so-called "Muslim-ban" during his electoral campaign, the Executive Orders make no reference to any religious criteria, but rather to the nation of origin and its suspected links to terrorism. The aforementioned distinction, although seemingly minor, is far from being irrelevant and needs to be addressed. Furthermore, although the first Presidential Order made an explicit reference only to Syria, which was later removed from the second Order, the other affected countries – in both Executive Orders – were indirectly identified by stating "countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12)". It should be noted that the latter was introduced in 2015, under the Obama administration, through the "Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015". This section excludes from the Visa Waiver Program (which allows foreigners to sojourn in the United States without a visa up to a maximum of 90 days) those coming from, for transit or nationality, Syria, Iraq and other countries which – on the basis of relevant legislation or according to the directives of the Secretary of State – have repeatedly supported international acts of terrorism, a criterion applicable to Iran, Sudan, Libya, Somalia and Yemen.

Consequently, we are left with the following conundrum: President Trump's Executive Orders affect those countries previously listed in former President Obama's 2015 law, which are in turn extracted from security directives related to alleged threats of terrorism. Therefore, the supposed discrimination on travel to the US should be reflected in both Obama's law and Trump's Executive Orders. Nonetheless, the issues at hand are far from being equivalent. In fact, whilst the former exempts these nationalities from the stay without visa, the latter bans their entry altogether. Thus, a significant difference emerges in terms of discrimination towards foreigners' entry into the US based on their country of origin.

At this point, attention must be drawn to the US Constitution's and Supreme Court's positions on discriminatory treatment. Indeed, it should be appraised whether, from a jurisprudential standpoint, constitutional principles allow for legal differentiations such as those in question.

With regards to the Federal Government, the Fifth Amendment provides that: "no person shall be […] deprived of life, liberty, or property, without due process of law". Furthermore, within the Due Process Clause, the Supreme Court included the Equal Protection Clause – which prohibits to "deny to any person […] the equal protection of the laws" -, although the Constitution raises it, in its Ninth Amendment, only in reference to Member States. However, regardless of the aforementioned codes of the Constitution, discriminatory treatment, as explicitly prohibited by the Equal Protection Clause, should be considered as conflicting in its very nature with the Due Process Clause[4]. The Supreme Court has thus underlined how the provision – which also concerns non-citizens[5] - prevents discrimination on the basis of parameters such as race, religion, or nationality: in other words, "suspect classifications"[6] directed at "discrete and insular minorities"[7].

[4] The application of the Equal Protection Clause towards the Federal Government - the so-called "reverse incorporation" - is rooted in Bolling v. Sharpe, 347 U.S. 497 (1954): "the Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause, as does the Fourteenth Amendment, which applies only to the States. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and therefore we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process". See A.R. Amar, *Bill of Rights* (1998), 163; M.K. Curtis, *No State Shall Abridge. The Fourteenth Amendment and The Bill of Rights* (1986), 154.

[5] Graham v. Richardson, 403 U.S. 365 (1971).

[6] The first reference to "suspect classifications" is found in Hirabayashi v. United States, 320 U.S. 81 and Korematsu v. United States, 323 U.S. 214.

[7] See United States v. Carolene Products Company, 304 U.S. 144 (1938): "there may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth […] It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation […] Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious […] or national […] or racial minorities […] : whether prejudice against discrete and insular minorities

Thus, the criteria to evaluate the legitimacy of the Executive Orders differ whether more relevance is attributed to their literal wording – whereby there is no explicit reference to religious background, but only to the country of origin –, or to President Trump's campaign promises to introduce a "Muslim-ban".

Starting with the first hypothesis, the Supreme Court applies two different standards of scrutiny, with regards to treatments that take citizenship as a differentiating factor, depending on whether the rules are enacted by Member States or by the Federal Government.

When Member States attempt to enforce these rules, the different treatment of aliens is considered unconstitutional, unless strict scrutiny[8] is able to prove that: a) the discrimination is narrowly tailored to achieve a compelling governmental interest; b) there is no less restrictive way to effectively achieve the interest[9].

On the contrary, in the case of differentiated treatments enforced by the Federal Government, a more deferential "rational basis review" is applied: in order to abide by the Constitution, it is sufficient for the Government's measures to be ""rationally

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may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry".

[8] The levels of scrutiny under the three-tiered approach to Equal Protection analysis are: the strict scrutiny (the government must show that the challenged classification serves a compelling State interest and that the classification is necessary to serve that interest); the middle-tier scrutiny (the government must show that the challenged classification serves an important State interest and that the classification is at least substantially related to serving that interest); rational basis scrutiny (the government needs only to show that the challenged classification is rationally related to serving a legitimate State interest). See: Lochner v. New York, 198 US 45 (1905); United States v. Carolene Products Company, 304 U.S. 144 (1938); Korematsu v. United States, 323 U.S. 214; Kotch v. Board of River Port Pilot Commissioners 330 U.S. 552 (1947); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Brown v. Board of Education, 347 U.S. 483 (1954); Craig v. Boren, 429 U.S. 190 (1976); E. B. v. Alabama ex rel. T. B., 511 U.S. 127 (1994); United States v. Virginia, 518 U.S. 515 (1996). Among the most recent studies on the subject see A. Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 Cal. L. Rev. 299 (1997); A. Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793 (2006); T.L. Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, in William & Mary Law School Scholarship Repository (2016), 475.

[9] For specific reference to aliens, see Graham v. Richardson, 403 U.S. 365 (1971).

related" to a "legitimate" government interest"[10]. The less demanding scrutiny on Federal rules is due to the fact that the Constitution delegates to the Federal Government a plenary power to deal with aliens and naturalization (art. 1, Sec. 8 and Sec. 9).

It is also necessary to take into consideration two further judicial elements that significantly strengthen the discretionary power conferred to the Federal Government. Firstly, it is professed that "there is a distinction between the constitutional rights enjoyed by aliens who have entered the United States and those who are outside of it"[11]: the effective difference between aliens already sojourning within the US territory and those still outside of it justifies the differing and less protective treatment of the latter. Secondly, "the statutory discrimination within the class of aliens – allowing benefits to some aliens but not to others – is permissible"[12]: since decisions in these matters may implicate relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are of a character more appropriate to either the Legislative and Executive bodies than to the Judiciary[13].

In conclusion, the decision by the Federal Government to prevent aliens, or some categories of aliens, from entering the country is a "fundamental sovereign attribute" fulfilled through the legislative and executive branches, that is "largely immune from judicial control"[14].

Conversely, parameters of judicial review would be much more restrictive if the anti-Islamic aim pursued by President Trump were considered to be more relevant. According to the First Amendment, "Congress shall make no law respecting an establishment of religion". In fact, in line with the so-called "Establishment Clause", any religious discrimination is forbidden,

[10] See Mathews v. Diaz, 426 U.S. 67, 83 (1976); Ruiz-Diaz v. U.S., 703 F. 3d 483, 486-487 (9th Cir. 2012); Narenji v. Civiletti, 617, F.2d 745, 748 (D.C. Cir. 1979).
[11] See Zadvydas v. Davis, 533 U.S. 678, 693 (2001).
[12] See Mathews v. Diaz, 426 U.S. 67, 83 (1976).
[13] See Mathews v. Diaz, 426 U.S. 67, 83 (1976).
[14] See Shaughnessy v. U.S. ex rel. Mezei, 345 U.S. 206, 210 (1953); Fiallo v. Bell, 430 U.S. 787, 792, (1977); Holder v. Humanitarian Law Project, 561, U.S. 1, 33-34 (2010).

with the exception of those that satisfy the stringent conditions of strict scrutiny.

The Courts have established that, in assessing whether a measure is discriminatory or not, it must not necessarily express distinctions on a religious basis[15]: even if the measure is "facially neutral", strict scrutiny must be applied if the measure has been adopted on the basis of a "discriminatory purpose"[16]; in other words, a measure can be considered discriminatory, even if "substantially motivated by improper animus"[17]. Therefore, in light of the declarations made by President Trump during his campaign and at the moment of the adoption of the first Order – in spite of the *excusatio* included in the second Executive Order [18] - the discriminatory aim appears to be undeniable.

Within this extremely complex framework, it would be challenging to conceive accurate forecasts regarding the potential outcomes of the verdict on the constitutional legitimacy of the

[15] Since Washington v. Davis, 426 U.S. 229, 242 (1976): "Government discrimination can be found also when a law or policy has a discriminatory purpose rather than just a disproportionate effect on a protected group". For a more recent view on "improper animus", from a jurisprudential standpoint, see also McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Desert Palace Inc. v. Costa, 539 US 90 (2003).

[16] "The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination […] Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality": see Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993). "'Discriminatory purpose' [...] implies more than intent as volition or intent as awareness of consequences [...] It implies that the decision-maker [...] selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group": see Massachusetts Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979).

[17] See Hunter v. Underwood, 471, U.S. 222, 233 (1985). Also see C. M. Corbin, *Intentional Discrimination in Establishment Clause Jurisprudence*, in University of Miami Law School - Institutional Repository, 300 (2015).

[18] See Sec. I, b), IV: "Executive Order 13769 did not provide a basis for discriminating for or against members of any particular religion. While that order allowed for prioritization of refugee claims from members of persecuted religious minority groups, that priority applied to refugees from every nation, including those in which Islam is a minority religion, and it applied to minority sects within a religion. That order was not motivated by animus toward any religion, but was instead intended to protect the ability of religious minorities -- whoever they are and wherever they reside -- to avail themselves of the USRAP in light of their particular challenges and circumstances".

Executive Orders. In fact, regardless of the different directions the judges may take, one should take into account the existing discrepancies between the numerous judicial precedents that have dealt with distinctions formulated on the basis of citizenship, origin and religion.

Some of the most representative cases that present the greatest similarities with this case are: the *Chae Chan Ping* case (1889)[19], in which the Supreme Court upheld the Federal law forbidding the immigration from China to the United States; the *Hyrabayashi* (1943)[20] and *Korematsu* (1944)[21] cases, in which the Court held that the application of curfews and detention against American Japanese citizens was constitutional, to protect the country from espionage in wartime; the *Graham* case (1971)[22], in which a State law was declared unconstitutional because it denied some kind of assistance to aliens; the *Doe* case (1982)[23], in which the Court struck down a Texan law forbidding the access to public schools for foreign children who entered illegally into the US; the *Church of the Lukumi Babalu Aye* case (1993)[24], in which the Supreme Court held that an ordinance forbidding the unnecessary killing of an animal, during a public or private ritual or ceremony, not for the primary purpose of food consumption, was unconstitutional, especially because the ordinance was intended against a religious minority residing in the area.

4. Executive Orders and Due Process Clause

Another controversial aspect of Trump's Executive Orders is related to their compliance with the Due Process Clause established by the Fifth Amendment, which provides that "no

[19] Chae Chan Ping v. United States, 130 U.S. 581 (9 S.Ct. 623, 32 L.Ed. 1068).
[20] Hirabayashi v. United States, 320 U.S. 81
[21] Korematsu v. United States, 323 U.S. 214. With an abounding literature on the "defense" from foreigners during times of war and terrorism, see, among the most recent texts, B.A. Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (2007); I.F.H. Lopez, *A nation of minorities: race, ethnicity, and reactionary colorblindness*, in Stanford Law Review, Vol. 59, 4, 985-1063 (2007).
[22] Graham v. Richardson, 403 U.S. 365 (1971).
[23] Plyler v. Doe, 457 U.S. 202 (1982).
[24] Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993).

person shall be […] deprived of life, liberty, or property, without due process of law". The Due Process Clause – in its procedural meaning – guarantees that the limitation of fundamental rights be implemented through fair and impartial rules, such as the right to sufficient notice, the right to an impartial arbiter, and the right to give testimony and present relevant evidence at hearings[25].

In light of this, it is necessary to distinguish, according to legal precedents, between those aliens who are yet to enter US soil, and those who, despite also being affected by the Executive Orders, have already entered. In fact, aliens who are still outside of the US territory do not have any constitutional right to entry: the power to admit or exclude aliens is a sovereign prerogative and aliens seeking admission to the US request merely a privilege[26]. Likewise, there is no constitutionally protected interest in either obtaining or continuing to possess a visa card. Therefore, since the due process guaranteed by the Fifth Amendment only applies when the Federal Government seeks to deny a liberty or property interest, aliens outside of the US would not be entitled to put forward any claim in this regard[27].

Conversely, because all alien "persons" already within the US, even if affected by the Executive Orders, are safeguarded by the Due Process Clause, they would be entitled to Fifth

[25] On procedural due process see H. J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975); R.L. Glicksman & E.R. Levy, *Administrative Law: Agency Action in Legal Context* (2010). For an illustration of case law see E. Chemerinsky, *Procedural due process claim,* 16 Touro L. Rev. 871 (1999). See also*:* Wisconsin v. Constantineau, 400 U.S. 433 (1971); Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); Mackey v. Montrym, 443 U.S. 1 (1979); Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). Conversely, as it is renowned, the due process clause, in its most concrete sense, is a principle allowing courts to protect certain rights deemed fundamental from government interference, even where procedural protections are present or where those rights are not specifically mentioned elsewhere in the Constitution. The most recent work on this topic is D. Bernstein, *The History Of 'Substantive' Due Process: It's Complicated*, 95 Tex. L. Rev. 1 (2016), to be consulted regarding the necessary jurisprudential and doctrinal references.

[26] See Landon v. Plasencia, 459 U.S. 21, 32 (1982).

[27] See Knoetze v. U.S., Dep't of State, 634 F.2d 207, 211 (5th Cir. 1981); Azizi v. Thornburgh, 908, F.2d 1130, 1134 (2d Cir. 1990); Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs, 104, F.3d, 1349, 1354 (D.C. Cir. 1997); De Avilia v. Civiletti, 643 F.2d 471, 477 (7th Cir. 1981).

Amendment protection, regardless of whether their "presence here is lawful, unlawful, temporary or permanent"[28]. Specifically, it has been acknowledged that aliens have significant due process interests that must be protected in deportation hearings. Thus, at the very least, before deportation aliens are entitled to prior notice of the nature of their charges, and a meaningful opportunity to be heard[29].

Subsequently, although the Executive Orders do not address deportation measures in case of their violation, it must be recognized that said measures will have to abide by the above mentioned minimum procedural guarantees. Nonetheless, some provisions applicable to visa holders coming from the banned countries have already appeared to be problematic. Namely: section 2(c) seems to deny re-entry to lawfully permanent residents and non-immigrant visa holders without constitutionally sufficient notice and opportunity to respond; the same section 2(c) prohibits lawfully permanent residents and non-immigrant visa holders from exercising their separate and independent constitutionally protected liberty of travelling abroad and thereafter re-entering the US; finally, section 4 contravenes the procedures provided by Federal statute for refugees seeking asylum and related relief within the US[30].

5. Executive Orders and the Federal system of the United States

The last consideration to be made is with regards to the compatibility of the Executive Orders with the Federal structure of the US. This issue, which might seem secondary at a glance, and has not predominantly featured in the heated public debates, has actually proved crucial for the decision that has led to the suspension of the first Executive Order.

In the case *State of Washington v. Donald Trump*, both the Court of Seattle in the first instance, and the US 9th Circuit Court of Appeals in the second (and in much less concrete terms), stated

[28] See Zadvydas v. Davis, 533 U.S. 678, 693 (2001).
[29] Reno v. Flores, 507 U.S. 292, 306 (1993); Choeum v. I.N.S., 129 F.3d 29, 38 (1st Cir. 1997); Demore v. Kim, 538 U.S. 510, 523 (2003).
[30] See U.S. Court of appeals for the 9th Cir., No. 17-35105, D.C. No. 2:17-cv-00141., 20.

that the first Executive Order, even if enacted while fulfilling an exclusive competence of the Federal Government (immigration and entry), excessively restricted certain responsibilities of Member States, which are unavoidably interconnected to those of the Federal Government. Specifically, the first-instance judgment reads: "the Executive Order adversely affects the States' residents in areas of employment, education, business, family relations, and freedom to travel. These harms extend to the States by virtue of their roles as *parens patriae* of the residents living within their borders. In addition, the States themselves are harmed by virtue of the damage that implementation of the Executive Order has inflicted upon the operations and missions of their public universities and other institutions of the higher learning, as well as injury of the States' operations, tax bases and public funds"[31].

In order to address these critical points, the second Executive Order allows for two hypotheses, whereby the ban may be waived according to a case-by-case assessment: if a) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, is outside the United States on the effective date of this order, seeks to re-enter the United States to resume that activity, and the denial of re-entry during the suspension period would impair that activity (Sec. 3, c, I); and, if b) the foreign national has previously established significant contacts with the United States but is outside the United States on the effective date of this order for work, study, or other lawful activity (Sec. 3, c, II).

The enhancement of the thesis carried forward by the two Federal judges is primarily a consequence of the need to evaluate the existence of an "irreparable harm", that is a necessary element in order to accord a temporary restraining order[32]. However, based on the ruling of the substance of the case, this argument seems likely to remain a background noise, especially thanks to the amendments presented in the second Executive Order.

[31] See U.S. District Court, Western District Court of Washington at Seattle, case no. C17-0141JLR.

[32] See Granny Goose Foods Inc. v. Bhd. Of Teamsters & Auto Truck Drivers Local No. 70 of Alameda City, 415 U.S. 423, 439 (1974); Winter v. Nat. Res. Def. Council Inc., 555 U.S. 7, 24 (2008).

6. Conclusion

In conclusion, within the intricate panorama of the law, it is rather difficult to predict the outcome of the decision of the Supreme Court on President Trump's Executive Orders. A decisive role will certainly be played by the political cleavage: this was clearly demonstrated by the Supreme Court deadlock in 2016 (*U.S. vs. Texas*)[33], when justices exactly split between republicans and democrats (4-4), with regards to former President Obama's Executive Order, allowing irregular immigrants to sojourn temporarily on US soil.

Nonetheless, this future verdict – as shown in the above mentioned cases – will unquestionably influence the interactions between the jurisdiction, Presidency, and Congress, partly contributing to the redefinition of powers within a constitutional system, such as that of the US, divided among "separated institutions competing for shared power"[34].

[33] United States v. Texas, 579 U.S. (2016).

[34] C. Jones, *The Separated Presidency*, in A. King (ed.), *The New American Political System* (1990), 3.

BOOK REVIEWS

ANGELA FERRARI ZUMBINI,
LA REGOLAZIONE AMMINISTRATIVA DEL CONTRATTO. ATTI AMMINISTRATIVI CONFORMATIVI DELL'AUTONOMIA NEGOZIALE, GIAPPICHELLI, TORINO, 2016 (390 PP.).

A REQUIEM FOR THE CONSTITUTIVE JUDGMENT?

*Ferruccio Auletta**

1.

Having been entrusted[1] with the examination of the opening contribution in the series "*Il diritto amministrativo: variazioni*" (directed by Giacinto della Cananea, Daria de Pretis, Marco Dugato, Aristide Police and Mauro Renna) a grim reflection immediately comes to the mind of the procedural law scholar, namely: if it is now possible that "administrative acts may constitute contractual relations", "as it is not necessary for the parties to manifest their common desire to enter into a contract" (p. 225); and it is also possible that "they may bring contractual relationships to an end" (pp. 226 f.), all this remaining firmly outside any "regulation conferring the *specific* power exercised", what is now the purpose of the constitutive judgment? What purpose is served by the fact that (alone) above the judge – the power of the State, better armed than any other with the guaranty provided by the Constitution – continues to encumber the law in order to use, case by case, its power to "create, modify or extinguish legal relationships with effect between parties" (art. 2908 Italian civil code)?

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[1]As on 20th June, 2016 on occasion of the presentation of the volume at the Department of Social Sciences at the Federico II University of Naples, where I was sent to speak alongside my colleagues Stefano D'Alfonso, Giacinto della Cananea, Lucilla Gatt, Renata Spagnuolo Vigorita and Aldo Sandulli.

In fact, if it were true that "administrative acts can produce the establishment of a contractual relationship between private bodies, but they can also [...] determine their early termination" (p. 4), then the system would be seriously exposed to allegations of (in)consistency because, after eliminating the judge subject to the law (*praevia*, *stricta*) of the case, the administration itself would then be the arbiter of the "exercise of discretionary administrative power" so that the constitutive or extinguishing effect "would come directly and immediately from the law" (p. 11). In brief, it would be both an atypical and menacingly authoritarian and illiberal power: indeed, "if the requirement of typicality is respected by constitutive power as a whole, the content of the acts adopted is not equally typical [...]. Therefore, private bodies suffer a limitation to their contractual freedom [...] what is more, with obligations established by the authority at its discretion even in terms of the *quid*" (p. 106).

Moreover, if examined together with the constitutive judgment, more startling (and worrying) aspects emerge: on the one hand, while administrative acts with constitutive effects (and therefore) performed by a judge (this is the topic of voluntary jurisdiction, declaredly alien to the volume: cfr. p. 24, nt. 49) are designed to respond to the strict principle of typicality; and, on the other hand, the minimum legal standards required in administrative actions of the kind considered here (at best being a matter for primary legislation: pp. 204 ff.) would not remain within its confines, as there would also be consequences in the judicial process, where the degree of reserve in terms of the law is rather different (arts. 108, 111, 117 Italian Constitution).

Let us consider, taking an example from the book, a case where the administration establishes a form of contract, "with an obligatory formal requirement *ad substantiam* or *ad probationem*" (p. 108). Such a discretionary choice would, in all evidence, also damage the parties involved (as "the evidence of witnesses is permitted only [...] when the contracting party has, through no fault of his own, lost the document that provided evidence"), which depends for its form on art. 2725 I. c.c. And then, it would no longer be true, as it says *there*, that only "the law or the will of the parties" can require that "a contract must be evidenced in writing." *Here* – in fact – there would be neither one nor the other.

2.

The scholar of procedural law feels a sense of relief, when addressing the (hypothetical) production of specific constitutive effects of contractual relations through the administration: the author – it should be pointed out – states, with regard to the so-called constitutive administrative acts, raised to the status of *self-standing*, that "unlike potestative rights, the holder of power is always outside the legal relationship which said power will affect. In fact, the 'conforming' regards the contractual autonomy of individuals (in the abstract) and is manifest (in practice) in contractual relations to which the authority is not a party. It is expressed through unilateral acts and is performed by the holder for an interest that is not shared" (p. 258).

Thus, the thought arises that with regard to the constitutive action at issue and the constitutive-extinguishing effect that (perhaps) depends on it, what needs to be taken as the point of reference rather than the "relationship", or even the contract (regarding which it appears safe to argue that it is an entity destined to precede and follow - in any case - the exercise of administrative power being investigated and thus remain indifferent to it in terms of the *substance*), is the subjective legal situation of each Contracting Party or both (but individually), and not so much the relationship that exists between them in any case.

This would seem to be the conclusion we get from reading § 2.5 of Chapter VI (*Structural and functional aspects of conformative administrative acts*), where no mention is made of the actual effects of the creation or extinguishing of real legal relationships, speaking only of "automatic constitution of the contract" or "the obligation to make exist" (p. 260), which implies the Administration's inability to give or take away existence (as a whole) in relation to the contractual autonomy of others, indeed presupposing its existence; and even more so from reading what, despite the affirmation that it is "always" a question of effects of a constitutive nature (p. 239), the author means when she says that there "are always two private legal spheres affected by the exercise of (constitutive) power"(p. 259).

In this case then, is it the individual subjective legal situation of the recipients that comes to the fore or the postulated constitutive (or extinguishing) effectiveness of their relationship or contract? For the author, it makes no difference, so much so that

"constitutive effectiveness – identified as a characteristic feature of the category – can taken on many forms to establish, modify or extinguish a subjective legal situation *which, in terms of constitutive acts, always imply a contractual relationship*" (p. 239).

Except that, while not "changing the proceduralist's mourning into dancing", the examples given in the study continue to paint a picture of a system in which the only truly constitutive power is judicial.

In the sole case (see. pp. 98 f., 225 f.) of the so-called "imposed contract" (as the case of the "obligation to contract" would only be a matter for judicial ruling in terms of its actual coming into existence), there are, in my view, a range of arguments for an alternative understanding, where the source of the obligations of each of the parties to the outcome of the exercise of administrative power does not become a *new* "contract", but perhaps an [administrative] act that can produce one in accordance with the legal order (art. 1173 cc), thus being one of *variae causarum figurae*.

On the question of the *imposed contract*, the author writes that: "the authority has therefore established the extended validity of the contract beyond the scope of the agreement between the parties" (p. 102), as one of the parties had already invoked the power to apply the termination clause within the contract. But this is not enough, in my opinion, to lead us to believe that it is thanks to an administrative act that a contractual relationship has been established *ex autorictate* whose content is also established by the administrative authority (p. 103).

Despite its different origin and the fact that it is destined to continue, the relationship does not appear new, nor does the administrative measure have any (other) power to affect the efficiency of the power of a private individual, whose effect it precariously neutralises. Whether this efficiency remains or is lost, the relationship is still the same, intangible in its identity, and there is no alternation between an original and genuinely private one and another that is imposed *jure imperii*, as may happen more generally with regard to non-enforceability arising *per factum principis* of a private power within the context of a framework contract (the case of arbitration awards under art. 1, c. 25, of the Severino Law and the Constitutional Court's judgment n. 108/2015 might serve as a paradigm of the conventional

permanence constraint *i.e., the same contract until (and beyond)* of the contract until (and beyond) the possible removal of the cause of ineffectiveness imposed upon the unilateral power of access to arbitrators).

The case of the administrative act allegedly able to end the effectiveness of the relationship or the contract of others is no different: but there is no real example even of this, in fact here the very words used by the author suggests – regarding the one example provided – that it is not a matter, in terms of the public power to affect, of a sufficient cause of effective extinction. In fact, she says that the act "imposes the termination", and not that it *actually* terminates the relationship (see p. 227).

The expert in procedural law, then, can still hope that the only power to "create, modify or extinguish legal relationships, with effect between the parties" remains, in its own way, the judicial authority.

3.

The different conceptual treatment that emerges also has other consequences, of course more noticeable in the field of legal protection than elsewhere (a field with other avenues of interest for scholars of procedural law, such as, for instance, means of exercising control over technical discretion, see pp. 308 s.).

The author declares, "a characteristic of constitutive acts is that they have an impact on contractual relationships. Administrative acts normally affect the legal position of a person or body, but the acts at issue are so specific and distinctive that they produce their effects on a contractual relationship and not on a legal position in itself. This characteristic causes numerous further consequences which are then examined, and what immediately stands out is that the act always has at least two subjects (the direct subject of the constraints, and an indirect one, i.e the contractual counterpart, who may assume various positions with respect to the act, increasing or restricting his/her powers)" (p. 107).

Now, beyond the fact that the true constitution or extinction of contractual relationships ought to be able to follow/proceed from the access of protected situations to forms of direct judicial protection (through the possible non-application of the administrative act and, in the abstract, the enforceability of a

regulation *pursuant* to art. 41, paragraph 2, of the Code of Civil Procedure by the Administration), no asymmetry in the power to act, and still less in the regulation of the duties (and preclusions) of the parties, appears consubstantial with the phenomenon. In short: the parties to a legally constituted or extinguished relationship cannot then be divided into direct or indirect subjects without the risk of confirming that the administrative structure has in fact affected (in a different way) the individual subjective situations and not (in the same way) the contract itself (which, in my opinion, is precisely the preferable opposite view).

Conversely, the question of the power constituting or extinguishing the contractual relationship of others, if and when it emerges, is naturally able to explain the presence of the "requirement to make immediate and timely appeal" (p. 337) or the effectiveness of *res judicata* "for all the contracting parties whose relationship had been brought into being by the contested measure" (p. 333); and yet this may not be logically compatible with the identification of a distinction between the categories of "indirect subjects – contractual counterparties alongside those of the direct subjects" (p. 296). The parties to a contract created from nothing or reduced to nothing are, isonomically, both direct and necessary subjects: each one is obliged to appeal, each is a necessary party to the judgment and, of course, the immediate recipient of the judgment. So, if we really wish to imagine an incidental extension of the authority towards the so-called indirect subjects, it may perhaps be necessary to think of the subjects as being in a position of giving or receiving cause to or from one of the parties and in respect of which a differentiated position, marked by interest concerning the nature of the contractual relationship may seem remarkable.

4.

Ultimately, "constituting, modifying or extinguishing legal relationships with effect between the parties" seems still to be the task of the judiciary, and the liberal guarantee of the "cases provided by law" a further valid protection, since, as I have learned, a "court hearing is required for the same reason that one may not take the law into one's own hands" and "explains why

the legislator has wished to reserve to its prior assessment of eligibility the use of a such an incisive form of protection"[2].

[2] G. Verde, *Diritto processuale civile*, I, (2015) 138.

ANGELA FERRARI ZUMBINI, LA REGOLAZIONE AMMINISTRATIVA DEL CONTRATTO. ATTI AMMINISTRATIVI CONFORMATIVI DELL'AUTONOMIA NEGOZIALE, GIAPPICHELLI, TORINO, 2016 (390 PP.).

*Aldo Sandulli**

This is the first volume in a new series of studies on administrative law (called "variations"), directed by five well-known scholars of the subject.

It is the author's debut monograph, though she has to her credit various substantial essays on public goods and has gained experience abroad, including periods of study in Germany and the United States.

This book was not, however, written simply as a means of obtaining a formal academic qualification, and it thus eschews the all too frequent descriptive survey approach that has characterised so many publications over the last half decade. The layout and structure are well defined and the thesis is original, namely that a panoply of administrative acts affecting private individuals have sprung up, giving rise to a new typology of acts (including both rulemaking and adjudications) so that the principal of contractual autonomy is not merely limited, but shaped and moulded by government authority.

This work also has something of the "old" about it, and is reminiscent of methodological choices from the past, perhaps influenced by the author's studies in Germany, or her early private law background. It is no coincidence that she frequently uses the terms "dogmatic" and "systematic", now fallen into disuse. The approach is strictly juridical and, one might almost say, it even applies the old legal method, as the reasoning is elegant and almost mathematical, although it takes the concrete analysis of actual cases as a starting point.

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Unlike many books on the subject of administrative studies where it has become difficult to discern what precisely their subject area really is, Ferrari Zumbini leaves the reader in no doubt whatsoever: this is a study in law. And this is most certainly one of the volume's main qualities, though one may still wonder whether, in a context dominated by legal uncertainty and the increasing blending of different areas of research, administrative law is still characterised by dogmas; and whether systematicity may be, if anything, an aspiration, or a goal to be aspired to, rather than a feasible and concrete reality.

On the other hand, it sheds light on how a set of principles and, indeed, "dogmas" from the past are now to be considered obsolete, such as the prohibition of implicit powers and the principle of the typicality of administrative acts. It describes an evolving framework of relations between public and private law, which are, in fact, very difficult to draw together into a system.

After an introductory chapter, which aims among other things to describe the antecedents of the phenomenon (a classic example from the past was the imposition of fixed prices), the book is divided into three parts.

The first, which aims to describe the phenomenon in general, examines a sector subject to regulation by an independent authority (electronic communications) and one that is subject to regulation by a traditional administrative authority (gaming and betting). With regard to electronic communications, various obligations are analysed, namely transparency, non-discrimination, access and interconnection, universal service, prior approval of a draft contract, the prohibition of the unjustified bundling of services, enforcement of the right of withdrawal, the provision of automatic compensation for users and – especially – price controls. Regarding the public gaming sector, the cases examined relate to the prior issuance of a standard contract model, the prior approval of the contract, changes and additions to contracts that have already been stipulated, the *ex post* limitation of the number of contractors, limits on the economic activities that can be carried out, and the range of lawful contractual subject matter permitted.

The second part is interpretative and examines the phenomenon, first from a private law perspective; that of the limitations to contractual autonomy imposed by administrative

acts of this kind, and then from a public law perspective, in terms of the effectiveness of such acts. Regarding the former, the text shows first of all that administrative acts affect all the elements of the contract, in compliance with art. 1325 of the Italian civil code (agreement, cause, object, form) and, in terms of the second, that these acts become sources of contract law (in the sense that the power whereby the administration imposes its effect of conformity does not originate expressly and precisely with the law) and that these acts have prescriptive and necessarily trilateral effectiveness (involving, therefore, at least two other parties in addition to the public element).

The third part, aiming to build up a systematic profile, identifies the structural and functional elements of the acts in question and examines aspects of judicial protection. As for the first topic, the author stresses the universality and multi-functionality of this type of act, while, in relation to the second, she highlights the most interesting characteristics associated with protection, focusing in particular, in the final part, on the judicial review of the discretion involved in the technical evaluation.

Do acts creating these trilateral contractual relations constitute a new category of administrative act, as the author suggests? Perhaps the answer to this question is not the most significant aspect of the book. More important than the taxonomic aspect seems to be the fact that the volume points to a growing phenomenon, thus adding an important new piece to the mosaic that lies in that middle ground that is the relationship between public and private law, an area that constitutes the most significant legal development of the last few decades. It is not, as Ferrari Zumbini clearly shows, a unidirectional relationship. It is not simply a question of introducing some of the institutions of private law into areas traditionally coming within the province of public law. Rather, it is bidirectional, as principles, rules, and institutions from public law also come to exert their influence on private law. These aspects have long been recognised by legal scholars: one recalls the studies by Salvatore Romano and Lina Bigliazzi Geri and the possibility of legitimate interest in private law, the limitation of private power in relation to the weaker party, the possibility of the functionalisation of agreements, re-examined here by the author, or the possibility of the proceduralisation of a contract. The strength of this book is the

way it illustrates their diffusion through the mapping of two sample areas.

In recent decades, the phenomenon has increased dramatically, as the author most ably illustrates. And the bidirectionality mentioned above dispels the myth of European Union law favouring the private invasion of public law, contributing to the decline of the public sphere. In reality, the volume shows that European law, from a functionalist perspective, also allows the opposite flow, with public law influencing private law when its mechanisms are better suited to achieving the objectives of the European system, and when the needs of public regulation may be necessary to obtain the best results from the balance between private interests in the regulated sector.

This is particularly marked within the various branches of economic law, of which the author argues that the area of electronic communications is certainly part. On the other hand, she places the gaming and betting sectors in the area of public safety and order. This is certainly true, but it is also true that in recent years, this sector has become strategic in keeping the public finances and therefore has a certain importance also in this area. The administrative activities of the ADM (the Italian Agency for Customs and Monopolies, which is competent to regulate the gaming sector) are therefore directed to overseeing the sector in order to achieve a twofold purpose: on the one hand, the ADM must combat illegal betting and organised crime; on the other hand, it must also ensure that the State receives the expected revenues from gaming and betting.

The power of public regulation that the legislator confers on the administrative authority is often an open one, meaning that it overturns every assumption and, indeed, the traditional "dogmas": it overcomes the ban on implicit powers, as the power conferred by law does not list a taxonomy of areas and modes of intervention: it bypasses the principle of typicality as it permits the adoption of acts that are not in fact categorised by the law, and which may thus be considered atypical. It follows, according to the European evolution, that power is no longer directly bound in its purposes by the law, which does nothing more than envisage the control of the sector by the authority, which then adapts it on

the basis of the public use required, but always under the aegis of the general principles of law and administration.

Here, at the end of the journey, we find the fundamental underlying question: to what extent can an administrative act set limits to the contractual autonomy of private individuals? For the author, it is the principles of law (in particular, those developed by European law) that guide the administration and the courts: the principles of reasonableness, proportionality, non-discrimination and legitimate expectations. Of particular interest, in this sense, is the part on judicial review on aspects of technical discretion, since most limitations on contractual autonomy are due to acts issued in the exercise of technical assessment. The author analyses some well-known theories which aim, on the one hand, to underline that courts cannot go so far as to replace the questionable technical assessments upon which some administrative acts are based; and, on the other, to show that indeed courts may very well go so far as to resort to this kind of judicial review. There is also an examination of the most recent guidelines for the administrative courts with a view to allowing judicial review of so-called technical discretion under special conditions and by means of *the two-step doctrine* mechanism, which, in some ways, is a sort of proportionality test to be applied to what might be referred to as the discretion involved in technical evaluation. Most of the cases analysed in the book reinforce the idea of a non-superficial judicial review, being, as mentioned above, characterised by an open power granted by the legislator, so that the authority is essentially *master* of the sector, and judicial review of the technical assessments is often the only counterweight to the exercise of a power, which, otherwise, would not encounter any kind of obstacle.

Ferrari Zumbini's book is also significant for another, more general, reason. It is yet another demonstration of the importance of that branch of administrative law where principles and rules of public and private law interact: areas where public law specialists and their private law counterparts must get used to working closely together, each examining the problems from their own standpoint and laying the traditional disciplinary boundaries aside.