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EDITORIAL

ON LAW AND POLITICS IN THE EU: THE RULE OF LAW CONDITIONALITY

*Giacinto della Cananea**

1. Rule of law, separation of powers and the courts

Not surprisingly, there are various opinions about what the rule of law means and implies. Long-standing debate has emphasised either the procedural or the substantive aspects of the question. In a similar vein, a distinction has been made between formal and substantive theories of the rule of law. The formal theories argue that laws are not required to have any particular kind of content but should simply constrain the exercise of power, while the latter emphasises the necessity of 'good laws', also protecting at least certain individual rights[1]. Although this is an important distinction, it must be observed that both theories reject the assertion that constraining political institutions and simultaneously protecting rights in courts is inherently undemocratic.

In Western Europe, this assertion became widespread after 1945, when the intolerable consequences of unlimited and unchecked power became manifest, even more so after 1989. Within the EU, it is axiomatic that the rule of law is one of the central values on which the Union is based, together with liberty, democracy, and the respect of fundamental rights. Judicial review plays a critical role because national authorities carry out most EU policies under the control of national courts. Weakening judicial review, for example, by undermining judicial independence on the part of the executive branch, poses threats for the supremacy of EU law over national law, which is why the rule of law crisis in the wake of the actions of certain Member States, notably

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[1] P. Craig, *Formal and Substantive Conceptions of the Rule of Law*, 51 Publ. L. 467 (1997).

Hungary, Poland and Romania, is so severe and has been taken very seriously by the Court of Justice. National measures running counter to the rule of law have thus been found to be tainted with invalidity. The political mechanism established by Article 7 TEU has been activated too, but it has not thus far produced any concrete effects, while a reaction has emerged against what is perceived to be a sort of "tyranny of values", as they are unilaterally regarded by EU institutions. Meanwhile, the European Court of Human Rights has handled various issues according to the standards it has defined and refined in previous decades, including the appointment of judges, the duration of their term in office, and the existence of guarantees against external pressure (for example, in its Judgment of 23 June 2016, Baka v Hungary, application n. 20261/12).

2. The rule of law and EU finances

It is against this background that more recent developments, which concern the rule of law in the context of the conditional use of the finances of the EU, will be examined.

In what some observers view as a fundamental institutional and political change, the EU has elected to address the pandemic crisis by establishing the Next Generation EU, a package worth 750 billion euros, due to operate from 2021 to 27. Within this framework, EU institutions currently provide both loans and subsidies to the Member States intending to receive them. These then submit their national plans, setting out their objectives, targets, and instruments. NGEU is innovative firstly because of the choice to use common debt and secondly because its legal framework governing expenditure is based on conditional funding.

Conditional funding is in itself neither new nor surprising. Within federal and confederal polities, central institutions often provide other public authorities such as regional and local governments, with grants-in-aid: public funds which must be used for a specified purpose and in a specified manner. These funds must therefore be distinguished from those, often termed block grants, that may be spent in a more discretionary manner. Within federations and confederations, there is continuous debate between advocates of grants-in-aid and supporters of block grants

as to which method of distributing public money promotes its more effective use, all the while respecting the autonomy of the institutions and bodies that receive the grants.

The conflict between these views has been exacerbated by the ambiguity of the action taken by the European Council. On the one hand, exercising its power of political direction in its meeting of 10 and 11 December 2020, the Council agreed on the essential features of the draft Regulation governing a general regime of conditionality to protect the EU budget. On the other hand, its declaration is, to say the least, ambiguous in several respects, to which we will return shortly.

Meanwhile, it may be observed that, after the meeting, the Council of Ministers adopted both Regulation n. 2020/2092 and the decision on the own resources of the EU. The Regulation was adopted with a qualified majority due to the opposition of Hungary and Poland concerning the rule of law. It requires the Member States to satisfy several conditions regarding the use of the financial resources provided by NGEU. Among these conditions are various standards traditionally associated with the rule of law, such as the principle of legality, the prohibition of arbitrariness, effective judicial review, and judicial independence. The Member States will have to elaborate and implement their plans without breaching the standards. Any breach of the rule of law, such as endangering judicial independence and limiting accountability, will give rise to "appropriate measures" to protect the EU budget in accordance with the principle of proportionality. Considered in itself, the Regulation may thus be viewed as being "a step forward in protecting the rule of law, albeit more timid than might have been hoped"[2].

3. The ambiguity of the European Council

The provisions described above would appear to give the Commission discretion to handle breaches of the rule of law. However, the European Council's declaration is framed in different terms. Firstly, it refers to full respect of Article 4 (2) TEU concerning the national identities of Member States. It is clear that

[2] T. Tridimas, *Editorial Note: Recovery Plan and Rule of Law Conditionality: A New Era Beckons?*, 16 Croatian Yearbook of Eur. L. & Pol. VII (2020).

such national identities are invoked as a sort of counterweight to the emphasis placed on the rule of law.

Secondly, the declaration impinges on the Commission's action. Not only does it require the Commission to define guidelines ("in close consultation with the Member States") and a methodology for carrying out its assessment, but, if an action is brought against the Regulation, "the guidelines will be finalised after the judgment of the Court of Justice so as to incorporate any relevant elements stemming from such judgment". Moreover, until the guidelines are finalised, "the Commission will not propose measures". This implies that the Commission's action on measures that affect the budget is not subject to the standard rules for such an action because the guidelines must follow judicial decisions instead of being reviewed by the Court. There will be no difficulty challenging the Regulation before the Court, as has already been the case. This raises an interesting question as to how far the criteria agreed by the European Council will apply – if they affect the institutional balance of the EU – given that they are highly detailed, as opposed to the broad policy guidelines that it ought to give.

It could be argued that the European Council resolves the matter by clarifying that the mechanism delineated by the Regulation is subsidiarity in character. The first argument in favour of this conclusion is that the measures it establishes will be applied only where other procedures, including infringement procedures and budgetary instruments, "would not allow to protect the Union budget more effectively". On the one hand, however, this presupposes that the Commission has the authority to decide the matter of the "effective protection" of budgetary interests for itself. This is not self-evidently correct. Another argument is that the Commission may only act if there has been an impact on the budget. Moreover, the declaration specifies that the negative consequences on the financial interests of the EU "will have to be sufficiently direct and be duly established".

Thirdly, according to the Council's declaration, the "mere finding that a breach of the rule of law has taken place does not suffice to trigger the mechanism". If the elements of fact and law do not suffice to trigger the new mechanism, it is because any formal opening of the procedure must be "preceded by a

thorough dialogue with the Member State concerned". The preconditions thus tend to look like obstacles.

4. A perspective

The new mechanism to safeguard the rule of law and the financial interests of the EU will evolve over time, and several factors will be of prime importance in shaping its legal effects in the coming years. The most immediate of these is the internal balance of power within the political institutions of the Union. In formal terms, the Regulation confers power on the Commission. Nevertheless, the preconditions set out by the European Council have the potential to paralyse its operation. The problem is not that the Commission's actions must be preceded by dialogue, which is already the case in infringement procedures. Instead, the problem is the extent to which no action can be taken prior to the judicial challenge brought by a Member State being considered by the Court. The second factor that will exercise notable influence over the mechanism is, therefore, the Court. Its assessment and weighing of the relevant interests will clearly be crucial. By contrast, room for independent policy initiatives by the European Parliament is limited within this mechanism. It is therefore not surprising that some of its members have urged the Commission to act without delay.

Last but not least, the role of legal scholarship should be considered. In recent years, some public lawyers have called for heightened attention to systemic deficiencies in the rule of law. The European Council's declaration, however, takes the opposite tack. It distinguishes "the closed list" of elements that the Commission can consider and "generalised deficiencies". The political intent is clear. However, our regime of public law has been shaped not only by political initiatives and judicial decisions; it has also grown from the work of writers who have not hesitated to criticise both these factors in the light of their conceptions of, among other things, respect for the rule of law and fundamental rights, as well as the separation of powers. Their observations have often led to changes in the norms with which we currently operate, or else they have constituted a constant and vital source for their critique. There is no reason why this should not also happen in relation to the conditions that will influence the implementation of the new mechanism.

THE PRECAUTIONARY PRINCIPLE IN THE ADMINISTRATIVE MANAGEMENT OF EPIDEMIOLOGICAL EMERGENCIES: FROM *AD HOC* RESPONSE MEASURES TO ADVANCE PLANNING POLICIES

*Francesco de Leonardis**

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1. Introduction

The emergency unleashed by the SARS-CoV-2 virus has produced a tsunami-like wave of changes not only on the medical, economic and social levels but on a legal level[1] as well.

Since the end of February 2020, the Italian legal system has been inundated by a veritable flood of resolutions and other types of legal acts. One may consider the resolutions passed by the

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[1] There are numerous journals and websites which have devoted special sections to a discussion of the legal issues related to the Covid-19 pandemic. Among these, we can mention the Covid-19 monitoring group of the University of Urbino; the Covid-19 emergency monitoring group of the online journal *Federalismi.it*; the section "Problemi giuridici dell'emergenza Coronavirus" of the online journal *Nomos: le attualità nel diritto;* various articles from the section "Leggi e istituzioni" of the online journal *Questione giustizia*; the forum on "Diritto, diritti ed emergenza ai tempi del Coronavirus" of the online *BioLaw Journal – Rivistadi Biodiritto*; the section "Diritto ed emergenza sanitaria" of the online journal *Il diritto dell'economia;* the monitoring group Comparative Covid Law; the forum "Emergenza Covid-19" of the monitoring group of the journal *AIC*; the dossier "Covid-19" of *Fondazione Astrid*; several articles from the online journal *Consulta Online*; the section "Speciale Covid-19" of the journal *Giornale di diritto amministrativo*, n. 3/2020.

Council of Ministers (Italian cabinet) that declared a state of emergency and subsequently extended it[2], the prime ministerial decrees (more than twenty), or the decree-laws [3] which are sometimes converted into permanent "confirmed" laws (almost thirty, among which we have the '*Cura Italia*' decree, the "Rilancio" decree and the series of '*Ristori*' decrees). There have also been ordinances from the extraordinary commissioner for the implementation and coordination of Covid-19 measures (more than thirty) and other civil protection ordinances (more than fifty). Beyond this, there have been ordinances and decrees from a number of ministries, first and foremost from the Ministry of Health (more than forty), but also from the Ministry of the Economy, the Interior, Infrastructure and Transport, Labor, Economic Development, Education, Agricultural Policies, Civil Service, Justice, the Environment, and Foreign Affairs[4]. Looking at different levels of government, we have seen ordinances from the presidents of the various Italian regions[5], as well as the contingent local ordinances and other urgent ordinances of the municipalities[6].

[2] In this context, 31 January 2020 represented the starting point of a chain of regulatory acts which has flooded the Italian legal system. See M. Luciani, *Il sistema delle fonti del diritto alla prova dell'emergenza,* 1 Consulta Online (2020). See also the resolutions of 29 July 2020, 7 October 2020, 13 January 2021 and 21 April 2021 extending the state of emergency.

[3] In using the term "decree-law" in this paper, we refer to article 77 of the Italian Constitution, which states that in extraordinary cases of necessity and urgency, the government may adopt "provisional measures having the force of law". These decree-laws "lose effect from their inception if they are not confirmed within 60 days from their publication".

[4] Very useful in this regard is the review *Covid-19: Documentazione e interventi del Governo* by the Covid-19 emergency monitoring group, edited by M. Malvicini (updated 21 July 2020).

[5] On this point, see the review *Covid-19: Documentazione e interventi delle Regioni in relazioni alle misure adottate per il contenimento dell'emergenza Covid-19 e relativa giurisprudenza amministrativa* by the Covid-19 emergency monitoring group, edited by S. Mallardo (updated 1 July 2020).

[6] The ordinances were passed by the municipal governments pursuant to art. 50, paragraph 5 of Legislative Decree n. 267 of 18 August 2000, but also pursuant to art. 32, paragraph 3 of Law n. 32 of 1978. Very useful in this regard is the review *Covid-19: Documentazione e interventi dei Comuni in relazione alle misure adottate per il contenimento dell'emergenza Covid-19* by the Covid-19 emergency monitoring group, edited by F. Severa (updated 7 June 2020).

If we add these to the list of interventions which have already occurred at the level of global law[7] and European law[8], it quickly becomes apparent that it comes to a vast amount of legal material. It will be an exceedingly difficult task to integrate these new resolutions, ordinances and laws into the existing legal system in a short period of time.

A large number of the institutions of public and administrative law (but also of labor law - think of "smart working" or layoffs -, contract law, bankruptcy law, tax law, and family law) have, in fact, been subjected to a sort of "stress test" by the pandemic[9]. In this connection we can mention: the relationship between government and parliament[10]; the relationship between

[7] Here we have a great wealth of material, starting with the declaration of a Public Health Emergency of International Concern (PHEIC) on 30 January 2020. In the context of that announcement, on the WHO website (Health Topics), a large amount of advice was published for the public; there were technical guides on some fifteen macro-topics (surveillance, national laboratories, planning, clinical care, research protocols, guidelines for schools, risk communication, etc.), as well as weekly reports and other relevant information.

[8] See for example the EU Commission Directive 2020/739 on including Covid-19 among the biological agents that can cause infectious diseases. For a more general introduction, see the special issue of the journal *Eurojus* with contributions by: F. Rolando, *La tutela della salute nel diritto dell'Unione europea e la risposta dell'UE all'emergenza Covid-19*; F. Munari, L. Calzolari, *Le regole del mercato interno alla prova del Covid-19: modeste proposte per provare a guarire dall'ennesimo travaglio di un'Unione incompiuta*; A. Arena, *Restrizioni Covid-19, mercato unico, situazioni puramente interne*; F. Rossi Dal Pozzo, *Trasporti e turismo in epoca di emergenza sanitaria Covid-19: il caso dei vouchers in alternativa ai rimborsi in denaro di titoli di viaggio, di soggiorno e di pacchetti turistici;* C. Fiorillo, *La protezione dei dati personali nel diritto UE e Covid-19*; G. Morgese, *Solidarietà di fatto … e di diritto? L'Unione europea allo specchio della crisi pandemica*; C. D'Ambrosio, *Dal Meccanismo Europeo di Stabilità ai "Corona Bonds": le possibili alternative per fronteggiare la crisi dell'eurozona a seguito dell'emergenza Covid-19;* E. Latorre, *Covid-19 e regole di concorrenza: rilievi nelle risposte della Commissione europea ad una pandemia globale*; C. Massa, *Covid-19 e aiuti di Stato: il Quadro temporaneo introdotto dalla Commissione e le misure di sostegno adottate dagli Stati membri*; T. Cimmino, *Covid-19 e pratiche commerciali sleali: la recente prassi della Commissione europea e dell'Autorità Garante della Concorrenza e del Mercato a tutela del consumatore*; A. Maffeo, *Gli effetti della pandemia da Covid-19 sul contenzioso dell'Unione europea.*

[9] F. Fracchia, *Coronavirus, senso del limite, deglobalizzazione e diritto amministrativo: nulla sarà più come prima?*, 3 Dir. econ. (2019).

[10] Among those who have most bitterly criticized the recourse to prime ministerial decrees (DPCMs), we can recall L.A. Mazzarolli, "*Riserva di legge*" *e* "*principio di legalità*" *in tempo di emergenza nazionale. Di un parlamentarismo che*

the prime minister and individual ministers[11]; the organization of work in the Italian parliament; the division of responsibilities between the state and the regions with reference to health care[12]; the relationship between nation states and the European Union[13]; the role of local authorities[14]; the protection of the citizens' right to health[15]; the guidelines pertaining to state aid; the system of the sources of law[16]; the freedom of movement, of assembly, of worship, of economic initiative[17]; the right to education and the public service that guarantees it; public transport; the environment[18]; immigration[19]; administrative procedures[20] and

non regge e cede il passo a una sorta di presidenzialismo extra ordinem, con ovvio, conseguente strapotere delle pubbliche amministrazioni: la reiterata e prolungata violazione degli artt. 16, 70 ss., 77 Cost., per tacer d'altri, 1 federalismi.it 23 (2020); G. Silvestri, *Covid-19 e Costituzione*, in *www.unicost.eu*, 10 April 2020; M. Calamo Specchia, *Principio di legalità e stato di necessità al tempo del "Covid-19"*, in *Rivista AIC*, n. 3/2020, 142ff. The opposite viewpoint is presented by E. Grosso in *La legalità ed effettività negli spazi e nei tempi del diritto costituzionale dell'emergenza: è proprio vero che "nulla potrà più essere come prima"?*, 1 federalismi.it (2020).

[11] Cf .M. Cavino, *Covid-19: una prima lettura dei provvedimenti adottati dal Governo,* 1 federalismi.it (2020).

[12] See G. Vesperini, *Il diritto del coronavirus*, 3 Giorn. dir. amm. 279 (2020).

[13] F. Gaspari, *Coronavirus, assistenza finanziaria dell'Unione Europea e "sentieri interrotti della legalità" costituzionale: per un ritorno alla Costituzione e alla sovranità nazionale*, 3 Dir. econ. (2020).

[14] I. Forgione, *La gestione locale dell'emergenza da Covid-19: il ruolo delle ordinanze sindacali, tra sussidiarietà e autonomia*, 2 Dir. econ. (2020).

[15] M. Noccelli, *La lotta contro il coronavirus e il volto solidaristico del diritto alla salute,* in federalismi.it (2020).

[16] M. Luciani, *Il sistema delle fonti del diritto alla prova dell'emergenza*, in *Consulta Online*, 11 April 2020. See also recently F. Spanicciati, *Covid-19 e l'emersione di un sistema amministrativo parallelo*, 3 Giorn. Dir. Amm. 317 (2020), who underlines that "the moltiplication of the sources of law is neither efficient nor justified by specific legal needs" (our translation).

[17] B. Raganelli, *Stato di emergenza e tutela dei diritti e delle libertà fondamentali*, 2 Dir. econ. (2020) and P. Pantalone, M. Denicolò, *Responsabilità, obblighi e coronavirus: l'ossatura dell'ordinamento nelle emergenze "esistenziali"*, 1 Dir econ. 4 (2020).

[18] Of particular interest were the conferences held by the Association of Professors of Environmental Law (www.aidambiente.it) on the various aspects of the pandemic related to environmental protection.

[19] A. Giuffrida, *Il rinnovo del permesso di soggiorno UE: un "premio" per l'integrazione degli stranieri? Riflessioni anche alla luce dell'emergenza Covid-19*, 1 Dir. econ. (2020).

[20] G. Strazza, *Il "tempo" del procedimento nell'emergenza Covid-19: considerazioni a prima lettura sulla sospensione dei termini*, 2 Dir. econ. (2020).

their simplification; the management of extraordinary powers[21]; digitalization; the civil, criminal and administrative process[22]; administrative bodies of a technical-scientific nature; the relationship between science and politics; the right to privacy; the prison system[23]; mobility in large urban centers; urban planning[24]; and public services.

In the current context of the epidemiological emergency, among the principles that have been used by legislators, administrators, lawyers and legal specialists[25] - not to mention in the discussions in the court of public opinion - a prominent role is played by the precautionary principle and the related principle of prevention.

Historically speaking, public health emergencies represent the laboratory in which the precautionary principle first emerged and was subsequently refined[26]. In fact, one of the first cases cited by legal doctrine to explain the essential idea of the precautionary principle refers to a public health emergency at the end of the 19th

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[21] S. Gardini, *Note sui poteri amministrativi straordinari*, 2 Dir. econ. (2020).

[22] F. Francario, *L'emergenza coronavirus e le misure straordinarie per il processo amministrativo,* 1 federalismi.it (2020); Id. (same author), *Diritto dell'emergenza e giustizia nell'amministrazione: no a false semplificazioni e a false riforme*, in *Federalismi.it*, 15 April 2020; Id., *L'emergenza Coronavirus e la "cura" per la giustizia amministrativa: le nuove disposizioni straordinarie per il processo amministrativo,* 1 federalismi.it (2020); Id., *Il non-processo amministrativo nel diritto dell'emergenza Covid-19*, 1 Giustizia insieme (2020); R. De Nictolis, *Il processo amministrativo ai tempi della pandemia*, in *Federalismi*, 15 April 2020; N. Durante, *Il lockdown del processo amministrativo,* in *giustizia-amministrativa.it*; M. A. Sandulli, *Nei giudizi amministrativi la nuova sospensione dei termini è 'riservata' alle azioni: con postilla per una proposta di possibile soluzione*, 1 federalismi.it (2020); Id., *Riflessioni "costruttive" a margine dell'art. 36, co. 3, d.l. n. 23 del 2020: proposta per una possibile soluzione per contemperare il diritto al "pieno" contraddittorio difensivo con le esigenze organizzative nei giudizi amministrativi*, in *giustizia-amministrativa.it.*

[23] G. Chiola, *Il coronavirus e la rivolta nelle carceri italiane*, 1 federalismi.it (2020).

[24] F. Cintioli, *Le conseguenze della pandemia da Covid-19 sulle concessioni di servizi e sull'equilibrio economico e finanziario*, 3 Dir. econ. (2020).

[25] F. Scalia, *Principio di precauzione e ragionevole bilanciamento dei diritti nello stato di emergenza*, 3 federalismi.it (2020). See recently also V. Di Capua, I. Forgione, Salus rei publicae *e potere d'ordinanza regionale e sindacale nell'emergenza Covid-19*, 3 Giorn. Dir. Amm. 332 (2020), who underline that the precautionary principle has "deeply changed the characters of the emergency administrative function" (our translation).

[26] M. P. Chiti, *Il rischio sanitario e l'evoluzione dall'amministrazione dell'emergenza all'amministrazione precauzionale*, 1 Riv. it. dir. pubbl. com. 1 (2006).

century in which an administration, faced with scientific uncertainty, found itself using precautionary measures *ante litteram* [27] (i.e. before the corresponding legal term had been officially codified.)

The precautionary principle has become the cardinal principle of the pandemic because it provides clear rules of conduct when administrations are faced with risk scenarios in which the outcomes are unknown or difficult to estimate (these are the "potential dangers to health and the environment" referred to in art. 301 paragraph 1 of the Italian Environmental Code, i.e. TUA – *Testo Unico Ambientale* –, Legislative Decree n. 152 of 2006). The current situation undoubtedly meets those criteria as administrations on various levels find themselves managing an emergency caused by a virus about which very little is known (here we can mention the long series of DPCMs, i.e. prime ministerial decrees, but also the regional and local ordinances which will be discussed later).

The proliferation of *ad hoc* technical advisory bodies such as the *Comitato Tecnico Scientifico* (CTS)[28], a development which has

[27] In 1854, in the London district of St. James, a cholera epidemic broke out that began to claim a large number of victims. The city health authorities found themselves in difficulty, not knowing what measures to take in dealing with an emergency of such magnitude. According to widespread knowledge at the time (studies had been carried out by the Royal College of Physicians), cholera was spread by air and, therefore, the administration should have taken measures to avoid contact between citizens (isolation, prohibition of passage, etc..). It happened, however, that a certain gentleman (Dr. John Snow, a physicist) observed that a number of deaths were linked to the use of a certain water source. Dr. Snow hypothesized that the spread of the disease was linked to the consumption of water coming from that particular fountain. The authorities, despite their uncertainty regarding the scientific arguments of the physicist, decided to prohibit the water supply to that source. Almost immediately, the cases of cholera decreased, and it was soon possible to eradicate the disease completely. Thirty years later, in 1884, the scholar Koch demonstrated that cholera was not spread by air, as previously believed, but rather through a vibrio (a type of bacteria) contained in water. It was therefore confirmed that the intuition of Dr. Snow had been correct. See P. Harremoes & oth., *The Precautionary Principle in the 20th Century: Late Lessons from Early Warnings,* London, Earthscan, 2002, 5.

[28] The Italian Technical-Scientific Committee was established on the basis of art. 2, paragraph 1 of ordinance n. 630 of 3 February 2020 from the Head of the Department of Civil Protection (see also the ordinance n. 371 of 5 February 2020). The purpose of the ordinance is to support the coordination of activities

incidentally also occurred in France[29], is something with which the Italian public is now familiar. This trend is a clear application of art. 301 of the Italian Environmental Code (TUA), which imposes certain procedural obligations. In accordance with that law, only those risks which can be identified as a result of "an objective scientific evaluation"[30] can be used to justify the application of precautionary measures.

As has been pointed out, the application of the precautionary principle legitimizes the use of very wide discretionary powers on the part of the public administration. Based on the criteria outlined in art. 301 of TUA, administrators must define terms like "dangers, even if only potential, for human health and the environment"; "high level of protection"; and "risk", the preliminary assessment of which must not only be "scientific" but also "objective". For the authorities who must apply the law, this leaves considerable room for interpretation, and the same is obviously true for the judges who are called upon to review the relevant acts.

The problems posed by the application of the precautionary principle are many: how should existing dangers to human health and the environment be assessed, especially if they are only "potential dangers"? What level of public authority is responsible for making the precautionary decisions? How can a "high" level of protection be adequately defined? What are the differences between the various levels of protection? And at what point does a possible risk become a probable risk? When can a technical evaluation be categorized as scientific, thus legitimizing precautionary measures? Does the scientific nature of the evaluation depend on the excellence of the person making the assessment? Is an isolated scientific opinion sufficient in justifying

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in overcoming the epidemiological emergency resulting from Covid-19. The CTS is made up of experts and qualified representatives of the state administration and other governmental bodies. Its composition was redefined by ordinance n. 663 (18 April 2020) from the Head of the Department of Civil Protection, and by the subsequent ordinances n. 673 of 15 May 2020 and n. 706 of 7 October 2020.

[29] President Macron set up a committee of experts for analysis and research (known as CARE) in order to obtain professional scientific advice on the Covid-19 emergency.

[30] One could discuss why there was a need to set up an *ad hoc* body instead of using existing technical bodies.

precautionary measures, or is it necessary to have a certain number of research institutes that share a particular thesis? When can a technical scientific evaluation be considered objective? Can such evaluations be based on experimental data?

As we can see, these are undefined concepts which careful legal doctrine has long invited us to reflect upon[31]. Consequently, we must now address the problem of compatibility between administrative actions inspired by precaution – which are therefore very indeterminate in nature – and respect for the principle of legality[32].

On the other hand, it is precisely in moments when legislators fail to promptly intervene that the precautionary principle is applied; it acts as a closing rule in the legal system when administrations are left without the necessary network of protections foreseen by the law in times of crisis characterized by technical and scientific uncertainty. Under truly unfortunate circumstances, this pandemic has provided us with ideal, almost laboratory-like conditions under which the functioning of the precautionary principle can be extensively examined.

In the course of this brief analysis, we will not dwell on the characteristics of the precautionary principle or on the principle of prevention, as a substantial body of literature[33] already exists on

[31] See A. Barone, *Brevi riflessioni su valutazione scientifica del rischio e collaborazione pubblico-privato*, 1 federalismi.it (2020).

[32] G. Manfredi, *Note sull'attuazione del principio di precauzione in diritto pubblico*, 4 Dir. pubbl. 1074 (2004).; see also M. Cecchetti, *Principi costituzionali per la tutela dell'ambiente* (2000).

[33] In this regard, we may refer to F. de Leonardis, *Il principio di precauzione nell'amministrazione di rischio* (2005); Id., *Tra precauzione e ragionevolezza,* in *Federalismi,* 2006; Id., *Articolo 301 TUA (applicazione del principio di precauzione)*, in *Codice dell'ambiente,* edited by Bottino et al., Milan, 2008; Id., *Il principio di precauzione nella recente codificazione*, in *Studi sul codice dell'ambiente* (2009), 77; Id., *L'evoluzione del principio di precauzione tra diritto positivo e giurisprudenza,* in *Principio di precauzione e impianti petroliferi costieri*, in V. Giomi (ed.) (2011); Id., *Principio di prevenzione e novità normative in materia di rifiuti*, in *Studi in onore di A. Romano,* vol. III (2011), 2079. Among the other authors who have dealt with these principles we can mention: I. M. Marino, *Aspetti propedeutici del principio giuridico di precauzione*, in *Studi in onore di Alberto Romano,* quoted, vol. III, 2177 ff.; N. Olivetti Rason, *Il principio di precauzione tra sicurezza e libertà*, in *Liber amicorum per Vittorio Domenichelli* (2018), 341; S. Cognetti, *Precauzione nell'applicazione del principio di precauzione*, in *Scritti in memoria di Giuseppe Abbamonte* (2019), I, 387; R. Ferrara, *I principi comunitari per la tutela dell'ambiente*,

those topics. Instead, we shall focus our attention on the application of those principles to the management of the current health emergency.

Moving forward, it is generally anticipated that the proposed solution will be to apply the precautionary principle in a different manner. If the use of the precautionary principle has so far been limited to the management of day-to-day government administrative business and the initial response to the crisis, the new suggestion will likely be that, henceforth, the principle should be increasingly applied to the spheres of planning and organizational activity[34] .

In other words – and as will be discussed in the concluding paragraphs of this paper –, advance planning is an absolutely

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in *Diritto amministrativo*, 2005, 509 ff.; S. Spuntarelli, *Normatività del principio di precauzione nel processo decisionale dell'amministrazione e legittimazione procedurale*, in F. Lorenzotti, B. Fenni (eds.), *I principi del diritto dell'ambiente e la loro applicazione* (2015), 21; S. Puddu, *Amministrazione precauzionale e principio di proporzionalità*, 4 Diritto e processo amministrativo 1155 (2015); P. Dell'Anno, *Principi del diritto ambientale europeo e nazionale* (2004) 90-91; F. Merusi, *Dal fatto incerto alla precauzione: la legge sull'elettrosmog*, 2 Foro amm. 221 (2001); M. Antonioli, *Precauzionalità, gestione del rischio e azione amministrativa*, 1 Riv. it. dir. pubbl. com. 45 (2017). The international literature is also extensive, therefore we shall limit ourself to cite U. Beck, *Risikogesellschaft. Auf dem Weg in eine andere Moderne* (1986); H.M. Beyer, *Das Vorsorgeprinzip in der Umweltpolitik* (1992); D. Bodanski, *The Precautionary Principle in US Environmental Law*, in T. O'Riordan, J. Cameron, *Interpreting the Precautionary Principle* (1994) 203 ff.; J. Tickner, C. Raffensperger, *Protecting Public Health and the Environment: Implementing the Precautionary Principle* (1999) ; D. Bourg, *Parer aux risques de demain: le principe de précaution (*2001); G. Corcelle, *La perspective communautaire du principe de precaution*, 450 Revue du Marché commun et de l'Union Européenne 447 (2001); J.P. Cot, *Le principe de precaution en droit européen et international*, in B. Guardiola, et al., *La prevention et la protection dans la société du risque: le principe de précaution*, Paris, 2001, 41 ff.; N. De Sadeleer, *Environmental Principles. From Political Slogans to Legal Rules* (2002); A. Trouwborst, *Evolution and status of the precautionary principle in International Law* (2002); J. Esteve Pardo, *El principio de precaución. El derecho ante la incerteza cientifica*, in *Rev. jur. Catalunya* (2002) 41 ff.; P. Nanda, G. Pring, *International Environmental Law and Policy* (2003); M. Rebollo Puig, M. Izquierdo Carrasco, *El principio de precaución y la defensa de consumidores*, in Doc. Administrativa, nn. 265-266 (2003); B. Beer, *Das Vorsorgeprinzip in der internationalen Verwaltung der biologischen Vielfalt; Aufnahme und praktische Umsetzung* (2004).

[34] In this sense, see insights of R. Cavallo Perin, *Il diritto amministrativo dell'emergenza per fattori esterni all'amministrazione pubblica*, 4 Dir. amm. 775 (2005)

essential part of any responsible protection plan in responding to possible new challenges generated by the pandemic. This requires better-structured organizations which are prepared to take administrative action on short notice, rather than making *ad hoc* administrative decisions once the emergency has already gotten out of hand. If a large and important institution such as the World Health Organization (WHO) defines the pandemic as "the most feared potential emergency at the international level in the field of public health", it would certainly be reasonable from an organizational and regulatory standpoint to prepare for it in good time.

For the remainder of this paper, we intend to proceed as follows: after briefly taking stock of the evolution of the epidemic, the analysis will be divided into three fundamental parts. First, we will look at prevention/precaution before the current pandemic, examining "if" and "how" planning or organizational activities were inspired by notions of precaution and prevention. Secondly, we will examine prevention/precaution during the pandemic; here we will see how the precautionary principle has been applied to day-to-day administrative activities using certain tools of administrative jurisprudence. Finally, we will speak about prevention/precaution after the pandemic, i.e. about those measures that could be put in place in light of the lessons we hope to have learned.

2. The evolution of the epidemic

On 9 January 2020, the World Health Organization announced that Chinese health authorities had detected a new strain of coronavirus [35] never identified before in humans,

[35] Coronaviruses (CoV) are a large family of respiratory viruses. To date, there are seven known human coronaviruses including MERS-CoV (which causes Middle East Respiratory Syndrome, first identified in Saudi Arabia in 2012, and which is thought to be transmitted from camels and dromedaries to humans), SARS-CoV (causing Severe Acute Respiratory Syndrome, first identified in China in 2002, and which is thought to originate from bats), and now also SARS-CoV-2 (also thought to originate from bats).

tentatively named 2019-nCoV and later officially classified as SARS-CoV-2[36] .

Following the declaration of a Public Health Emergency of International Concern (PHEIC) by the WHO Safety Committee on 30 January 2020 in accordance with existing International Health Regulations (IHR 2005)[37], the Italian Minister of Health ordered a three-month ban on air traffic from China. Then, on 31 January 2020, by resolution of the Council of Ministers, a nationwide state of emergency was declared in Italy for a period of six months (this has subsequently been extended, first to 15 October 2020 then to 31 January 2021, then again to 30 April 2021 and finally until 31 July 2021).

On 21 February 2020, the first official Covid-19 case in Italy was confirmed, followed by the first outbreaks mainly in northern regions, including Lombardy and Veneto.

The rapid circulation of the virus throughout the country necessitated the implementation of restrictive measures to ensure the containment of the spread of Covid-19. This included the prohibition of movement between municipalities – whether by public or private transport – for all individuals except in cases of proven business needs, absolute urgency or legitimate health concerns. The new measures also mandated the closure of non-essential commercial activities and all non-essential production activities[38].

As pointed out in the introduction, from the beginning of the pandemic and throughout the course of 2020 (with a pause during the summer months), a series of legislative interventions were announced and carried out. These measures have been aimed at compensating businesses for the financial losses resulting from the limitations placed on the freedom of economic

[36] The virus was associated with an outbreak of pneumonia cases which began to be recorded starting 31 December 2019 in the city of Wuhan, central China.

[37] In declaring a public health emergency of international concern (pandemic), the WHO issues recommendations of significant measures that states should implement from both a practical and policy perspective (travel, trade, quarantine, screening, treatment, etc.).

[38] In this sense, we can especially mention Decree-Law n. 6 of 23 February 2020, converted into Law n. 13 of 5 March 2020; Decree-Law n. 19 of 25 March 2020, converted into Law n. 35 of 22 May 2020.

initiatives[39]; at supporting initiatives in the field of justice[40]; at strengthening the health care system[41] and, in general, they have been aimed at protecting the right to health[42]. The measures have also been aimed at instituting new rules regarding the education system [43] ; at electoral consultations [44] ; at supporting new epidemiological and statistical studies[45]; and at digitalization[46].

Starting in May 2020, in light of epidemiological developments, a series of prime ministerial decrees (DPCMs) were issued which began to relax the restrictive measures until a gradual reopening of all activities became possible as Italy entered the summer period (this was done in compliance with the measures and provisions contained in the aforementioned decrees). As the restrictions were eased, ports and airports were gradually reopened to domestic and international passenger traffic and, during the summer months, there was a sort of return to normality. Immediately after the summer, however, against the backdrop of a national epidemiological situation which was clearly worsening (this situation has been referred to as the second

[39] See for example Decree-Law n. 9 of 2 March 2020; Decree-Law n. 23 of 8 April 2020, converted into Law n. 40 of 5 June 2020 (the so-called *decreto liquidità*); Decree-Law n. 34 of 19 May 2020, converted into Law n. 77 of 17 July 2020 (the so-called *decreto rilancio*); Decree-Law n. 104 of 14 August 2020, converted into Law n. 126 of 13 October 2020; Decree-Law n. 137 of 28 October 2020 (the so-called *decreto ristori*); Decree-Law n. 149 of 9 November 2020 (the so-called *decreto ristori bis*); Decree-Law n. 154 of 23 November 2020 (the so-called *decreto ristori ter*); Decree-Law n. 157 of 30 November 2020 (the so-called *decreto ristori quater*).

[40] See for example Decree-Law n. 11 of 8 March 2020; Decree-Law n. 28 of 30 April 2020, converted into Law n. 70 of 25 June 2020; Decree-Law n. 29 of 10 May 2020.

[41] See for example Decree-Law n. 14 of 9 March 2020; Decree-Law n. 18 of 17 March 2020, converted into Law n. 27 of 24 April 2020 (the so-called *decreto cura Italia*).

[42] See for example Decree-Law n. 33 of 16 May 2020, converted into Law n. 74 of 14 July 2020; Decree-Law n. 83 of 30 July 2020, converted into Law n. 124 of 25 September 2020.

[43] See for example Decree-Law n. 22 of 8 April 2020, converted into Law n. 41 of 6 June 2020; Decree-Law n. 111 of 8 September 2020.

[44] See for example Decree-Law n. 26 of 20 April 2020; Decree-Law n. 117 of 11 September 2020; Decree-Law n. 148 of 7 November 2020.

[45] See Decree-Law n. 30 of 10 May 2020, converted into Law n. 72 of 2 July 2020.

[46] See Decree-Law n. 76 of 16 July 2020.

wave[47]), a new set of restrictive measures was rolled out. The new system called for a differentiated response according to the level of risk in each individual Italian region (the regions were categorized using one of three colors – yellow, orange or red – based on a scale of progressively increasing danger).

In this context, we have recently seen new rounds of DPCMs containing limitations to various rights and freedoms. The practice of issuing decree-laws to manage the compensation of economic losses has also continued.

3. The precautionary principle before the pandemic: the pandemic plan

After briefly reviewing the essential phases in the development of the epidemiological crisis, a number of questions naturally arises. First of all, in a situation that could be characterized as pre-pandemic, we should ask ourselves if regulations related to an implementation of the precautionary principle – applied to administrative organization, planning, and above all to the organization of health care – had been thought out in advance. And if so, we should ask ourselves whether or not those regulations were ever implemented.

As is known, the very principles of prevention and precaution involve the idea of *ex ante* protection with respect to future events, postulating a series of actions which should take place at the level of administration and organization in chronological order prior to the onset of a given problem.

As has been correctly pointed out, "the precautionary approach is (...) not only linked to the "extraordinary" handling of emergencies and to the exercise of *extra ordinem* powers which, since the administrative unification of the Kingdom of Italy, are legitimized by the emergency itself. Rather, it is first and foremost a responsibility of the ordinary administration, which must evaluate, plan and put into action all the functional measures to prevent the appearance of emergencies. And if an emergency

[47] See Decree-Law n. 125 of 7 October 2020, which extended the state of emergency.

nonetheless appears, the ordinary administration is responsible for responding to it as effectively as possible[48].

With regard to planning, it is necessary to verify whether any action plans had been created for the eventuality of a pandemic (such as the creation of new organizations which would be capable of responding in case of need) and whether any of them were actually carried out[49].

It should be noted that the law establishing the National Health Service, i.e. the cornerstone of our Italian health system, appears to be deficient; the references to prevention found in it are mostly related to the prevention of diseases and to the prevention of accidents at the workplace[50]. A general section related to the prevention of health emergencies is completely absent.

In 1999, the World Health Organization was among the first to point out the need for a pandemic plan with the publication of its "Influenza pandemic preparedness plan: the role of WHO and guidelines for national and regional planning".

Following those guidelines in 2002, Italy – for the first time in its history – formulated an action plan to face a possible pandemic[51].

The European Union also subsequently intervened and, with its 2005 publication "Communication on Pandemic Influenza Preparedness and Response Planning in the European

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[48] F. Scalia, *Principio di precauzione e ragionevole bilanciamento dei diritti nello stato di emergenza*, 3 federalismi.it (2020).

[49] About that and for an historical perspective of the instruments of the Italian legal system to face pandemics see also the reflections of M. Gnes, *Le misure nazionali di contenimento dell'epidemia da Covid-19,* 3 Giorn. Dir. Amm. 384 (2020).

[50] There has been an evident relationship between prevention and the right to health since the law regulating the Italian National Health Service was passed (Law n. 833 of 23 December 1978). This holds true despite the fact that, in the scope of that law, the term 'prevention' was largely used in reference to diseases and to accidents at the workplace. In art. 2 of that law, speaking about the objectives, the legislator establishes that the achievement of health protection is to be ensured through "the prevention of illnesses and accidents in every work environment". In establishing the National Health Council (whose duties since 1993 have passed to the State-Regions Conference), art. 8 of the same law states that the Council would have to be consulted regarding any "global prevention programs".

[51] This was the Italian multi-phase emergency plan for an influenza pandemic, published 26 March 2002 in issue 72 of the *Gazzetta Ufficiale* (the official source which publishes the laws currently in effect in Italy).

Community"[52], it outlined the main responsibilities of member states, the Commission, and other European Community agencies in the event of a pandemic, also including information about the various phases of a possible pandemic.

Partially in response to the avian influenza outbreak in 2003, the WHO decided to update its International Health Regulations (IHR) which had been adopted by the General Assembly in 1969 (and later updated in 1973 and 1981). That project concluded with the approval of the so-called "IHR (2005)" which came into effect in 2007. In a more recent update in 2014, it was suggested that each member state should have its own pandemic plan.

It was precisely on the basis of such recommendations that the Italian Ministry of Health developed the "National plan for preparedness and response to an influenza pandemic" in 2006, which was then approved by the State-Regions Conference [53]. This is the plan with which our administration faced the 2020 pandemic.

The goal of this plan was to strengthen pandemic preparedness at the national and local levels so that cases of influenza caused by new viral subtypes could be rapidly identified, confirmed, and described in order to recognize the onset of a pandemic in a timely manner. Other goals of the plan included minimizing the risk of transmission; limiting pandemic-related morbidity and mortality; reducing the impact of the pandemic on health and social services while ensuring the maintenance of essential services; ensuring adequate training of personnel involved in the pandemic response; guaranteeing the availability of up-to-date and timely information for decision makers, health care professionals, the media, and the public; and monitoring the effectiveness of the interventions undertaken.

With those objectives in mind, a series of actions were also envisaged, including improving epidemiological and virological surveillance; implementing measures to prevent and control infections (public health measures, prophylaxis with antivirals, vaccination); ensuring treatment and care of active cases; developing contingency plans to maintain the functionality of health services and other essential services; developing a training

[52] COM(2005) 607 final, 28 November 2005.
[53] In *Gazzetta Ufficiale* n. 77 of 1 April 2006.

plan; developing appropriate communication strategies; and monitoring the implementation of planned actions based on the risk phase, the existing capacity/resources for the response, the additional resources needed, and the effectiveness of the interventions undertaken.

It is worth remembering some of the statements which were made in that plan back in 2006. For example, the authors stated that "the effectiveness of the plan will be evaluated with national and regional simulation exercises in which all institutions potentially involved in the event of a pandemic will participate". They also asserted that the plan would be "subject to periodic revisions as the epidemiological situation changes."

On the basis of the 2006 plan, the respective regional operational plans should have been developed.

Unfortunately, regardless of whether the plan was revised or not, and regardless of the responsibilities related to that process – which are beyond the scope of this paper –, it appears that the pandemic plan has not been taken into account by the administrations involved in the management of the current health emergency. It is sufficient to observe that it has not been mentioned or considered in the prime ministerial decrees and decree-laws that have appeared in great numbers over the last year.

The 2006 plan was a document full of statements and ideas which were worth sharing and implementing. The main principle of that plan was that "global emergencies require coordinated global responses in which the planning process must be shared by the decision makers, and in which the action steps must already be clear before the events occur so that everyone is able to 'play' their role and manage their responsibilities".

From an organizational standpoint, the main institution responsible for overseeing and implementing this plan should have been the National Centre for Disease Prevention and Control (henceforth abbreviated as CCM using the Italian acronym), which was established by Law n. 138 of 26 May 2004, with the aim of addressing public health emergencies. The CCM operates "in cooperation with regional structures through its agreements with the Italian National Institute of Health (ISS), the National Institute for Occupational Safety and Prevention (ISPESL), the Experimental Zooprophylactic Institutes (IZS), several Italian

universities, the Institute for Treatment and Research (IRCCS), a number of public and private assistance and research structures, as well as with military health organs". It also operates "on the basis of annual programs approved by decrees issued by the Minister of Health".

The activity of the CCM formally began on 27 October 2004 [54] and the institution remains operational today [55]. The activities that it is called upon to carry out are: the analysis of health risks; the approval of surveillance plans and active prevention plans in cooperation with the Italian regions; the support of national alert and rapid response systems, also in connection with bioterrorism; the design of prevention programs – also of experimental nature – regarding primary, secondary and tertiary prevention; the promotion of programs used to evaluate performance in the health care system; the updating of existing systems and the training of personnel concerning the implementation of the annual program of activities; the maintenance of dialogue with other Italian institutions and with similar European and international institutions; the dissemination of information[56].

[54] Initially, the functioning of the CCM was regulated by the Ministerial Decree of 1 July 2004. Subsequently, the terms of its operation were better specified by the Ministerial Decree of 18 September 2008. Pursuant to Decree-Law n. 223 of 4 July 2006, which was converted, with amendments, by Law n. 248 of 4 August 2006. On the basis of that, Presidential Decree n. 86 of 14 May 2007 extended the CCM's operations until 21 July 2010 and – pending the formalization of its further three-year renewal – in any case extended it by another two years, pursuant to point 4.2 of the DPCM of 4 August 2010.

[55] Presidential Decree n. 44 of 28 March 2013 contained "Regulations on the reorganization of collegiate bodies and other bodies operating at the Ministry of Health, pursuant to article 2, paragraph 4 of Law n. 183 of 4 November 2010". Article 9 of that same Presidential Decree regulated the composition and the responsibilities of those bodies.

[56] In the context of these activities, the CCM supports the Ministry of Health, among other things, in analyzing the epidemiological situation; in identifying and assessing the risks to human health arising from infectious agents, environmental conditions and behavioral factors; in identifying prevention measures and continuity-of-care pathways; in encouraging social health integration; in verifying that national monitoring and prevention plans are being implemented.

The CCM, located within the Directorate General of Preventative Health Care of the Ministry of Health[57] - the offices of which provide operational support in the implementation of its projects – is, in part, a collective body composed of the following committees: the Strategic Committee and the Scientific Committee[58].

The CCM operates on the basis of an annual program which is prepared in conformity with the priorities identified by the Strategic Committee. Each year, the program is typically approved by June 30 with a specific decree from the Minister of Health. The execution of the program takes place through the implementation of projects and in collaboration with the regions and various institutional partners. The projects are planned in a standardized manner so that the objectives, procedures, responsibilities, resources and timeframes are clearly defined.

The CCM's annual program of activities for 2020 was approved by ministerial decree on 20 October 2020 and it is currently being implemented at the relevant levels. In the current emergency scenario, it was considered appropriate to direct the program's entire focus towards the containment of the SARS-CoV-2 virus. This included an increase in useful activities such as monitoring and testing.

The 2020 program intends to support the regions by strengthening their capacity to respond not only to the current pandemic, but also to other future pandemics. This entails the implementation of risk prevention measures and the promotion of

[57] The operations directorate of the CCM develops a proposed annual program of activities and makes proposals for projects which will implement that program. It also supports committees and subcommittees in reviewing the implementation and the results of the projects. The director general of Preventive Health Care is also the chief operating officer of the CCM, and serves in that capacity until the expiration of the CCM's term.

[58] With the aim of initiating a simplification process for certain procedures, including project approvals, and in agreement with the regions, the Ministerial Decree of 18 September 2008 sanctioned the cancellation of the Scientific Committee. The decree did, however, envision a number of ways for regional representatives to meet and compare notes. It also formalized the longstanding practice of consulting the bodies identified by the Conference of Presidents of the Regions, including on matters regarding the interregional coordination of preventative measures. The CCM, in fact, carries out its own projects in coordination with the regions.

a generally healthy lifestyle, including the use of information campaigns to involve the population. These activities and initiatives will be supported by the integrated networks of social services and health services.

Another important planning tool was the national prevention plan: the plan in place at the time of the pandemic was the National Prevention Plan 2014-2018 (which had been extended). It was only in August 2020 that the new Italian National Prevention Plan (*Piano Nazionale della Prevenzione*, abbreviated as PNP) 2020-2025 was adopted with an agreement being signed between the state and the regions.

These brief reminders are sufficient to reach a first conclusion: that Italy would have been more adequately prepared for the impact of the pandemic if it had implemented the necessary precautionary and preventive principles before the event occurred.

4. The three tests of legitimacy: science-based inquiry, proportionality, and temporary duration

In one of the countless precautionary rulings that have come down to us this year, the Council of State significantly affirmed that, "although all the measures approved up to this point by national, local and technical governmental political authorities are somehow different in nature and serve various purposes, the common thrust of those measures has demonstrably been that of ensuring, according to the principle of maximum precaution, the health of citizens as a primary and non-negotiable constitutional value. The primacy of protecting citizens' health has even compelled authorities to suppress – within limits and in the manner deemed necessary from time to time – the exercise of different rights or freedoms, chief among which is the right to the freedom of movement"[59].

[59] The Council of State, with its court order n. 4323, III, 17 July 2020, confirmed the monocratic decree n. 3769, III, 26 June 2020. The latter decision overturned the order of the Lazio Regional Administrative Court, III, n. 4350/2020, which had allowed precautionary protection for a number of private analysis laboratories that had requested permission to carry out swab testing. The ordinance of the President of the Lazio Region, n. Z00003 of 6 March 2020, had reserved the exclusive right to carry out swabs to public laboratories belonging

And in fact, as far as administrative jurisprudence is concerned, it was precisely the application of the precautionary principle in protecting the citizens' right to health which has justified the suppression of a number of constitutionally guaranteed rights and freedoms.

An analysis of art. 301 of the Italian Environmental Code (TUA) provides us with general indications that are useful for systematizing these numerous rulings, above all concerning rulings of a precautionary nature which have been approved by administrative judges in applying this principle[60]. It is worth noting that the pandemic has led to a veritable explosion of precautionary monocratic protection, reopening a debate about the possibility of challenging decrees[61].

In accordance with paragraph 1 of art. 301 TUA, precautionary measures must be based on preliminary, objective scientific assessments. Beyond this, as provided for in paragraph 4 of the same article, such measures must be: proportional with respect to the level of protection that is being proposed; non-discriminatory in their application and consistent with similar measures which have already been adopted; based on a careful examination of the potential benefits and burdens; updatable with regard to the emergence of new scientific data.

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to the Coronet Lazio network. In the end, only public laboratories were allowed to test.

[60] To get an idea of the order of magnitude of these numbers, consider that there have been approximately two hundred rulings directly linked to the management of the health emergency (until the beginning of the summer period in 2020, there had been just over a hundred). Some of these rulings are well known among the general public, such as the initial rulings of the Marche Regional Administrative Court (TAR Marche) that suspended regional ordinances which were more restrictive than the state ones (TAR Marche, monocratic decree n. 55 of 27 February 2020, later reconfirmed by the collegial court order n. 63 of 5 March 2020). Another example, among others, is the Campania Regional Administrative Court that confirmed regional precautionary ordinances (TAR Campania, monocratic decree n. 416 of 18 March 2020; monocratic decree n. 424 of 19 March 2020).

[61] On this point, see the critical remarks of M.A. Sandulli, *Sugli effetti pratici dell'applicazione dell'art. 84 d.l. n. 18 of 2020 in tema di tutela cautelare: l'incertezza del Consiglio di Stato sull'appellabilità dei decreti monocratici*, 1 federalismi.it (2020), in which the author reviews the few precedents that have led to this possibility of challenging the rulings.

The following are what we may call the "three tests" to which pandemic precautionary measures should be subjected in order to verify their legitimacy: the test of adequate scientific inquiry, the test of proportionality (which also includes a cost/benefit analysis), and the test of temporary duration (the test of non-discrimination appears to be the least frequently used with reference to the current epidemiological context)[62].

Regarding both the test of proportionality and the test of short duration, we can take the example of a municipal ordinance (from a municipality in Campania) with which a more restrictive suspension of teaching activities was ordered than the one ordered at the state level. The municipal ordinance was deemed legitimate since, in the balancing of interests, the importance of limiting the contagion prevailed over the personal interest of the plaintiff, i.e. the ordinary conduct of his professional activity. In reaching the decision, the limited temporal validity of the suspension was also taken into account[63].

On the other hand, a regional ordinance (in the Lazio region) was considered illegitimate when it provided for a sort of centralization of the Covid-19 swab testing system in the network of public laboratories. The result, in this alleged application of the precautionary principle, was that private laboratories were excluded from conducting testing.

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[62] A significant contribution on this point is the article by G. Azzariti, *Coronavirus: le misure sono costituzionali a patto che siano a tempo determinato*, in *Repubblica,* 8 March 2020.

[63] TAR Campania, monocratic decree n. 2205, V, 27 November 2020. Issuing monocratic precautionary protection, the administrative judge commented that the municipal order "is motivated, not unreasonably, and in the context of an unpredictable situation, by the express need to contain the contagion on a local scale, given the alarming estimated infection rate (1 in 50 inhabitants, for a total of 2.166 cases according to the last check, as stated in the documentation attached by the respondent). Such circumstances obviously can not have been taken into account either by state measures or by regional ones, which were planned and mediated on a much different, and larger, territorial scale. As provided for by the relevant regional ordinances, the measures being taken by the region are based on the primacy of the principle of precaution, which is now being invoked while waiting to consolidate the results of the screening process among the school population, teachers and support staff".

The administrative judge, after several rulings for interim relief[64], and in the context of a cost/benefit analysis, finally ruled that the regional ordinance was illegitimate, thus opening the system to private laboratories.

The Lazio Regional Administrative Court, which restated the scope of application of the precautionary principle, communicated that "it is not true that the trend of infections is decreasing; on the contrary, we are faced with a surge of infections. One of the reasons for this increase in the infection rate has been the increased number of tests being carried out ascertaining positivity". The court therefore concluded that "the desired participation of private testing centers is of decisive use, since if the national interest is to maximize testing capacity in order to proceed with tracking (...), increasing the number of centers able to carry out such tests is a clear means to that end"[65].

The test of adequate preliminary inquiry was used in another case to confirm the legitimacy of a regional ordinance (in the Sardinia region) when the region's Technical Committee, "inspired by a principle of utmost caution", expressed itself in favor of maintaining the closure of book retailing activities in a more restrictive manner than that provided for by the national ordinance[66].

In a similar manner, the legitimacy of a regional ordinance (in the Campania region) that suspended teaching activities was confirmed. The reasoning was that "the region seems to have exhaustively documented the preliminary investigation", in particular taking into account "the correlation between the increase in positive cases of Covid-19 and school attendance" and "the exponential diffusion of the infection itself" [67] . The

[64] The case saw a series of conflicting rulings in the interim phase. The court of first instance, the Lazio Regional Administrative Court, declared that it was in favor of opening up the system to private providers (TAR Lazio, court order no. 4350/2020). The Council of State, on the other hand, defended the public system as sole providers of the service in question (Council of State, monocratic decree n. 3769 of 26 June 2020, and Council of State, court order n. 4323 of 17 July 2020).

[65] TAR Lazio, III quater, n. 10933 of 26 October 2020.

[66] TAR Sardegna, I, monocratic decree n. 141 of 20 April 2020.

[67] This is the order of the Campania Regional Administrative Court, Naples section, n. 1921 of 19 October 2020, with which the administrative judge confirmed the suspension of in-school teaching activities operated by the

administrative judge also noted that the regional ordinance restricting school activity seemed to be proportionate with reference to "the increasingly alarming situation in regional health care structures which have become overburdened as a result of the virus". In the judge's view, the ordinance was therefore "very relevant in view of preventing the emerging health risk".

There was also a case in which the legitimacy of a regional ordinance (in the Piedmont region) was confirmed. In this instance, parents were ordered to provide declarations that they had measured the body temperature of their children before sending them to school[68].

In the cases just mentioned, administrative courts have allowed regional needs to prevail over those of the state. In other cases, however – and again using the test of adequate scientific inquiry –, judges have made rulings in the opposite sense, favoring the needs of the state. This fact should not be surprising; on the contrary, it confirms that judicial review is a non-partisan activity (i.e. neither pro-state nor pro-region) focused exclusively on the outcome of the tests. The rulings will therefore vary from case to case, depending in each instance on the specific context and on the interests that are being considered.

And so, after starting as a monocratic measure for interim relief, with later confirmation in the collegial phase, and in the face of legal challenges by private citizens, the state ordinance necessitating a period of distance education was deemed legitimate. The court made its decision "taking into account that the disputed measures are the result of objective and technical-

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Campania Region. The suspension had first been ordered by the Campania Regional Council with ordinance n. 79 of 15 October 2020. In defending the legitimacy of the regional measure, TAR Campania noted that it had to "give precedence to the public interest underlying the contested measure, taking into account that the public interest is expressly based on the need to protect the primary right to health, which is presently endangered by a scarcity of resources".

[68] TAR Piemonte, monocratic decree n. 446, I, 17 September 2020. The appeal was eventually declared inadmissible as the contested measure (Decree n. 95 of the President of the Piedmont Regional Council, 9 September 2020) lost effect on 7 October 2020. In its place, a new measure (Decree n. 105 of 7 October 2020) regulating similar cases was adopted.

scientific evaluations which are rationally justified by the fundamental principle of precaution"[69].

During the appeal proceedings, the decision that had been established in the court of first instance was upheld, both in the monocratic court and in the collegial court, and the Council of State significantly stated: "the current resurgence of the epidemiological spread objectively demonstrates the opposite of what was claimed by the applicants. Most likely, the containment of the infection within a certain threshold was causally linked to the preventative measures adopted, which included the measures applied in the school system. Moreover, the fact that there were no cases of death among the school population is neither relevant nor significant; in this context, students must be considered not only as potential victims, but also and above all as possible agents of viral diffusion within families. As for the alleged violation of the constitutional precepts regarding personal freedom and the right to education, we can only refer – in the context of this interim measure – to the principles established by the relevant Section of the Regional Administrative Court concerning the proper application of the precautionary principle. The court also reaffirms the primacy of the right to health; in protecting that right, preventive measures are scientifically based and limited to the strict minimum necessary to achieve the objective[70].

More recently, the administrative courts have had to deal again with the legitimacy of state measures which imposed a period of distance education. Specifically, students and parents of minors that were enrolled in schools located in "red zone" regions requested the Lazio Regional Administrative Court to suspend the effectiveness of DPCM 2 March 2021, which provided until 6 April 2021 an automatic mechanism of full suspension of face-to-face teaching at all school levels in the whole territory of these regions[71]. The court of first instance highlighted the lack of a preliminary investigation, accepted the request of interim measures and ordered the government to review such previsions

[69] TAR Lazio, monocratic decree n. 6030, III bis, 29 September 2020, later re-confirmed by TAR Lazio with court order n. 6569, 21 October 2020, and also confirmed by the Council of State via court order n. 6832, III, 27 November 2020.
[70] Council of State, order n. 6832, III, 27 November 2020.
[71] See artt. 43 and 57 of d.P.C.M. 2 March 2021.

before 2 April 2021[72]. The government appealed against that judgement and the Council of State in monocratic court firstly upheld it, stating that "it would not appear a rational motivation of the priority assigned to the sanitary precaution, given the serious restriction to the right of education also protected by the Constitution"[73]. The statement, however, was overruled in the collegial court, given the fact that the decree-law n. 44/2021 turned the DPCM measures related to face-to-face education into law. Therefore, the Council of State declared not admissible the interim measures requested in the proceedings at first instance, due to the fact that the effects of the DPCM had ceased[74].

Similarly, the administrative judge of the court of first instance, this time with a judgment, annulled a regional ordinance (in the Calabria region) which was less precautionary than the national ordinance as it extended the freedom of economic initiative[75]. For the judges in Calabria, "there were no special conditions on the sole territory of the Calabria region that could justify the abandonment of the precautionary principle". The judges also stated that "a valid scientific method was not being used in the evaluation of the epidemiological risk", asserting that the regional ordinance was "compromising the consistent management of the epidemiological crisis by the government".

The Calabria Regional Administrative Court makes an important statement in terms of the relationship between health risks and health care organization: "epidemiological risks do not only depend on current infection rates in a defined territorial space such as that of the Calabria region; they are also based on other factors such as the efficiency and responsiveness of the regional health care system. Containment measures, which can either be gradually adopted or gradually revoked, also have an impact on the spread of the virus (one thinks, in this regard, of the relaxation of interregional travel restrictions)".

It is worth remembering some of the basic features which make the precautionary principle an attractive choice for

[72] TAR Lazio, court order n. 1946, I, 26 March 2021.
[73] Council of State, monocratic decree n. 1776, III, 1 April 2021.
[74] Council of State, court order n. 2179, III, 23 April 2021.
[75] TAR Calabria, n. 841, I, 9 May 2020, on which see also the considerations of G. Piperata, *Emergenza pandemica e distribuzione del potere amministrativo tra centro e periferia*, 3 Giorn. dir. amm. 327 (2020).

administrators. For the Calabria Regional Administrative Court "the precautionary principle is a sort of *modus operandi* which can guide the work of public authorities in the context of a health emergency such as the one currently in progress (in this case, the emergency is due to the circulation of a virus, and there are no absolute certainties about the behaviour of that virus in the scientific community). According to the precautionary principle, each time the risks associated with a potentially dangerous activity are not clear, public authorities are advised to pursue a strategy of prevention based on existing information while further scientific knowledge on the topic is being consolidated[76]. It is absolutely necessary to use such cautious preventative strategies when dealing with delicate matters like public health which can potentially have an impact on all citizens"[77].

The administrative courts, as we have seen, have shown great balance and discretion in applying the precautionary principle – sometimes considering it applicable and sometimes not – depending on whether or not the situations of danger were adequately demonstrated[78].

The cost/benefit analysis test, although not mentioned in the ruling, was later used in another case to justify the state measure of closing gaming halls[79].

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[76] Here the citation is from the Council of State, Sec. III, n. 6655, 3 Oct 2019.

[77] Constitutional Court, n. 5, 18 January 2018.

[78] Consider the case in TAR Lazio, II bis, n. 8736 of 24 July 2020, which concerned the suspension of activities at a power plant operated by a municipality. The plant in question was producing electricity from biogas. Under those circumstances, the court commented that "not even the consideration of the precautionary principle is likely to be relevant in this case in order to reach different conclusions; this is because that principle cannot legitimize an interpretation of the regulatory, technical and administrative provisions in force in a particular sector, expanding their meaning to include events not significantly related to the context concerned. For the precautionary principle to apply, the situation of danger in question must be potential or latent, not merely assumed, and it must significantly affect the environment and human health".

[79] See TAR Lazio, I, no. 7191 of 19 November 2020, which explains that "the precautionary principle may reasonably be used in identifying – at least for a limited period of time – the economic activities which will be subject to total suspension. Beyond this, the precautionary principle is useful in ensuring compliance with safety protocols and in evaluating the ability of economic activities to meet the primary needs of users, while attempting to treat identical

The test of proportionality was also used in a case in which a region, acting on the advice of a technical body, had decided to adopt more restrictive rules on vaccinations than the state. In this case, on the appeal of a group of private individuals, the administrative judge of the court of first instance[80] deemed those regional rules illegitimate. The region, in deference to what had been recommended by the technical body[81], had ordered the mandatory vaccination of individuals over 65 years of age. This had been done based on the need to reduce the pressure on hospital facilities during the fall and winter through the use of differential diagnoses[82].

The test of temporary duration was used in another instance to confirm – as monocratically ordered interim relief – the legitimacy of a state measure which suspended activity in the food service industry. The court made its decision "in light of the brief duration of the contested measure, and in consideration of the fact that the precautionary principle, even if unexpressed, must cover

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situations in the same manner. As a result, the owners of activities like amusement arcades and gambling shops – which are businesses of a purely economic nature, objectively not directed at meeting the primary needs of individuals – are likely to be less interested in the use of the precautionary principle".

[80] TAR Lazio, III quater, judgment n. 10081, 5 October 2020. In this case, the court considered order n. Z00030 of 17 April 2020 by the President of the Lazio Region, which contained "further measures for the prevention and management of the Covid-19 epidemiological emergency", to be illegitimate. In the court's opinion, the competence to impose mandatory vaccinations belongs to the state and not, conversely, to the regions. The court went on to specify that, "while the emergency Covid-19 legislation does authorize the regions to introduce more restrictive measures than those established by the state, this may only be done within very specific limits which are established by the state legislature itself".

[81] This had been the advice of the CTS as it appeared in the minutes (n. 95) of the committee's meetings on 16 July and 20 July 2020.

[82] The Lazio Regional Administrative Court, however, argued that "there are also other ways to avoid the congestion of health facilities, all of which potentially fall within the scope of constitutionally granted regional competencies (e.g. the enhancement of tracing activities, the intensification of swab testing, or the concrete development of mobile and in-house health care alternatives). It seems rather evident that the measures listed above would most likely involve greater expenditures and an increased use of organizational resources, but in any case, the logic of saving public funds cannot justify such a large displacement of normative competencies, i.e. it cannot justify the regions making decisions on matters which are normally decided by the state".

all administrative activity in the present epidemic emergency, therefore assuming a value and importance prevailing over other interests at stake"[83].

In another case, the same test of short duration was used in legitimizing the closure of a nursing home by a local health authority. The administrative judge, issuing the collegial precautionary measure, deemed this order to be legitimate, noting that the principle of proportionality invoked by the applicant could be considered respected in the case in point, particularly with regard to the temporary duration of the ordered closure of the structure, as the closure was instrumental to the complete disinfection of the home"[84].

There was also a case concerning the transparency of the minutes of the Technical Scientific Committee that leads us to examine the decision-making process behind the precautionary principle and to review how that information is shared. A private individual had contacted the Department of Civil Protection requesting access to five sets of minutes from the meetings of the Technical Scientific committee (it was on the basis of these minutes that certain containment measures and prevention strategies had been implemented in managing the spread of the pandemic). The administrative court of first instance[85] granted that access, referring to the regular practice of allowing public

[83] Tar Lazio, III quater, monocratic decree n. 6970, 13 November 2020. Considering that the collegiate panel is planning to issue a simplified ruling pursuant to art. 60 of the Code of Administrative Trial, and deeming it necessary to give an appointment to the parties which would enable them to specify their defense, the court confirmed the monocratic decree which had rejected the precautionary petition and set the council chamber for 22 December 2020.

[84] TAR Campania, V, court order n. 826 of 22 April 2020, which significantly states that "the preventive and precautionary functions underlying all the measures taken – and with regard to the ten positive cases of Covid-19 so far ascertained – must be considered of primary importance. In particular, they must find adequate reflection in the actions the health authority (...); it will therefore not be sufficient to simply close the department in which most of the positive cases occurred". In making this decision, the court also considered the importance of the fact "that clear and solid scientific knowledge about the mode of transmission of the coronavirus is not yet available, and that many of the available studies confirm the possibility that the virus can remain active on certain surfaces for longer periods of time (...)".

[85] Tar Lazio, I quater, n. 8615 of 22 July 2020.

access, and commenting that "if the legal system guarantees broad access to all the preparatory work and decision-making processes involved in the adoption of individual measures or of acts characterized by a much smaller social impact, then we must certainly allow access to documentation such as the minutes in question, which lay the groundwork for the adoption of the described Prime Ministerial Decree, i.e. of legal acts characterized by a particularly large impact on the social, local and community levels". The Council of State, however, ruling for interim relief, eventually overturned the decision of first instance, denying access to the minutes[86]. The Technical Scientific Committee later independently decided to publish its minutes, making them publicly available 45 days from the dates of the meetings, and the matter was thus concluded.

5. The post-pandemic agenda

At this point, we must look to the future and ask ourselves what lessons we will have learned after the pandemic has ended. To that end, we can already summarize three conclusions.

The first suggestion concerns the system of the sources: it would be useful to provide a regulatory model (for example, a decree-law) which could be implemented in the scenario of a future pandemic. We believe it is important to be equipped with a single clear model, one which is well defined in advance in order to avoid the disorganized, flood-like mass of regulatory acts that have affected the lives of citizens in the last year[87]. In such a model, decision-making centers should be clearly identified, interference between competencies (i.e. who does what) should be avoided, and the organizations in charge should be provided with the necessary powers to carry out their work.

The second suggestion concerns planning: it will be necessary to create a pandemic plan that will be well known and

[86] This ruling by the Lazio Regional Administrative Court was followed by the Council of State's monocratic decree n. 4574, section III, of 31 July 2020, which effectively suspended the enforceability of the Lazio Regional Administrative Court's ruling.

[87] On this point, see F.S. Marini, *Le deroghe costituzionali da parte dei decreti-legge*, 1 federalismi.it (2020).

well understood by public institutions, in schools, and by citizens. Frequent updates to the plan will also be necessary.

In the new pandemic plan, hospital networks and intensive care units[88] will have to be strengthened and personal protective equipment will need to be stockpiled in sufficient quantities. In addition, a fundamental space in the plan should be reserved for the improvement and restructuring of basic medical services in our local health care systems (e.g. the number of family doctors, their equipment and supplies, and an improvement in their working conditions). Indeed, it does not seem that the downsizing of hospital services, especially in some regions, has been matched by a sufficient strengthening of local health care structures in Italy, and the coordination between existing structures seems to be lacking.

In making a new start, we need to provide local health services with the capability to operate a reliable monitoring system and to effectively implement public health measures. To achieve that goal, it will be necessary to recruit doctors specialized in public health who will do their work not in offices, but in a mobile capacity at the local level. Deployed in sufficient numbers and equipped with the necessary resources, these specialists will work in coordination with general practitioners to conduct epidemiological analyses: they will carry out systematic contact

[88] Here we can mention interesting data reported by A. Pioggia, *Coronavirus e sistema sanitario nazionale,* in *Ridiam, 2020*. The author states that "the total number of hospital beds in Italy is below average compared to other OECD countries and has declined by 30% from 2000 to 2017. In total, the health expenditure incurred by the Italian State in 2017 was equal to 6.6% of GDP. That is about three percentage points lower than Germany (9.6%) and France (9.5%), and about one percentage point lower than the United Kingdom. Italy ranks slightly higher than Spain (6.3%), Portugal (6.0%) and the Czech Republic (5.8%)".
With reference to intensive care and staffing, and not counting this year's increases, Pioggia reports that "in the last two decades, hospital beds in Italian intensive care departments have gone from 575 per 100 thousand inhabitants to the current figure of 275. A cut of 51% was gradually made from 1997 to 2015, which puts Italy at the bottom of the European ranking (Germany is the leader in this category with 621 hospital beds, more than double the Italian figure). Staffing levels have also dropped proportionally. Overall, the Italian national public health system lost more than 46,000 employees between 2009 and 2017. More than 8,000 doctors and more than 13,000 nurses were lost, according to the State General Accounting Office."

searches, test and monitor cases in isolation and quarantine, assist with the in-home treatment of asymptomatic cases, conduct home testing, and ensure that safety distances are being maintained in the workplace and other public places using the prescribed protective equipment[89].

In short, the proposal is to deliver an increasing number of health care services with mobile units outside of hospitals. This will make it easier to guarantee that hospital services will be available for individuals who cannot do without them.

A third suggestion concerns the implementation of new technologies in our health care system. In this connection, the use of artificial intelligence could be broadly encouraged (think of applications that can carry out diagnostic tests on the basis of mere x-rays); the Electronic Health File (*Fascicolo Sanitario Elettronico*, abbreviated as FSE) [90] should be made bindingly operational; a mandatory tracking system should be developed – with proper regard for the protection of privacy – which could be employed in the event of an epidemic (in particular with reference to travel)[91]; the use of new technologies such as thermo scanners or drive-through tests should be envisaged; the police or the army should be deployed to carry out contact tracing within 24 hours if necessary; remote medical monitoring and diagnostic tools should be utilized in order to treat patients in their own homes.

Generally speaking, to achieve these objectives, it is not enough to simply announce that funding has been earmarked for *ad hoc* preventative measures; instead, the money must actually be invested and the measures must be fully implemented[92]. Relevant

[89] See F. Curtale, *C'era una volta il piano pandemico,* www.internationalhealth (2020).

[90] A. Sorrentino, A.F. Spagnolo, *La sanità digitale in emergenza Covid-19: uno sguardo al fascicolo sanitario elettronico*, 1 federalismi.it (2020).

[91] On this point see D. De Falco, M. L. Maddalena, *La politica del tracciamento dei contatti e dei test per Covid-19 alla luce delle ultime direttive OMS: nessun ostacolo giuridico impedisce di utilizzare il "modello coreano" anche in Italia,* 1 federalismi.it (2020).

[92] Five percent of the Italian National Health Fund is allocated to each region to be spent on prevention activities related to communicable and non-communicable diseases. In recent years, the total expenditures for preventive health care have been stable and in fact lower than the anticipated 5% in all but three Italian regions. According to the criteria adopted by the OECD, only 2.9% of the allocated 5% is normally spent.

research has also shown that we need to put a stop to the downward trend in public health spending which has been evident in recent years (that trend is probably due to the fact that health care requires more personnel than other sectors)[93].

These issues will be of central importance in the coming years. Will we succeed in developing a proper regulatory model? Will we be able to formulate a pandemic plan and will we be capable of executing it? Will the use of new technologies be adequately incentivized? Will we create mobile health units that can be deployed, in a manner similar to mobile emergency task forces (e.g. in the event of earthquakes), when the need arises? And will we carefully monitor the need for personal protective equipment, ensuring that a certain supply is always available and that production can be increased on short notice?

As we have seen, drafting a new pandemic plan is only the first step in preventing future health emergencies. Once the details have been decided, the complete implementation of that plan, down to the last detail, is equally important. In Italy, it seems that the real challenge to our system is in applying the principles of precaution and prevention to planning and organizational activities. Only the future will tell if we have learned our lesson.

[93] It turns out that the Italian regions have been much more interested in spending on hospitals and medicine than on prevention, a phenomenon that is all the more pronounced in the regions that have favored private health care. Between 2008 and 2013, while the percentage of regional funds spent on prevention remained almost constant, there was a substantial decrease in spending in the areas of veterinary public health (-3.8%) and public health and hygiene (-5.7%).

DIFFERENTIATION AND INEQUALITIES: ASYMMETRIC REGIONALISM IN A ONE AND INDIVISIBLE REPUBLIC

Laura Ronchetti[*]

Abstract

The public debate on "autonomy" regarding the "further forms and particular conditions" of autonomy allowed by paragraph three of Article 116 of the Constitution shows the serious misrepresentation of the constitutional idea of autonomy, confused with independence, separateness and self-sufficiency from the rest of the Nation, instead of being correctly understood as self-government in the awareness of the interdependence between the entities of the Republic as a whole.

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1. Some axioms of Italian Regionalism

The many and unsustainable changes that the form of regional state has undergone in Italy demands that some cornerstones of Italian Regionalism be unceasingly recalled, in particular the fundamental principles of the Constitution and their interrelationships (De Martin, 2019; Ronchetti, 2020).

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It is apparently irrelevant to recall that Regionalism in itself represents the recognition of factual differences (Bin, 2012) and the promotion of differences in the policies of the various regional autonomies which, through their own laws approved by their representative institutions, adapt the fundamental principles contained in State legislation protecting the unity and indivisibility of the Republic to the specific needs of their communities and their territories.

The concurrent powers, i.e. the law-making powers shared by the State and the Regions, constitute in fact the hinge of a system whereby the Regions, which are autonomous, converge – albeit with a physiological degree of conflicts – with the political direction of the State and all the entities of the Republic can contribute to identifying and pursuing the national interest. Shared legislative powers, with their peculiar synergy between the principles of a matter set by the State and the detailed rules defined by the Regions, are the emblem of an idea of local autonomy as co-protagonist in the identification of the national interest, with a view to cohesion based on the awareness of interdependence (Ronchetti, 2018): each entity of the Republic contributes to the pursuit of the public interest, with the mediation but also with the intervention of the Constitutional Court where disputes arise, in the name of the Nation and its overarching interests. The participation of all legislators in defining the rules and regulations that govern a given subject matter, in fact, is the expression in practice of the awareness of the interdependence among the entities in identifying the national interest, pursued by laying down uniform norms that lay down uniform principles and norms that adapt those principles to the individual social, political and territorial realities.

This is the idea of autonomy enshrined in the Italian Constitution (Giannini, 1959) and indeed in 2001, despite the reversal in the sharing of powers between the State and the Regions, the centrality of concurrent powers remained intact, as the centre of gravity of the balance between autonomy and the unity and indivisibility of the Republic.

Secondly, the differentiation provided for in the Constitution aimed at recognizing and promoting the "needs of autonomy" pursuant to Article 5 of the Constitution, is strictly connected to all the other fundamental principles of the Constitution that irrevocably characterize our Republic.

The other fundamental principles include, in particular, the principle of equality pursuant to Article 3 of the Constitution that indicates how the meaning of autonomy is to be construed under Article 5: the ultimate objectives of the principle of substantial equality - full development of everyone's personality and true participation of everyone in the economic, political and social life of the Country - are the glue that allows the Republic to be one and remain indivisible, that makes the process of national unification a permanent one through the fight against the inequalities among the people, groups and territories.

And overcoming inequalities requires differentiation according to the different capacities and specific needs. Regionalism, therefore, is a form of state ontologically based on differentiation, which constitutes «a way of being of the Republic» (Berti 1975) which is one and indivisible from both a formal and substantial point of view because it contributes to the social cohesion of the Italian people (Salazar, 2017).

It is no coincidence that we talk about the autonomous regional governments as "welfare entities": based on Article 5 of the Constitution, the autonomous regional institutions are the instrument for pursuing the principle of substantial equality, and not levers for disrupting the national solidarity pact, just as, vice versa, the fight against territorial inequalities requires different types of intervention.

This leads to an additional corollary: the unceasing process of national integration which involves the elimination of inequalities presupposes the fulfilment of the «mandatory duties of economic, political and social solidarity» provided for by Article 2 of the Constitution and, therefore, only where regionalism is strongly rooted in solidarity can it act as a strong bond of the unity and indivisibility of the Republic.

National unity, which is inherently «multifaceted and manifold» (Modugno, 2011), cannot be given once and for all because it requires a permanent process of unification of society based on solidarity (Luciani, 2001). The substance of the awareness of interdependence, therefore, requires that solidarity be an on-going process that needs to be exercised permanently.

Enhancing competitiveness any further in our regionalism, on the other hand, would mortify its solidarity dimension and thus violate the Constitution. This is because the last axiom that characterizes the type of regionalism admitted by our Constitution consists in the fact that the aforementioned Articles 2, 3 and 5 have been read jointly with prevalence over Part II of the Constitution, hence orienting their interpretation, in our case with particular reference to Title V (Pezzini, 2015).

What is gradually emerging, however, is a serious distortion of the idea of autonomy as referred to in the Constitution, increasingly confused with and superimposed on independence, separateness, self-sufficiency from the rest of the Nation, instead of being correctly understood as self-government in the awareness of the interdependence among the entities of the Republic as a whole. The transfiguration of the very concept of autonomy is being promoted by a public debate on "autonomy" which refers to "further forms and particular conditions" of autonomy permitted under paragraph three of Article 116 of the Constitution.

2. From differentiation to asymmetries

The aforementioned paragraph three of Article 116 contains a provision introduced with the Constitutional Revision Law no. 3 of 2001 which envisages the possibility of an "asymmetrical" regionalism based on the physiological differences among the Regions: while up to 2001 regionalism allowed for differentiation among Regions having identical powers, after 2001 this differentiation may be asymmetrical because the provision does not require the framework set by the State to be uniform across Regions, but differs in relation to individual Regions for the twenty subject

matters over which powers are shared by the State and the Regions and the three other subject matters that the Constitution entrusts exclusively to the State in Article 117 of the Constitution (organisational requirements for the Justice of the Peace, general provisions on education, and protection of the environment, the ecosystem and cultural heritage).

Paragraph three of Article 116, therefore, contemplates as many as twenty-three subjects that can be transferred exclusively to the Regions while, pursuant to paragraph two of Article 117, the State has exclusive powers, once the three mentioned above are removed, over fourteen matters.

The devolution *en bloc* of all the subject matters referred to in the paragraph three of Article 116 in their (indefinable) entirety would mean that for the individual Regions, concurrent competence is abolished and configures a Region that makes laws and administers, on an exclusive basis, a larger number of subjects than those which come exclusively under the sole competence of the State. This hypothesis clearly embodies the idea that any form of interdependence, collaboration and synergy between the Region and the State is rejected, since having exclusive powers over the listed matters presupposes a hard and fast separation between the State and the Region and embodies a claim of self-sufficiency by the Region which repudiates the on-going exercise of interdependence required by the idea of concurrent or shared powers with the State. While concurrent legislative competence reflects institutional relations which converge towards unity and integration, the very idea of powers that are "exclusive" to an institution (whether it be the State or the Regions) expresses a self-centred vision, and leads to a separation of interests, oblivious to the needs of the national interest. Moreover, the national interest envisages complex public policies that are difficult to break down into individual subject matters, attributed exclusively to one body or another. This emerges clearly from constitutional case law which, in fact, in its efforts to solve cases of "intricate subject matters" has devised the principle of the "prevailing" matter, according to the objective being pursued by public policy in the given circumstances. When the complexity of the

social sector to be regulated makes it difficult to refer to only one single subject, priority must be given to the most prominent matter in accordance with the purposes being pursued by the law (Ronchetti, 2014).

Furthermore, it is very likely that in the future the State will regret having consented to this significant loss of law-making power over a number of areas and will firmly claim the broadest possible interpretation of its competence over the remaining areas, as already happened after the 2001 revision. This state of affairs is bound to cause a rise in the number of cases brought before the Constitutional Court precisely at a time when the cases of conflict between the State and the Regions had finally decreased. The case law on the overwhelming number of post-2001 constitutional disputes, however, has greatly reduced the actual exercise of the many, significant powers that the new Title V attributes to the Regions. It is therefore particularly difficult to understand why the State should be willing to grant exclusive law-making rights on all those matters given the fact that since 2001, even through its politically different Governments, it has encroached on the spaces of regional autonomy. The generic reference made by Article 116 to all concurrent competences listed in paragraph three of Article 117, moreover, would seem to imply that the concurrent matter of "financial coordination", which has so far been construed by constitutional case-law as a quasi-exclusive State matter because it "cuts across" all regional powers, is also under the exclusive competence of the Region.

For these basic reasons the devolution *en bloc* of matters to a single Region is not legitimate, just as the devolution of any matter without a specific motivation and without undergoing a rationality verification is not legitimate (Vandelli, 2019). Furthermore, there are some subject matters that inherently cannot be devolved exclusively to a Region (Olivetti 2019): for example, it is difficult to understand what kind of «financial *coordination*» can be regulated and organized by an individual Region. Therefore, there ensues from a systematic reading that not only the number but also the size of the subject matters indicated by Article 116, paragraph 3 needs to be delimited. It has been demonstrated, in fact, that even in the case of Emilia-

Romagna which claims fewer subjects, the devolution of powers would be no less impressive and destabilizing (Pallante, 2019).

From this point of view, a closer examination of the matter, if not a sharp and clear turnabout, by constitutional case law itself is necessary. So far there has been only Sentence no. 118 of 2015 in which the Constitutional Court considered legitimate the Referendum to be held by the Veneto Region in which voters were asked if they agreed on requesting «further forms and special conditions of autonomy». Although there was «no indication of what areas need greater regional autonomy on which voters are asked to express their opinion», the Constitutional Court merely found that these areas «can *only* [our italics] concern» matters of concurrent legislative powers, referred to in Article 117, paragraph three of the Constitution as well as the matters of exclusive legislative power mentioned above: according to the Court, «thus interpreted, the referendum query *does not envisage developments in autonomy that exceed the limits posed in the Constitution* [our italics]» (sentence 118 of 2015).

After the referendum (Violini, 2018), Veneto requested to take on all twenty-three subjects on an exclusive basis, Lombardy a few less and Emilia-Romagna sixteen. This in a context in which not even the ordinary constitutional division of competences is fully respected, in particular through three mechanisms for centralizing powers endorsed by the Constitutional Court. Constitutional case-law has created other "types" of powers, and in particular the goal-oriented powers of the State (cross-cutting nature of some matters under the exclusive competence of the State), and the power - in the name of unitary requirements - to "call for subsidiarity" thereby taking over administrative and legislative regional functions. And lastly, the anomalous cross-cutting nature of concurrent powers, namely "the coordination of public finances" intended essentially as a means for containing expenditure (Ronchetti, 2014).

The Constitutional Court, therefore, must be urged to specify that the «only» it used to indicate the matters referred to in paragraph three of Article 116 simply intended to delimit the range of subjects *within which* it is possible to request additional forms of autonomy

and only with specific and individual arguments based on the interest of the entire system of Regions. Even though the Court has expressly excluded that a formal declaration of independence can be made through a referendum, Constitutional case-law more generally should clarify that autonomy, although asymmetrical, cannot be a sort of independence, not even from a substantial standpoint. In the aforementioned 2015 ruling, indeed, the Court declared the regional law illegitimate, which provided for a consultative referendum to find out the will of the Veneto voters on the following question: «Do you want Veneto to become an independent and sovereign Republic? Yes or no?». In the opinion of constitutional case-law, this question suggested «institutional upheavals radically incompatible with the fundamental principles of unity and indivisibility of the Republic, pursuant to Article 5 of the Constitution» because «social and institutional pluralism and territorial autonomy (...) cannot be taken to extremes, to the point of causing a *fragmentation* of the legal system [our italics]». Is this illegitimate claim hidden in some way in the concrete forms emerging from the direct application of asymmetric regionalism?

This question is legitimate in the face of such radical and extreme requests, and it arises from the specific institutional context in which the asymmetrical configuration of regionalism was initiated.

3. An already broken context: length of residence in the territory

While following the reform of Title V, the State attempted to re-centralize the legislative powers constitutionally attributed to the Regions, it failed to exercise its main tasks: on the one hand, it failed to define the essential levels of services concerning civil and social rights; on the other hand, it failed to establish the forms of «equalization with no allocation restraints, for the territories having lower per-capita tax-raising capacity» (Article 119, paragraph 3), the «supplementary resources» and «special measures in favour of specific Municipalities, Provinces, Metropolitan Cities and Regions to promote economic development along with cohesion and social solidarity, to eliminate economic and social imbalances, to foster the

exercise of personal rights, or to achieve goals other than those pursued in the ordinary implementation of their functions» (Article 119, paragraph 5).

The absence of any redistribution activity took place in a context in which, especially following the 2008 crisis, the State made spending cuts with dramatic repercussions on the ability of local authorities to provide the services for which they are responsible. In this way, rights such as social services, housing, health care, education, training and job placement were jeopardized, making "regional citizenship" the protagonist of the "substantial" dimension of citizenship.

The downsizing of the spending autonomy of the Regions is one of the causes of the widespread tendency to reduce the number of beneficiaries of services by requiring long-term residence in the territory of the Region: with this criterion unreasonable discriminations have been introduced in the enjoyment of fundamental rights to the detriment of all those who are newcomers to the Region. These policies of exclusion of citizens (and even more so of non-citizens) who are living in a Region that they are not originally from clearly express a form of separation and isolation from the rest of the Nation: in this way the articulation of the people turns into fragmentation. This was well understood by the Constitutional Court which, with regard to the criterion of length of residence for access to social benefits, stated that «the rules that introduce this requirement (...) involve the risk of depriving certain individuals of access to public services only because they exercised their right to movement or because they had to change their Region of residence» in pursuance of Article 120 of the Constitution (sentence no. 107 of 2018).

This breakdown of the national community pursued by many Regions, especially in the North, through the criterion of long-term residence in the regional territory for access to social benefits is part of a dynamic of internal migrations consisting of people moving from the South to the North of Italy. This resumption of the abandonment of the South in favour of the North is determined by the widening of the Country's territorial gap (Svimez, 2019) due, not only to the

absence of territorial equalization policies, but even to a misunderstood fiscal federalism whereby public spending has been skewed in favour of the inhabitants of the Centre-North.

And yet the Northern Regions are witnesses to the much more significant privileges enjoyed by their neighbouring Regions which have special statutes. The difference in quality of life, far more than exquisite cultural issues, would seem to be at the basis of the phenomenon of the "migration" of their municipalities towards neighbouring specialties (Cortese, 2018). These are micro-secessions motivated by the desire to enjoy the considerably higher tax revenues in those Regions (Buglione, 2016).

In addition, the reprehensible - and in fact censured - «dilatory, spurious, ambiguous, incongruous or insufficiently motivated attitudes» (sentence no. 103 of 2018) attributed to the special Regions to restrict their contribution to the necessary process of fiscal consolidation of public accounts. This dispute also demonstrates the extent to which the guarantee of the bilateral agreement enjoyed by the Regions with a special statute can be abused, and hence is a warning against the direct application of differentiated regionalism based on agreements with each individual Region.

4. When claiming asymmetry means demanding inequalities

It appears significant that the other referendum approved by a law of the Veneto Region concerned the percentage of tax revenue, which is a salient distinctive feature of the 'special statute': the question addressed to the Venetians was if they wanted to "retain" eight tenths of the tax revenue raised on their regional territory. In sentence no. 118 of 2015, the Constitutional Court clearly explains that this hypothesis would have unlawfully entailed «the diversion of a large proportion of funds from general public finance, directing it to the exclusive advantage of the Region (...) and its inhabitants (...) thus affecting (...) the bonds of solidarity between the regional population and the rest of the Republic».

This passage shows that the claim to withhold this share of State taxes would have broken national unity that is underpinned by

the mandatory duties of solidarity, just as the declaration of independence would have violated the principle of unity and indivisibility of the Republic pursuant to Article 5 of the Constitution: therefore, both the territorial and substantial secession (Viesti, 2019; Villone, 2019) of part of the sovereign people from the duties of national solidarity are *contra Costitutionem*.

However, after the referendum, the Veneto Region continued to firmly claim its "right to receiving back" the wealth produced on its territory which, in its opinion, presented an "exorbitant fiscal balance" to its disadvantage because the regional public administration would have less resources than the taxes levied in Veneto for the provision of services for its resident citizens. The Constitutional Court, with sentence no. 83 of 2016, had already clarified, however, that the fiscal residue «cannot be considered a specific criterion of the provision contained in Article 119 of the Constitution, both because the appropriate methods for calculating the differential between fiscally acquired resources and their reuse in the territorial areas of origin are controversial, and because "the absolute balance between taxes levied and use of the latter in the territory of origin is not a principle laid down in the constitutional provision invoked" (sentence no. 69 of 2016)».

On closer inspection, the criterion of the regional origin of revenue, as well as the criterion of long-term residence in the Region in order to be given access to public services, expresses the idea of "we are served first and then everybody else", in clear violation of the principle of equality between people regardless of where they live on the national territory. Furthermore, with the direct application of asymmetrical regionalism, it was immediately found that, on the basis of a more careful assessment of the enlarged public expenditure, the complaints of the Region were groundless and that an unjustifiable inequality in treatment affected the Southern Regions. This is why the so-called "34% to the South clause" was introduced, in particular to ensure that public investments would gradually become commensurate with the size of the population residing there: even though the population residing in the South of the Country is 34% of Italy's total population, this area has on

average received about 26% of public resources. The mentioned 'clause' pursues the objective of bridging the gap in the flow of public resources between the Regions of the South and the Regions of the Centre-North.

Nonetheless, confirming the substantially secessionist nature of the requests made following the regional referendums for the application of paragraph three of Article 116, Regional Council resolution no. 155 of 15 November 2017, demanded, in order to exercise the powers to be devolved to them, «the following shares of the taxes collected by the State: nine tenths of personal income tax IRPEF, nine tenths of the income from taxes on businesses IRES, nine tenths of the revenue from value added tax VAT)»: shares that were even higher than the eight tenths already judged to be unconstitutional by the Court in 2015!

On 28 February 2018, the minister for regional affairs of the outgoing *Gentiloni* government signed three pre-agreements with the Lombardy, Veneto and Emilia-Romagna regions where – setting aside the hypothesis of "receiving back" the 'fiscal residue' - a mechanism was envisaged for transferring resources anchored to the criterion of historic expenditure, which has recently been found to cause very serious inequalities. According to the draft agreements signed on March 4 2019 by the Minister for Regional Affairs of the newly sworn-in government, the transition from historic expenditure to standard needs was to be entrusted to inter-governmental joint committees only after the approval of the law implementing the agreement. Furthermore, if such committees were not established within three years, the "fiscal privilege" of the guarantee of average per capita expenditure would be applied to the Regions concerned to the detriment of the others, given the supposed invariance of total public expenditure. Furthermore, the standard needs would be «calculated also taking into account regional tax revenues, and in any case without prejudice to the current level of services (i.e. only increases would be allowed). Up to now, tax revenues have never been considered in the complex calculations of the standard needs of the Municipalities, always and only connected to the territorial characteristics and socio-demographic aspects of the population.

Relating the financing of services to tax revenues means establishing an extremely important principle: namely that citizenship rights, education and health to begin with, can be different among Italian citizens; greater where per capita income is higher» (Viesti, 2019).

Even though there is greater awareness of the need to establish 'essential levels of services' (LEPs) and of the importance of ensuring uniformity in the services provided throughout the territory, the hypotheses currently under discussion are in favour of proceeding with devolution based on the «permanent resources entered into the State budget under the current law in force»: an unclear formula which, however, closely resembles historical expenditure.

Is it legitimate to devolve all the competences claimed by making permanent the unfair distribution of public spending based on the unjust inequality followed so far, in the hope that sooner or later we will be able to recalibrate the allocation of public resources according to criteria that do not contradict the principle of equality so much? It should be remembered that the autonomy principle detached from solidarity implies, or in any case risks, being reduced to mere competition and the promotion of indifference for the fate of others, under the claim of practicing independence disguised as autonomy.

If the autonomy principle is, as I believe, strictly connected to the objectives set out in Article 3, the forms taken on by the direct application of differentiated regionalism appear to diverge completely from the meaning of autonomy as laid down in our Constitution. The concept of autonomy has been misinterpreted by the institutions and political forces that prepared and initiated the process implementing the provision of paragraph three of Article 116 of the Constitution because they have gone blatantly against the principle of substantial equality, challenging the unity and indivisibility of the Republic with forms of substantial secession of part of the sovereign people from the duties of national solidarity.

5. Remedies

Before any concrete application, therefore, there is a need at least for a law implementing Article 116, paragraph 3. The Government in office is taking action in this direction to overcome «the absolutely reprehensible practice» of the past. One problem is that «the Constitution focuses only on the final moment» of approval of the law (Vandelli, 2019), which requires approval by an absolute majority on the basis of a State-Region agreement (paragraph three of Article 116). In order to integrate this rule I do not think that an ordinary framework law is suitable as proposed by the Minister for Regional Affairs (cfr. Mazzarolli, 2019; Olivetti 2019; Piraino, 2019; Bifulco, 2019; Gianfrancesco, 2000; Morelli, 2000) in line with the thinking on the issue of some scholars (Morrone, 2007). In my opinion a source of constitutional rank is required to supplement paragraph three of Article 116 (Ronchetti, 2020): constitutional rules are needed that explicitly set forth the procedural and substantive limits of asymmetric devolution, and that prevent Article 116 from being construed and applied in ways that undermine or go against the unity and indivisibility of the Republic, what is more in an almost irreversible way. I would like to recall that the law pursuant to Article 116, paragraph 3, not only cannot be modified without the consent of the Region concerned which works out the agreement jointly with the State, but it actually prevails, since it is reinforced, over the previous framework law which is a primary law. Furthermore the very object of the agreement, namely a derogation from the sharing of legislative powers and the necessary resources, is definitely of constitutional standing, and as such requires adequate guarantees.

The supplementary constitutional provisions must regulate the «principles» and «methods» pursuant to Article 5 of the Constitution that are to be followed. This is necessary in order to avoid that, in the name of autonomy and its needs of interdependence, separation and isolation from the rest of the Nation is pursued and, lo and behold, at the expense of the nation itself.

Indeed, the constitutional limits deriving from the fundamental principles of the Constitution must be expressed in

these supplementary rules, in particular by reinforcing the interconnection between the principle of autonomy and the principle of equality.

The first limit consists in subordinating any hypothesis of applying paragraph three of Article 116 to the determination of the essential levels of services and national solidarity interventions, which are the initial steps for any further territorial differentiation, under penalty of unsustainable inequalities. Only once the State has fulfilled these unavoidable and mandatory tasks is it possible to discuss the devolution of individual matters, where arguments going against the general public interest would not be acceptable. Furthermore, Parliament, the body holding the legislative power to be devolved, must be the true *dominus* of the agreement and, to this end, it will finally have to apply the norm of constitutional standing (Article 11 of Constitutional Law No. 3 of 2001) which establishes that Parliamentary regulations can envisage the participation of representatives of the Regions, Autonomous Provinces and Local Authorities in the Parliamentary Committee on Regional Issues. In this way our legislative power, with its disclosure guarantees, will be able to address the question of possible asymmetries together with the entire system of autonomous bodies, taking into account the interdependence that exists between them. As regards the sharing of powers between the State and the Regions, constitutionally provided for by Article 117, these initiatives also belong to the «constitutional matters» that Article 72, paragraph four of the Constitution expressly entrusts to the ordinary procedure of the legislative process, with sectoral parliamentary committees that refer back to the Assembly which is empowered to decide. Only with these procedural guarantees will the substantive issues relating to the size and number of powers and relevant resources be truly protected.

Asymmetry in differentiation - in itself a rather radical idea of regionalism and a potentially very weak idea of the State and of its role - directly questions the relationship between regionalism and the principle of equality. Taking to extremes the dual and compartmentalised vision of the State and of the individual Region and their respective powers involves massive interventions on the

distribution of public resources: what quota of public spending that is funded by taxes should go to the individual Region having asymmetrical powers compared to the other Regions?

The reflections on the relationship between differentiation and inequalities are to take into account above all the various answers to this latter question: further differences in the distribution of wealth and in the provision of public services can only be divisive, betraying that concept of interdependence that lies at the heart of the positive meaning of autonomy as a driver and defence of republican unity and national interest.

It is no small matter, as had been clearly understood by Vandelli (2019) the need to involve the social partners as being essential: his teaching is that a true and sincere upholder of autonomy cherishes the unity of the Republic and the indivisibility of the sovereign people, not only from a formal point of view but also from a substantial standpoint.

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TURNING THE PAGE: AN ANALYTICAL SOLUTION TO THE LAW OF JURISDICTIONAL ERROR

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Abstract

The article discusses problems with the law on error of law and error of fact, particularly the law-fact distinction. It suggests a novel two-stage analytical structure, by which to review jurisdictional error. At the first stage, law and fact are distinguished as analytical categories. At the second stage, frameworks for review of these independent categories are set out.

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1. Introduction

Since the decision in *Anisminic Ltd v Foreign Compensation Commission*[1] (as interpreted by *R v Hull University Visitor, ex p*

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Page[2]), in which the "arbitrary and uncertain"[3] distinction between jurisdictional and non-jurisdictional errors of law was abolished, the courts have struggled to conceptualise jurisdictional error as a ground of review. There has been a disfigurement of the distinction between law and fact, with these heads functioning as instrumentally manipulated, ex-post facto labels indicating little more than the desirability of court intervention[4]. This area of judicial review is burdened by inconsistent and unclear decisions. Review on grounds of jurisdictional error has been avoided both through exploitation of a porous law-fact division[5] and through reliance on the uniqueness of certain facts[6]. However, it is unclear when and why these escape routes from the position under *Page* are available. Similarly, in respect of error of fact, the decision in *E v Secretary of State for the Home Department*[7] may have set the groundwork for a sensible and consistent analysis, but the scope of application of this decision is unclear[8].

Despite jurisdictional error being a ground of review, which derives from the central tenants of our constitution, the position arrived at under *Page* lacks constitutional justification. *Page* conceives of the courts as the only bodies able to supply the clarity and consistency demanded by the rule of law; however, in an expanded administrative and judicial system, other decision-makers are necessary to share the task of promoting these rule of law values. This has been acknowledged by the Supreme Court in respect of the Upper Tribunal[9], and other decision-makers[10], and was one motivating factor in establishing a unified tribunal system

[1] [1969] 2 AC 147 (HL).
[2] [1993] AC 682 (HL).
[3] P. Craig, *Administrative Law*, 8th ed. (2016).
[4] See P. Daly, *Deference on Questions of Law*, 74 Mod. L. Rev. 694 (2011); R. Williams, *When is an Error not an Error? Reform of Jurisdictional Review of Error of Law and Fact*, P.L. 793 (2007).
[5] *Jones v First-tier Tribunal*, [2013] UKSC 19, [2013] 2 AC 48.
[6] *R v Monopolies and Mergers Commission, ex p South Yorkshire Transport*, [1993] 1 WLR 23; *Page*, cit. at 2.
[7] [2004] EWCA Civ. 49, [2004] QB 1044.
[8] See Williams, *When is an Error not an Error?*, cit. at 4.
[9] *R (on the application of Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663 41.
[10] *Jones*, cit. at 5, at [47].

under the Tribunals, Courts and Enforcement Act 2007[11]. Tribunals should be considered as a judicial, rather than administrative, mechanism: they are administered and funded by the Ministry of Justice, in a system combined with the courts. The apex body in this system (the Upper Tribunal) is almost entirely composed of High Court judges[12] and exercises a jurisdiction equivalent to that of the High Court in judicial review. The separation of powers' focus on preventing tyranny is harmed if tribunals are denied a role in answering questions of law, and a monopoly power is reserved for the courts. Other decision-makers – for example, immigration officers and local authorities – are not judicial bodies, and as such, should not be able to conclusively determine questions of law, which may expand their powers beyond the scope delegated by Parliament. In drawing a distinction between different excesses of jurisdiction, as was done by Laws LJ in *Cart*[13], the separation of powers demands review in certain situations but not in others, contrary to the position under *Page*. Where a decision-maker ventures into territory that they are not entitled to – for example, if a local authority with jurisdiction over cases in Edinburgh tries to determine cases in Cambridge – the courts will always intervene to correct the ultra vires action. By contrast, where a decision-maker acts within their authorised field, but misunderstands the meaning of the statute – for example, if the Mergers Commission, in reaching the *South Yorkshire* decision, had interpreted 'substantial' in section 64 of the Fair Trading Act 1973 to mean only 'more than de minimis' – review is not always appropriate. It may be a disproportionate use of court resources, or the tribunal may be more expert than the courts in interpreting the law in this area. Parliamentary sovereignty is the constitutional principle most apparently harmed by the position under *Page*, reflecting an unrealistic understanding of Parliament's sovereign will where the courts are uniformly best-placed to understand the considerations and implications of the statute's interpretation. Practical justifications in support of tribunal interpretation – the endowed expertise and

[11] Department for Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals* (2004).
[12] *R (on the application of Cart)*, cit. at 9, at [22], [25].
[13] *R (on the application of Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin), [2010] 2 WLR 1012 78.

efficiency, which allows tribunals to better understand and serve common law principles and Parliament's intended policies – are an implicit consideration in parliamentary intention[14]. Where Parliament has granted greater capabilities and accountabilities to a tribunal, Parliament intends for this tribunal to have a greater role in conclusively determining the law. Under *Page*, the law-fact distinction is a tool manipulated by judges to undercut parliamentary intent and seize powers destined for decision-makers.

The law under *Page* can be seen as a reaction to the perceived need for increased judicial review over an expanded administrative State[15]. However, the courts' desperate attempts to escape the resulting absolute position through exceptions and manipulation of the law-fact distinction demonstrate the need to develop an approach reflective of the judicialization and increased expertise and efficiency of decision-makers. A rigorous analytical framework, which explains what questions of law and fact are – independent of considerations of competence, efficiency etc. – and sets out analyses to determine the appropriateness of judicial intervention under these different heads can be a powerful defence against judges masking substantive reasoning and baldly carving their way around a law-fact distinction in order to reach their desired conclusions. A formalistic approach supplies clarity, certainty, and a buttress to the rule of law[16] – values harmed by unstructured and disguised judgments which appeal to undefined concepts such as "expediency"[17]. Therefore, I propose a two-stage analytical solution to replace the existing, unsatisfactory approach to the law of jurisdictional error. At the first stage, the law-fact distinction is given independent value. Standing analytical distinctions in the area of jurisdictional error – whether this be Australia's distinction between jurisdictional and non-

[14] P. Daly, *Deference on Questions of Law*, cit. at 4.
[15] P. Murray, *Escaping the Wilderness:* R. v Bolton *and Judicial Review for Error of Law*, 75 Cambridge L.J. 333 (2016).
[16] C. Forsyth, *Showing the Fly the Way out of the Flybottle: The Value of Formalism and Conceptual Reasoning in Administrative Law*, 66 Cambridge L.J. 325 (2007); T. Endicott, *Questions of Law*, 114 Law Q. Rev. 292 (1998).
[17] *Jones*, cit. at 5, at [47].

jurisdictional errors of law[18], the English law-fact divide, or the EU's law/fact/discretion triad[19] – are formally decisive, but in practice they have no stand-alone impact on the courts' determinations, which are instead propelled by subterranean pragmatic reasoning. The encompassing nature of 'law' (understood as statutory interpretation) is recognised: the elucidation of the words of the statute, driven by common law principles of interpretation and policies underpinning the statute, arriving at an understanding which is of direct applicability to the facts in question. Separate from law, a decidedly narrow category of 'fact' can be distinguished: issues of primary fact-finding, misunderstandings of evidence, and failures to consider evidence. These three situations of 'fact' are unique in their objectively and independently verifiable nature.

Adopting these distinct meanings for 'law' and 'fact' (albeit one being particularly broad; the other particularly narrow), the law-fact distinction becomes analytically valuable and allows these normatively distinct categories to be properly and independently addressed. At the second stage, analyses for the appropriateness of judicial intervention in errors of law and fact are set out, reasoned on the basis of substantive considerations, which have thus far been hidden behind labels of 'jurisdictional'/'non-jurisdictional' and 'law'/'fact'. I propose two routes of challenge to address errors of law. Route One is a correctness challenge to the decision-maker's interpretation at a level of abstraction, where the courts are more expert than the decision-maker in interpreting the statute. Route Two is reasonableness review of the decision-maker's interpretation at a level of detail, where the decision-maker is more expert than the courts. Errors of fact are addressed separately, and with a correctness standard.

[18] J. Boughey, L.B. Crawford, *Reconsidering* R (on the application of Cart) v Upper Tribunal *and the Rationale for Jurisdictional Error*, P.L. 592 (2017).
[19] P. Craig, *Judicial review of questions of law: a comparative perspective*, in S. Rose-Ackerman, P.L. Lindseth & B. Emerson (eds.), *Comparative Administrative Law*, 2nd ed. (2017), 389.

2. Stage One: A Meaningful Law-Fact Distinction

In order to give independent utility to labels of 'law' and 'fact' – such that they can move beyond representing a conclusion reached as to the appropriateness of review – 'law' should take on a clear and distinct, albeit broad, meaning. 'Law' is the exercise of making sense of statutory wording, through application of common law principles of interpretation and consideration of the statute's policy. This process concludes with an understanding of statute that is of direct application to the present factual scenario. It cannot be separated out, for example, into 'law' and 'application of the law'. What can be distinguished is a narrow category of 'fact', which should be limited to matters of primary fact-finding, misunderstandings of evidence, and failures to account for evidence.

2.1. Law

Interpretation of statute is the search for the proper understanding of Parliament's words allowed by common law principles of interpretation. The raw materials for this process are the words of statute, which can only rarely be applied without interpretation (for example, an absolute ban on people leaving or entering the country during a health pandemic), and the finished product is custom-built for the facts at hand. For the purposes of my analysis, the interpretation process is divided into two. At the first stage, interpretation is conducted at a level of abstraction, where the courts are more expert than the tribunal; at the second stage, interpretation reaches a level of detail, where the tribunal becomes best-placed to develop the understanding of statute. The crossover between first and second stages happens at a point particular to the statute in question, and the comparative expertise of the tribunal. This divide is a key to promoting the proper understanding of statute: when the body most expert in interpretation gives their understanding, this should be taken to be the statute's inevitable meaning as determined by common law principles of interpretation.

Lord Mustill in *South Yorkshire* seems to suggest a separation between statutory interpretation, and application of this interpretation to the factual scenario: 'substantial' was interpreted to mean "of such size, character and importance as to make it worth consideration for the purposes of the Act";

however, this criterion "may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case"[20]. This should be seen not as a variation in kind, but one of degree. To suggest that the legal meaning of a term can be isolated from its application overlooks the pragmatic nature of statutory draftsmanship[21]. A generalist law cannot set out the consequences to follow in every possible factual scenario; the meaning of statute must be elucidated in greater detail until it can be applied to the present factual situation. A general understanding of 'substantial' is informed by common law principles of interpretation – statutory wording of "part of the UK"[22] conveyed Parliament's intention for the area's size, rather than its market share, to be central to the understanding of 'substantial'. Any further engagement with the statutory term is a continuation of this understanding, still driven by common law principles and the policy of the statute, but engaging with the statute at a greater depth. Contrary to the court's suggestion in *South Yorkshire* (Lord Mustill talks of a "range of possible criteria from which it was difficult to choose and on which opinions might legitimately differ" and a "meaning broad enough to call for the exercise of judgment")[23] it is not helpful to understand statutory interpretation as involving a choice. Interpretation is permissive of only one answer: it is the carving of the statutory veined block of marble with the tools provided by common law principle, the statute's policy, and background considerations, in order to reach the appropriate meaning.

In administering a statutory scheme, a statute's understanding must be developed to such a depth as to straightforwardly fit the primary facts; an interpretation tailored to the facts entails further refinement of the general statutory definition[24]. A decision that the region of South Yorkshire is a 'substantial part' of the UK within the meaning of section 64(3) of the Fair Trading Act 1973, is a demonstration of the meaning of

[20] *South Yorkshire*, cit. at 6, at [32].
[21] Williams, *When is an Error not an Error?*, cit. at 4.
[22] Section 64, Fair Trading Act 1973 (as enacted).
[23] *South Yorkshire*, cit. at 6, at [32].
[24] T.R.S. Allan, *Doctrine and Theory in Administrative Law: an Elusive Quest for the Limits of Jurisdiction*, P.L. 429 (2003).

the statute. Engaging with the statute – by developing higher-level guidance (for example, that the area must be of worthy size, character and importance), applying common law principles, and reaching a conclusion on the facts – clarifies its meaning. If interpretation at greater levels of detail is instead viewed as isolated fact-specific determinations, law disintegrates into a wilderness of single instances. The Housing Act 1996 cases of *Poshteh v Kensington and Chelsea Royal London Borough Council*[25] (in which accommodation that reminded the applicant of her imprisonment in Iran, from which she suffered post-traumatic stress disorder, was 'suitable' for purposes of the act) and *El-Dinnaoui v Westminster City Council*[26] (in which accommodation on the 16th floor was not 'suitable' for an applicant with a fear of heights) appear to be incompatible decisions. This is not so: the cases uphold and inform the same understanding of the Housing Act, in the context of their particular facts, such as the significant shortage of housing in Poshteh's area, Poshteh's inaccurate recollection of the accommodation's features, and El-Dennaoui fainting during her visit. Interpretation of the statute at the fact-centric level should be viewed not as isolated understandings, but as individual brush strokes on a canvas, which colour the interpretation of statute.

2.2. Fact

I use 'fact' to describe only primary facts, misunderstandings of evidence, and failings to take account of evidence. An exercise of primary fact-finding can be seen in *South Yorkshire*, where the Secretary of State delineated the reference area in question: "the county of South Yorkshire, the districts of Bolsover, Chesterfield, Derbyshire Dales…"[27]. Craig has identified examples of the other varieties I seek to classify as 'fact'[28]. *R (on the application of Haile) v Immigration Appeal Tribunal*[29] involved a misunderstanding of evidence: the special adjudicator had confused the relevance of evidence to one body with another

[25] [2017] UKSC 36, [2017] AC 624.
[26] [2013] EWCA Civ 231, [2013] HLR 23.
[27] *South Yorkshire*, cit. at 6, at [26].
[28] P. Craig, *Judicial review, appeal and factual error*, P.L. 788 (2004).
[29] [2001] EWCA Civ 663, [2002] INLR 283.

body. *R v Criminal Injuries Compensation Board, ex p A*[30] addressed a failure to take account of evidence: a doctor's report on the victim, which supported allegations of sexual assault, was ignored by the Board.

More evaluative fact-finding such as assumptions, deductions, inferences and assessments of risk, are excluded from this category. These 'secondary facts'[31] are not factual determinations in the same sense; instead, they are a necessary and inseparable part of the interpretation process. In *Khawaja v Secretary of State for the Home Department*[32], at issue was whether the applicant was an 'illegal entrant' within the meaning of section 33(1) of the Immigration Act 1971. The court interpreted this to cover persons who had obtained leave to enter by practising fraud or deception. It was for the tribunal to develop this interpretation and determine whether the primary facts – Khawaja's non-disclosure of his previous unsuccessful application attempts, and his marriage to a UK national in Brussels – meant that the applicant was an 'illegal entrant'. The distance between the court's interpretation and the primary facts was bridged through development of the statutory interpretation in view of the facts: did Khawaja's acts amount to 'deception'?

The court in *R(A) v Croydon London Borough Council*[33] demonstrated an ability to distinguish objectively ascertainable facts from secondary facts (which I posit make up part of the interpretation process). Baroness Hale said section 20 of the Children Act 1989 "draws a clear and sensible distinction between different kinds of question". On the one hand, "the question whether a child is 'in need' requires a number of different value judgements"; on the other hand, "the question whether a person is a 'child' is a different kind of question. There is a right or wrong answer"[34]. Crucial to the objective nature of the second question was Parliament's deliberate step away from an evaluative definition: 'child' was defined by section 105(1) as 'a person under the age of 18'. Whilst there may be evidential difficulties in

[30] [1999] 2 AC 330 (HL).
[31] J. Beatson, *The Scope of Judicial Review for Error of Law*, 4 Oxf. J. Leg. Stud. 22 (1984).
[32] [1984] AC 74 (HL).
[33] [2009] UKSC 8, [2009] 1 WLR 2557.
[34] *R(A)*, cit. at 33, at [26], [27].

answering this question, the primary facts will objectively meet or fall short of this statutory requirement[35]. By contrast, determining whether the child is "in need" entails confronting difficult questions that inform the proper interpretation of the statute:

> "What would be a reasonable standard of health or development for this particular child? How likely is he to achieve it? What services might bring that standard up to a reasonable level? What amounts to a significant impairment of health or development? How likely is that? What services might avoid it?"[36]

This evaluative element settles the question firmly within the category of 'law'. 'Fact' is therefore distinguished on the basis of its objective verifiability: either the primary fact existed, or it did not; either the decision-maker erred in his treatment of evidence, or he did not. To maintain a distinction with 'law', 'objective verifiability' must be understood narrowly, because there is no way to properly distinguish assessments involving "a minute degree of discretion in the definition of a particular condition from situations in which the degree of discretion is much greater"[37].

3. Stage Two: Standards of Review

'Law' covers the vast plane of statutory interpretation, which journeys from abstract to fact-centric understanding. Since different implications and considerations arise at different points of this process, I propose two routes, by which the courts can review the decision-maker's statutory interpretation on grounds of jurisdictional error. Route One is available for interpretation at a level, where the tribunal is less expert than the courts. The courts' expertise allows them to identify errors in interpretation, and provide a proper understanding of statute. However, judicial intervention must be tempered, because where disproportionate court resources are allocated to addressing errors of law at this level of interpretation, injustices can result. Route Two is available for the tribunal's interpretation at a point, where they have

[35] *R(A)*, cit. at 33, at [51].
[36] *R(A)*, cit. at 33, at [26].
[37] R. Williams, *When is an Error not an Error?*, cit. at 4, 802.

expertise superior to the courts. The tribunal should generally be trusted to have used their expertise to deliver the proper interpretation of statute; however, the courts can assess whether the understanding reached by the tribunal is an unreasonable one, in order to ensure that the tribunal has properly utilized their greater expertise in interpretation. Separate to this analysis of law are errors of facts, the objective verifiability of which justifies judicial intervention to a correctness standard, irrespective of the courts' expertise.

3.1. Law

The route pursued in review of an error of law depends on which part of the interpretation process is challenged. In most cases, a threshold exists – the location of which is specific to the tribunal and statute in question – where the tribunal's expertise comes to outweigh the courts'. When first engaging with the words of the statute, the courts are likely to be the expert body. Interpretation at this stage typically manifests as a generally applicable test, with factors and scope set out. As a more detailed and intricate understanding is demanded, the tribunal will become the most expert interpreter. Decision-makers are able to utilise their familiarity with the area and available lay expertise, to develop the interpretation to give a nuanced understanding of the law on the particular facts.

The courts recognise the limits of their expertise and the strength of tribunal expertise. In *South Yorkshire*, the House of Lords interpreted 'substantial' to mean "of such size, character and importance as to make it worth consideration for the purposes of the Act"[38]. however, further interpretation of the term was left to the Monopolies and Mergers Commission. In the absence of a detailed knowledge of the technical and complex area of regulation, the court were reluctant to fetter the Commission's ability to develop a proper understanding of the statute and "substitute non-statutory words for the words of the Act which the commission is obliged to apply"[39]. The tribunal may be of superior expertise throughout the process of interpretation, as in

[38] *South Yorkshire*, cit. at 6, at [32].
[39] *South Yorkshire*, cit. at 6, at [31].

Puhlhofer v Hillingdon London Borough Council[40], where the meaning of 'accommodation' in section 1(1) of the Housing (Homeless Persons) Act 1977 was at issue – an unqualified, non-legal term in an Act that "[abounded] with the formula when, or if the housing authority are satisfied as to this, or that, or have reason to believe this, or that"[41]. By giving considerable scope for the housing authority to act, there is a parliamentary intent for interpretation of this statute to be a matter for tribunal expertise. Carrying out the policy of the statute – to assist, but not necessarily house, the homeless[42] – required allocation of limited resources between competing needs of the homeless and others on the waiting list, with "due regard for all their other housing problems"[43] – a political judgement that should be deferred to administrative managerial expertise. Therefore, interpretation of the term was left to the local authority. At the other end, the interpretation of provisions such as ouster clauses – implicating judicial creations such as the common law presumption against ouster as well as expertise in constitutional principles, and where specialist technical knowledge is of less value – are best left to the courts.

The crossover of expertise in interpretation can be used to divide 'law' into two stages. The exact point of crossover is largely irrelevant because interpretation is only vocalised in discrete forms – such as a base understanding, higher-level guidance, the identification of specific elements, an understanding particular to the facts –which apparently fall either side of the divide. Route One is available to challenge the tribunal's interpretation on grounds of jurisdictional error where the courts' familiarity with the common law and higher-level interpretation places them in a position of greater expertise in interpretation than decision-makers. Route One is a correctness review, and its availability is determined by what Elliott and Thomas[44] have called 'proportionate dispute resolution' (PDR). PDR calls for proportionality between the cost of resolving an issue, and the benefit of doing so; however, I make sense of the concept through

[40] [1986] AC 484 (HL).
[41] *Puhlhofer*, cit. at 40, at [518].
[42] *Puhlhofer*, cit. at 40, at [517].
[43] *Puhlhofer*, cit. at 40, at [518].
[44] M. Elliott, R. Thomas, *Tribunal Justice and Proportionate Dispute Resolution*, 71 Cambridge L.J. 297 (2012).

interplay of considerations of expertise, efficiency, and parliamentary intent. Route Two is a reasonable review available to challenge the tribunal's more detailed, fact-centric interpretation. At this level of interpretation, the courts' expertise in guiding the common law pales in significance when compared to the tribunal's expertise – derived from exposure, and the input of lay expertise – in the vast and technical area of law at issue, which allows the tribunal to address nuances and deliver the statute's policy on the particular facts. The appropriateness of review via either of these routes will be analysed on the basis of three considerations: expertise, efficiency and parliamentary intent. In Route One these considerations must be counterbalanced to produce a proportionate result. In Route Two, expertise, efficiency and parliamentary intent all point in favour of the tribunal's determination, such that the more deferential standard in reasonableness review operates. The courts should only intervene through Route Two when something has clearly gone wrong in the interpretation process – i.e. when the tribunal has reached an unreasonable understanding – with the intensity of reasonableness review reflecting the importance of the interests at stake.

3.1.1 Route One: Proportionate Dispute Resolution

PDR is encapsulated by Lord Dyson's statement in *Cart*: "the scope of judicial review should be no more…than is proportionate and necessary for the maintaining of the rule of law"[45]. Although intervention is needed to ensure that decisions are taken in accordance with the law,

> "the rule of law is weakened…if a disproportionate part of the courts' resources is devoted to finding a very occasional grain of wheat on threshing floor full of chaff"[46].

In addressing a challenge to the Upper Tribunal's refusal of application to appeal, the Supreme Court had to balance the need to minimise errors and provide independent scrutiny, against the strength of the enhanced TCEA system and the limitations of

[45] *South Yorkshire*, cit. at 6, at [100].
[46] *South Yorkshire*, cit. at 6, at [122].

strained judicial resources. The "particular statutory context and the inferred intention of the legislature" was also central[47].

It is this trade-off between competing considerations which lies central to PDR. The interplay between three factors – expertise, efficiency and parliamentary intent – will be used to determine the appropriateness of correctness review of questions of law at a level, where the court are more expert interpreters than the tribunal. Expertise favours court intervention, but this must be balanced against the efficiency offered by tribunals and countervailing parliamentary intent.

3.1.1.1. Expertise

The courts' long history in developing and applying common law principles of interpretation puts them in a position of superior expertise with respect to higher-level interpretation of statute. In some areas, for example human rights, the courts have taken a special interest and should be considered to have a particular expertise. The statutory appeal criteria adopted in *Cart* – which allowed judicial review when (a) an important point of principle or practice was raised, or (b) there was some other compelling reason – speaks on these hotspots of judicial prowess. Branch (a) appeals to the courts' expertise in overseeing and maintaining a functioning and coherent general law[48]. Branch (b) concerns situations, where extreme consequences result for the individual[49], which speaks on the courts' expertise in protecting fundamental rights and interests of individuals as reflected, for example, in their powers under the Human Rights Act 1998. Nonetheless, the disparity in expertise between courts and increasingly impressive tribunals should not be overstated. As such, tribunal expertise should be used to shape the law in these specialist areas to a greater extent than is permitted under *Page*; judicial review of errors of law at this level of interpretation is not always justified.

Decision-makers can access legal and non-legal expertise to facilitate an interpretation, which best serves the statute's policy objectives. Tribunal panels are composed of specialised judges,

[47] *South Yorkshire*, cit. at 6, at [130].
[48] *South Yorkshire*, cit. at 6, at [43], [57], [128].
[49] *South Yorkshire*, cit. at 6, at [57].

supported by non-legal experts; local authorities are composed of specialist teams, informed by expert guidance; government ministers are supported by special advisers and civil service departments. By contrast, generalist courts lack an all-star cast and are limited to witness reports for the input of non-legal expertise. Decision-makers also develop expertise from familiarity with the breadth of complex and technical law that tribunals regulate – "to fully comprehend such great volumes of law and the regulatory creatures who inhabit these silos requires concentration of almost Herculean qualities"[50]. Tribunals administer a huge diversity of heavily regulated and technical areas such as tax, charity, and immigration. Their familiarity with these specialised fields, the nuances of factual scenarios and the practical implications of statutory interpretation means that intervention by the administrative courts in these corpuses of coherent jurisprudence may harm the law's development and flexibility[51].

In *Page*, the distinction drawn between generally-applicable law and "a peculiar or domestic law of which the visitor is the sole judge"[52] was used by the court to justify their refusal to correct the visitor's interpretation. Despite the differences in regulating public and private spheres, this can be viewed as an acknowledgment of the strength of tribunal specialism. Where the courts fail to value expertise by exposure, there is a risk that the law is left in poor repair. In *Kostal UK Ltd v Dunkley*, the Employment Appeal Tribunal (EAT), interpreting section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 – which gives workers the right not to have an offer made to them by their employers for the purposes of forgoing collective bargaining – decided that the provision applied to an increased pay and bonus offer, and therefore the offer should not have been made by the employer[53]. The Court of Appeal rejected this conclusion, interpreting section 145B to be of no application, where a worker is merely forgoing a collectively bargained term, rather than forgoing the right to have these terms determined by collective bargaining in the future[54]. This means that fundamental terms are not protected, and

[50] P. Daly, *Deference on Questions of Law*, cit. at 4, 707.
[51] P. Daly, *Deference on Questions of Law*, cit. at 4, 707.
[52] *Page*, cit. at 2, 700.
[53] [2018] ICR 768 (EAT).
[54] [2019] EWCA Civ. 1009, [2020] ICR 217.

employers can bypass statutory protections by addressing terms individually. The decision turned on a policy assessment of Parliament's intention[55], but the court failed to account for the realities of industrial practice – this is explained by the court's comparatively inferior expertise. At EAT level, the case was decided by Simler J: specialist employment counsel during her time at the bar. In comparison Bean, King and Singh LJJ – the Court of Appeal judges – had less extensive expertise in this area, with only Singh LJ having practiced in employment law (alongside human rights work).

It appears "anomalous"[56] for High Court judges to be less well-equipped to answer legal questions than tribunal judges, as Lord Carnwath acknowledged to be the case with the Investigatory Powers Tribunal (IPT) and Upper Tribunal. However, in assessing the comparative expertise of court and tribunal, the potential for onward transmission once claims are "channelled into the legal system"[57] must be accounted for. A tribunal judge is of no match for a five-person Supreme Court panel in answering questions of law, but at higher appellate levels the courts can only play an increasingly limited role and efficiency becomes a more prominent consideration in determining the appropriateness of review.

3.1.1.2. Efficiency

An ineffective court-tribunal relationship, whereby all errors of law are subject to correctness review, has resulted in the time-consuming, procedurally-laborious, formal and expensive court route becoming a systematic fetter on administrative decision-making. The great majority of immigration and asylum claims – which make up two-thirds of total applications for permission for judicial review – are unsuccessful[58], but applicants acting to avoid or delay drastic consequences of detention and deportation, even when faced with only dim prospects of success,

[55] IDS, *Employer's one-off direct pay offer to employees not unlawful inducement*, IDS Emp. L. Br. 11.
[56] *R (on the application of Privacy international) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219 [140].
[57] *R (on the application of Cart) v Upper Tribunal* [2010] EWCA Civ 859, [2011] QB 120 [30].
[58] *South Yorkshire*, cit. at 6, at [117].

have "overwhelmed" the administrative courts with a repetitive, burdensome caseload[59]. A proportionate approach is needed to ensure that scarce judicial resources are used most effectively to deliver justice; unmeritorious claims should not be able to clog the system, even where important interests are at stake[60].

Decision-makers derive efficiency from their generally informal, accessible and inquisitorial approach, which reduces the impact of practical barriers, such as legal representation and financial and temporal burdens. Tribunal expertise also facilitates their ability to quickly deliver substantial justice. Whilst efficiency is a trade off with rigour (for example, cross-examination helps to address evidence but is largely unique to the court process), appellate bodies in tribunal ecosystems can provide authoritative guidance and some self-sufficiency in correcting legal errors[61]. Ultimately, Baroness Hale's appeal to practical limitations must inform our approach: "there must be a limit to the resources which the legal system can devote to the task of trying to get the decision right in an individual case"[62].

3.1.1.3. Parliamentary intention

Parliamentary intention is inextricably linked to the practical justifications of efficiency and expertise[63], but it can take on a more central role in a PDR analysis. For example, in *Cart* the Supreme Court adopted second-tier appeal criteria for judicial review of the Upper Tribunal, as found in section 13(6) of the TCEA, because as well as reflecting the Upper Tribunal's expertise and efficiency, this indicated "the circumstances in which Parliament considered that questions of law should be…channelled into the legal system"[64]. Open-textured, non-legal statutory language – such as 'substantial' in section 64 Fair Trading Act 1973 – reflects a parliamentary intention to delegate the responsibility of creative development of the law[65], best achieved by expert decision-makers. Similarly, the absence of

[59] *South Yorkshire*, cit. at 6, at [47].
[60] *South Yorkshire*, cit. at 6, at [51].
[61] *South Yorkshire*, cit. at 6, at [42].
[62] *South Yorkshire*, cit. at 6, at [41].
[63] Daly, *Deference on Questions of Law*, cit. at 4.
[64] *R (on the application of Cart)*, cit. at 9, at [52].
[65] P.S. Atiyah, *Common Law and Statute Law*, 48 Mod. L. Rev. 1 (1985).

parliamentary intervention in the long-standing common law relating to the treatment of university visitors demonstrated an intent for decisions of visitors to be respected by the courts.

In a PDR analysis, these considerations of expertise, efficiency and parliamentary intent are traded off against one another to determine the appropriateness of judicial review via Route One. At this stage of interpretation, the courts have superior expertise; but the lesser the disparity in expertise, the greater the efficiency and corresponding burden on the courts, and the clearer the parliamentary intent favouring the tribunal, the less interventionist the courts should be. We should be more willing to allow questions of law to find finality through the quick, efficient procedure of an expert tribunal than *Page* currently allows; how willing depends on the particular balance struck on the facts. *Cart* saw a powerful demonstration of a PDR analysis, but its reasoning has been criticised by Wade and Forsyth as pragmatic but not principled, due to the courts' "abandonment of jurisdiction as the organising principle of administrative law"[66]. In a similar vein, Boughey and Crawford have argued that *Cart* looks to balance the rule of law and efficiency, rather than focusing on what Parliament has authorised the tribunal to do. Such criticism is misplaced, because error of law and jurisdiction have been vehicles for judicial manipulation, rather than organising principles in our system[67]. The rule of law, our constrained court system, parliamentary intent and the growing expertise and efficiency of tribunal demand a proportionate approach. In a PDR analysis, the composite factors of expertise, efficiency and parliamentary intent are articulated in a balancing exercise; however, these same factors have long been present in the case law as the courts have tussled with the absolutism of *Page*. In *Page* itself, expertise, parliamentary intent, and considerations of efficiency (speed, cost and finality) were used to justify the conclusion reached[68]. By refusing to pin a "spurious degree of precision" on an "inherently imprecise word"[69], the court in *South Yorkshire* appealed to parliamentary intent and implicitly recognised the expertise of the tribunal. In *Moyna and Lawson v*

[66] H.W.R. Wade, C. Forsyth, *Administrative Law*, 11th ed. (2014), 222-223.
[67] J. Beatson, *The Scope of Judicial Review for Error of Law*, cit. at 31.
[68] *Page*, cit. at 2, 704.
[69] *South Yorkshire*, cit. at 6, at [29].

Serco Ltd[70] the courts spoke of "desirability" and "expediency"– umbrella terms composed of considerations such as the utility of an appeal, relative competence of tribunal and court, and utilisation of expertise to shape law and practice in a specialist field[71].

The Supreme Court in *Eba v Advocate General for Scotland*[72], suggested that all tribunals should be subject to the criteria used to determine the appropriateness of review of the Upper Tribunals' decisions on grounds of jurisdictional error. There was a "harmony"[73] between the appeal criteria – adopted from Rule 41.59 of the Act of Sederunt (Rules of the Court of Session 1994) 1994 – and the common law position of judicial restraint against reviewing tribunal decisions. Uniformity of standards was also preferred in *Cart* across the Upper Tribunal chambers, reflecting a strong parliamentary intent embodied in the section 13(6) TCEA appeal criteria (which also aligns with the practice of judicial restraint in considering tribunal decisions)[74]. However, to roll-out the specific criteria reached in *Cart* to all tribunals would defeat the utility of PDR to reach tailored, proportionate resolutions. Beyond the TCEA, there is a strong diversity of decision-makers, differing in subject matter, composition, expertise, appellate tier structure, procedure and available remedies.

The Supreme Court engaged with considerations of expertise, efficiency and parliamentary intent in respect of the IPT in their analysis of an ouster clause in *Privacy International*. The IPT's efficient procedural capabilities failed to impress Lord Carnwath, because the High Court could also protect sensitive information[75], as did the tribunal's specialist expertise because the tribunal's determinations touched upon the general law of the land, in areas where the courts are expert (such as human rights and tort law)[76]. However, the IPT's special status, deriving from parliamentary intent reflected in, for example, the body's

[70] [2006] UKHL 3, [2006] 1 All ER 823.
[71] R. Carnwath, *Tribunal Justice – A New Start*, P.L. 48 (2009), cited in *Jones*, cit. at 5, at [46].
[72] [2011] UKSC 29, [2012] 1 AC 710.
[73] *Eba*, cit. at 72, at [51].
[74] *R (on the application of Cart)*, cit. at 9, at [49].
[75] *R (on the application of Privacy international)*, cit. at 56, at [112].
[76] *R (on the application of Privacy international)*, cit. at 56, at [14].

exclusion from obligations under the Freedom of Information Act, warranted the restriction of judicial review[77]. A PDR analysis to determine the appropriateness of review via Route One of the IPT would require this strong parliamentary intent to be balanced against the weaker arguments of expertise and efficiency. To take another example, the Employment Appeal Tribunal has an efficient procedure, and is marked out by Parliament as a superior court of record (section 20 of the Employment Tribunals Act 1996); but its expertise may be seriously weakened by the possibility of hearings being conducted by a lone judge (Courts and Tribunals Judiciary, 2018), without the support of non-legal experts.

In summary, PDR is the methodology behind a Route One claim, available for review of interpretation of statute formulated at a level, where the courts are more expert than the tribunal. It addresses the absoluteness of *Page* by balancing considerations of expertise, efficiency, and parliamentary intent to reach a proportionate conclusion as to the availability of correctness review of errors of law on grounds of jurisdictional error. The growing expertise, efficiency and parliamentary intent behind tribunal action should be balanced on their merits: the interaction of these considerations will be markedly different in relation to a tribunal headed by a High Court judge compared to a government minister; but PDR is an adaptable framework, able to address both of these decision-makers.

3.1.2. Route Two: Reasonableness Review

I propose a second route to review on grounds of error of law in the form of reasonableness review, available in respect of interpretation operating at a level, where the tribunal is more expert than the courts. The courts' comparatively inferior expertise in interpretation at this stage means that they should take a merely supervisory role in ensuring that the tribunal has utilised their specialist expertise to reach a proper understanding of statute. This reasonableness review would operate as a check on tribunal procedure, not as a means to supplant tribunal interpretation in favour of the courts' formulation. It is a standard justified by the same trident of considerations determinative in Route One's PDR analysis – expertise, efficiency, and

[77] *R (on the application of Privacy international)*, cit. at 56, at [126].

parliamentary intent. Route Two addresses interpretation at its latter stages, where these factors are not counterbalanced or traded-off against one another; they align in unilateral support of tribunal determinations.

3.1.2.1. Expertise

More so than at the earlier stages of interpretation, a practical understanding of the specialised area at hand, in all its nuance and complexity, is required to interpret statute in greater depth and deliver its policies on the particular facts. Although the courts are able to address the difficult questions raised by interpretation of statute at this level of detail (as highlighted by Hale in *R(A)*[78]), lay participation in the decision-making process – something largely absent in the courts – is crucial to delivering a proper application of statute. Non-legal expertise is of manifold value. Lay experts – such as trade union officials on employment panels, and permanent local authority staff, who process hundreds of housing applications each year – represent the community values of the people affected. They supply wider expertise and socio-political perspectives, facilitative of more effective decision-making and responsiveness to the context of the case[79]. Who should be trusted to interpret, at such depth, immigration legislation designed to:

> "produce a logical and just system for admitting those numbers and categories of long-term and short-term applicants for entry who can be absorbed without disastrous economic, administrative or social consequences"?[80]

Even where external expertise is unavailable (as is the reality of publicly-funded bodies), familiarity achievable only through specialisation means that there is a clear disparity between the ability of tribunals and courts to answer questions of law at this level.

[78] *R(A)*, cit. at 33, at [26].
[79] S. Turenne, *Fair Reflection of Society in Judicial Systems - A Comparative Study* (2015).
[80] *Khawaja*, cit. at 32, at [126].

3.1.2.2 Efficiency

Tribunals are informal, quick and accessible bodies born of the volume and diversity of cases, which pass through the judicial system and which cannot be adequately addressed with the scarce resources and cumbersome processes of the courts. The courts have not the time, resources, nor expertise to manage the full breadth of individual circumstances and unforeseen situations, which arise in the administration of a statutory scheme. Their ability to give binding guidance that speaks directly to all subsequent cases under the legislation is constrained to means of abstract interpretation (which would fall under Route One). Interpretation at a more detailed level, which engages with the facts, will elucidate the general understanding of the statute, but may be of limited direct value to other factual scenarios. Therefore, efficiency requires that decision-makers carry out the legwork in interpreting statute at this stage, in order to properly address the particular facts.

3.1.2.3. Parliamentary intention

The third prong in the trident, which strikes in support of reasonableness review in Route Two is parliamentary intent. Parliamentary intent is facilitative of the substantive expertise and efficient operation of tribunals; but as noted in relation to Route One, it can also have independent value. For example, the courts' relinquishment of their ability to answer questions implicit in the process of reaching a detailed interpretation in *R(A)* can be explained on the basis of parliamentary intent. The court was not comfortable in determining which service the local authority should provide because it was "entirely reasonable to assume that Parliament intended such evaluative questions to be determined by the public authority"[81].

These three considerations – expertise, efficiency and parliamentary intent – support the conclusion that questions of law at this more detailed, fact-centric level should be left to the determination of decision-makers. Tribunals reach more effective decisions more efficiently; judicial review is therefore only useful as a backstop, where interpretation has clearly gone wrong. Reasonableness review reflects the courts' proper place, as

[81] *R(A)*, cit. at 33, at [26].

dictated by considerations of expertise, efficiency and parliamentary intent. In light of these factors, the House of Lords in *Puhlhofer* subjected the interpretation of statute to review only where this body had acted perversely. The court was receptive to Parliament's legislative intention and the tribunal's expertise in managing finite resources. Efficiency also pointed strongly against invasive judicial review, due to the prolific litigation, which accompanied the introduction of the Housing (Homeless Persons) Act 1977[82], and the inability of the courts to address the strong diversity of factual situations "ranging from the obvious to the debatable to the just conceivable"[83]. Whilst the courts' comparatively inferior expertise points against correctness review, it does not deny them the ability to recognise an unreasonable interpretation.

Reasonableness review is a flexible, structured[84], and potentially intrusive[85] standard. Therefore, Route Two is a viable solution even in areas where the courts take a special interest in protecting individuals, for example asylum and immigration cases. In the asylum case of *R v Secretary of State for the Home Department, ex p Turgut*[86], the Secretary of State's assessment of 'risk' – a secondary fact, part of the tribunal's interpretation of statute particular to the facts – was subjected to anxious scrutiny. This sub-Wednesbury standard reflects the important rights implicated and the courts' supervisory (and not decision-making) role in reviewing interpretation at this level. However, the courts are not always this unambiguous in their review. In *Kibiti v Secretary of State for the Home Department*[87], the court's discussion centred around whether the tribunal's determination was adequately justified by the evidence. This was framed in terms of assessing whether the tribunal's decision was beyond "the range of responses open to a reasonable decision-maker", which should be considered an exercise of anxious scrutiny[88]. It is not, nor should it be, correctness review – a standard which pays no

[82] *Puhlhofer*, cit. at 40, at [511], [518].
[83] *Puhlhofer*, cit. at 40, at [518].
[84] P. Daly, *Wednesbury's Reason and Structure*, P.L. 237 (2011).
[85] *R v Ministry of Defence, ex p Smith*, [1996] QB 517 (CA).
[86] [2001] 1 All ER 719 (CA).
[87] [2000] Imm AR 594 (CA).
[88] *Smith*, cit. at 85, at [554].

attention to the tribunal's decision, no matter how reasonable or well-intended. The intensive reasonableness review of errors of law in these cases is proportionate: the "more substantial the interference with human rights, the more the courts will require by way of justification before it is satisfied that the decision is reasonable"[89]. In the immigration case of *Khawaja*, the court required the immigration officer's decision to detain and remove the applicant to be justified on the balance of probabilities, with the degree of probability being "proportionate to the nature and gravity of the issue"[90]. This determination, arrived at by developing statutory interpretation to fit the facts, was treated with "extreme jealousy"[91] because of the potential consequences of deportation and imprisonment without trial. Again, this should be understood as reasonableness review: the silent premise being that if the tribunal's conclusion is not adequately justified, then the decision is unreasonable[92]. The distinction drawn by Lord Bridge in *Khawaja*, between situations where a resident is deported because of their illegal entry (immigration), and situations where the applicant's leave to enter is refused (asylum) is false[93]. He suggested that the immigration applicant warrants greater protection than the asylum-seeker, which may open the door for an argument in support of a correctness standard to operate in the immigration context at all stages of interpretation. However, it is the same adverse consequences and rights, which are at stake in immigration and asylum cases: the applicant is detained and removed from the UK, after living there for a period of time. Khawaja had been living in the UK for a year as an illegal entrant before being detained; the applicants in *Turgut* and *Kibiti* had actually been present in the UK for longer, as asylum-seekers. Therefore, it is a reasonableness standard, which should apply across the board in review of interpretation at this stage, where the tribunal is more expert than the courts. The standard's flexibility ensures that the particular demands of the case can be met, without allowing the courts to intrude too far into something that they do not – nor have the time nor resources to – understand.

[89] *Smith*, cit. at 85, at [554].
[90] *Khawaja*, cit. at 32, at [97].
[91] *Khawaja*, cit. at 32, at [122].
[92] T. Endicott, *Questions of Law*, cit. at 16.
[93] *Khawaja*, cit. at 32, at [122].

3.2. Fact

The law on error of fact lies in uncertainty. *E* established "mistake of fact giving rise to unfairness" as "a separate head of challenge", requiring the error to be "uncontentious and objectively verifiable"[94] alongside four other conditions. However, it is unclear whether this decision opens the gates to review error of fact generally[95], or only in the case of misunderstanding of established and relevant facts, as one of three purported pre-existing categories in error of fact[96]. Craig's understanding of 'fact' has required him to limit the intrusiveness of the decision by arguing for restrictions on the admissibility of fresh evidence and the introduction of a threshold of failure[97]. But if 'fact' is understood as being limited to objectively and independently verifiable assessments, correctness review is justified by reason of the decision-maker's determination alone[98]. I propose that the criteria in *E* should serve as the sole basis to review error of fact, when the criteria are read in faithfulness to its wording.

Unique to this decidedly narrow category of 'fact' that I propose – which includes only primary fact-finding, failures to take evidence into account, and misunderstandings of evidence – is the ability to say objectively, and without the need for any specialist expertise, whether or not there has been an error in determining the issue of fact. Contrast questions of law: although driven by policy and common law considerations to an inevitable conclusion, only the most expert body is able to say whether these considerations have been properly understood and the correct interpretation reached. The judgment of the most expert interpreter must be followed, except where it is evidently wrong. Therefore, the appropriateness of correctness review of errors of fact derives from the objectively ascertainable incorrectness of the error: the tribunal failed to establish the proper primary facts, they misunderstood the evidence, or failed to take the evidence into account.

The propriety of a correctness standard of review for errors of fact does not derive from the factors prominent in my analysis

[94] *E*, cit. at 7, at [66].
[95] P. Craig, *Judicial review, appeal and factual error*, cit. at 28.
[96] R. Williams, *When is an Error not an Error?*, cit. at 4.
[97] R. Williams, *When is an Error not an Error?*, cit. at 4, 796.
[98] R. Williams, *When is an Error not an Error?*, cit. at 4, 796.

of errors of law (expertise, efficiency and parliamentary intent). These factors point to leaving questions of fact to tribunals, subject to a concession to justice where correctness review is appropriate. First, expertise: the non-legal expertise of decision-makers facilitates an understanding of evidence in all its intricacy and difficulty. Second, efficiency: it would be inefficient to place the significant and time-consuming burden of determining fact in the courts' *legally* expert hands. The courts' examination and cross-examination processes would bring further complications and delay. By contrast, non-legal proficiency in understanding the situation and its characters allows decision-makers to adopt an inquisitorial approach. This allows them to go beyond the evidence presented to them, and make the necessary determinations of credibility to resolve factual disputes with oral and written evidence alone[99]. Third, parliamentary intent: this lies implicit in the strong arguments of expertise and efficiency. However, justice demands that tribunal dominance in the domain of fact not be absolute. When an objective error of fact falls through the expert and efficient decision-making system, the courts should be able to intervene without difficulty. Where there is an error of primary fact, the courts should substitute the objectively correct answer. Where evidence is misunderstood or overlooked, there is no substitutionary answer, because the courts' check is effectively one of procedural fairness, which highlights a mistake in the tribunal's method. Therefore, the decision should instead be quashed and remitted for reconsideration by the tribunal, as was done in *CICB* and *Haile*.

Judicial review on grounds of error of fact must be a proportionate treatment for the particular situation, and the criteria in E offers a sensible basis to limit the scope of judicial intervention. It requires an uncontentious and objectively verifiable error, which is material, and for which the claimant is not responsible. The decision has been criticised for not applying its own criteria stringently[100]; however, I propose to reinterpret the reasoning of the court and have it serve as the foundation for review of the narrow category of 'fact'. At issue in *E* was whether

[99] H. Genn, *Assessing credibility*, (Jan. 20, 2016) available at https://www.judiciary.uk/publications/assessing-credibility-genn/.
[100] R. Williams, *When is an Error not an Error?*, cit. at 4.

the applicant's membership of the Muslim Brotherhood meant that he was liable to persecution if he were to return home. This inference or prediction is a secondary fact, and would be 'law' under the above analysis; it cannot properly be said to be 'uncontentious and objectively verifiable', in the way that primary facts and dealings with evidence are. The tribunal's determination can be understood to have been struck down not on the basis of making an improper inference or prediction, but on the basis of their failure to consider evidence, which had become available after the applicant's hearing but before promulgation: namely, a doctor's medical report in support of the claimant's allegations. The Court of Appeal made a particular point of including failures to take evidence into account within the scope of their criteria[101], and if the wording of "uncontentious and objectively verifiable"[102] is applied faithfully, it is difficult to see how any matters beyond misuses of evidence and determination of primary facts can be said to be 'uncontentious'. Thus, the existing law under *E* can be reconceptualised in order to realise my proposed approach to reviewing errors of fact – as I have narrowly defined them – on grounds of jurisdictional error.

4. Conclusion

I have proposed an analytical approach to replace the faux-analytical position under *Page*, and reflect the expansion of the state and the growing competence of decision-makers, building on promising aspects of what is otherwise directionless caselaw.

Law and fact should be properly defined labels of analytical utility which distinguish different parts of the process of administering a statute which deserve independent treatment. I propose a narrow category of fact separated by its objective verifiability. Correctness review of errors of fact is demanded by justice, and does not require any particular expertise from the court. However, sensible limits must regulate the courts' intervention in this area. *E* offers suitable criteria: as well as being uncontentious and objectively verifiable (something that should be construed narrowly), the error should be material, and not the

[101] *E*, cit. at 7, at [66].
[102] *E*, cit. at 7, at [66].

responsibility of the claimant. Questions of law cover the expansive process of statutory interpretation. It would be problematic to review this with one tool (and would likely fail to avoid many of the dissatisfactions with the current law); two routes should be used to address review of statutory interpretation on grounds of jurisdictional error. Route One is a claim against higher-level interpretation, at the stage where the courts are more expert in interpretation than the tribunal. This is a correctness standard, the appropriateness of which is dictated by PDR – a concept which I explain on the basis of expertise, efficiency and parliamentary intent. Route Two targets interpretation operating at greater levels of depth, where the tribunal is more expert than the courts. This takes the form of reasonableness review, and ensures that expert decision-makers have made use of their expertise to reach an appropriate understanding of the statute. In practice, interpretation is a staggered process, particular to the statute in question and articulated at distinct stages. In challenging a decision-maker's interpretation of statute on grounds of jurisdictional error, it must be determined which body has superior expertise at this level of interpretation, because this will determine whether the claim progresses via Route One or Route Two. It may be the case that there is only higher-level interpretation (such that Route Two is unavailable), only fact-centric interpretation (such that Route One is unavailable), or no interpretation required at all in order for the statute to fit the present facts.

Whilst this approach draws inspiration from the case law, it is far from a rationalisation of the existing law. The law-fact distinction has been mistreated ever since it became decisive to review on grounds of jurisdictional error: this position was established in *Page*, but the court avoided the consequences of the decision through reasoning on the basis of the case's facts. Drawing on demonstrations by the courts, for example in *R(A)* and *South Yorkshire*, it is clear that there is a practical ability to discern between normatively distinct categories, which make up the process of administering statute. A rigid law-fact divide is possible, and 'law' can be further partitioned on the basis of comparative expertise. *Cart* is demonstrative of a PDR approach, which offers a necessary compromise between justice and the realities of the courts and tribunals system. This should be

expanded to supply one route to review of errors of law. Route Two builds upon the courts' responsiveness to decision-making expertise with reasonableness review, as seen, for example, in *Puhlhofer*. Both routes appeal to considerations of expertise, efficiency and parliamentary intent – factors which have influenced the courts' decisions for some time. The law on error of fact can find structured and proportionate guidance from the *E* criteria; however, the proper meaning of the criteria should be respected, and applied to the decidedly narrow category of fact isolated above.

Jurisdictional error is an area central to judicial review and is of great significance to constitutional principles generally. It is essential that the law escapes from the captivity of *Page*, and its uncoordinated, pragmatic struggles to escape the consequences of the decision. An analytical approach is the solution.

THE RIGHTS OF PERSONS INVOLVED IN THE EXCHANGE OF TAX INFORMATION: RECENT OPENINGS OF THE COURT OF JUSTICE AND PERSISTING DOUBTS ON THE RESPECT OF EU FUNDAMENTAL RIGHTS

*Stefano Dorigo**

Abstract

The present work intends to offer an analysis of the topic of people' rights involved in the tax information exchange, based on the recent jurisprudential arrests offered by the Court of Justice of the European Union

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1. Introduction: the role of tax cooperation and the taxpayer's rights

Cooperation between the tax administrations of different states is an essential instrument to ensure the correct taxation of transnational income as well as to enforce tax claims in another jurisdiction[1]. This dual function is clearly manifested in all the instruments through which tax cooperation is implemented: on the one hand, procedures (information exchange, simultaneous controls, physical presence in administrative offices and participation in administrative enquiries) which aim to ascertain the effective ability to pay of a taxpayer who has links with several jurisdictions; on the other hand, procedures (assistance in tax collection) through which a state can concretely implement its tax claim outside its national borders[2].

In the present days such mechanisms are used much more widely than in the past, due to the awareness of states of the need for greater cooperation to protect their fiscal systems, particularly following the global economic crisis[3]; indeed, they are proving to have an additional function, namely as privileged instruments for governing international tax policy choices[4]. The global economic crisis, which exploded in 2008, has led to international cooperation being given the pre-eminent role of helping to recover, as far as possible, revenue for state coffers. Thus, this issue has become central to the political debate among states, which have understood the need to strengthen forms of mutual assistance, without which these days no one nation is able to adequately govern its tax system. This awareness has favoured a multilateral approach, simultaneously involving a plurality of interested states, through both political forums (e.g., the G20 or the main multilateral organizations such as the UN and the OECD) and international multilateral agreements, which are capable of

[1] See M. Stewart, *Transnational Tax Information Exchange Networks: Steps towards a Globalized, Legitimate Tax Administration*, World Tax J. 152 (2012)

[2] On the development of the strong tendency towards cooperation between States see X. Oberson, *International Exchange of Information in Tax Matters. Toward Global Transparency* (2015).

[3] A. Christians, *Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20*, Nw. J. Law & Soc. Pol'y 19 (2010).

[4] For a detailed examination of the fiscal consequences of the global economic crisis, see J. Wouters, G. Meuwissen, *Global Tax Governance: Work in Progress?*, *EUI Working Papers RSCAS 2011/12*, 2011.

regulating the phenomenon without the fragmentation typical of the system of bilateral conventions against double taxation[5].

The EU experience confirms this trend. Here tax cooperation not only has a strictly tax function, but also supports the whole European political framework, with – as we shall see – an unusual focus on the protection of taxpayers' rights.

Hence, the subject of this contribution is precisely the way the EU legal system protects the rights of the persons involved in a procedure of exchange of information. After a brief overview on how the European sources deal with these procedures and the opposite duties of the States involved, the attention will be focused on the recent case law of the Court of Justice of the European Union. As we will we see, although there is an evolution in the Court's jurisprudence towards a greater focus on individual rights, there is still resistance to a complete opening up of taxpayers' participation rights in the course of the exchange of information, which can only be justified by the overriding interest of States in the recovery of revenue. Although apparently characterized by recourse to multilateralism, the framework that emerges still aims to protect the tax system of each Member State and, therefore, is a partial contradiction in terms[6]. At the end of the day, this could lead, also within the national legal orders (as the Italian one), to an overestimation of the public interest, which now seems frankly anachronistic in light of the safeguard of the taxpayer's rights.

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[5] Some authors propose the institutionalisation of tax cooperation through the creation of a forum for consultations and common decisions, as it already happens in other fields of international law: D. Rosembloom, N. Noked, M. Helal, *The Unruly World of Tax: A Proposal for an International Tax Cooperation Forum*, Riv. trim. dir. trib. 183 (2014).

[6] The new features of sovereignty in tax matters have been explored by a large number of scholars in recent times. See, inter alia, T. Dagan, Tax Sovereignty in an Era of Tax Multilateralism, in D. Weber (ed.), *EU Law and the Building of Global Supranational Tax Law: EU BEPS and State Aid* (2017); B. Peeters, *Tax sovereignty of EU Member States in view of the global financial and economic crisis*, EC Tax Rev. 236 (2010); and L. Van Apeldoorn, *BEPS, Tax Sovereignty and Global Justice*, Critical Rev. Int'l Soc. & Pol. Phil. 478 (2018). On the contributions of the Italian doctrine, see F. Gallo, *Giustizia sociale e giustizia fiscale tra decentramento e globalizzazione*, Riv. dir. trib. 1069 (2014); and G. Tremonti, *La paura e la speranza. Europa: la crisi globale che si avvicina e la via per superarla* (2008).

2. Information exchange: the forms and unstoppable rise of automatic exchange

Information exchange is the instrument through which two or more states make available to each other data and documents that have been collected in their own territory, in application of their domestic provisions, concerning the position of a resident taxpayer, in order to correctly determine the latter's worldwide tax base[7]. This form of tax cooperation takes place mainly between states. However, joint bodies can be set up in order to coordinate the procedure between the two states involved. For example, the Directive 2011/16/EU creates a European data supervisor and an exchange of information committee, whose task is to assist the Commission in the work of supervising and implementing the discipline therein. Moreover, the European data supervisor's remit also covers the circulation of information for tax purposes[8].

EU law leaves Member States free to choose the most appropriate modes of exchange. However, three methods are more commonly used. The most widely used to date is exchange on request, wherein the tax administration of one state requires the competent authorities of another state to collect and transmit information in its possession which can be of interest for the former. Therefore, if the state receiving the request does not already have the information in question, it has to activate the investigation procedures set out in its domestic law in order to retrieve it. The request must be detailed, so as to allow the Member State in question to carry out targeted activities and thus avoid wasting resources[9]; in particular, it must indicate both the details of the taxpayer to whom the request refers and the elements already collected by the requesting state which lead to the well-founded belief that the information requested is "foreseeably relevant" for the application of the domestic law, as pointed out by the Court of Justice on several occasions[10].

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[7] For a thorough analysis of this kind of tax cooperation, see R. Seer, M. Gaber (eds.), *Mutual assistance and information exchange* (2010).

[8] See Art. 26.

[9] C. Garbarino, S. Garufi, *Transparency and Exchange of Information in International Taxation*, in A. Bianchi, B. Peters (eds.), *Transparency in International Law* (2013).

[10] According to para. 9 of the initial recitals of the 2011 Directive, "the standard of 'foreseeable relevance' is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that

These indications serve to avoid so-called "fishing expeditions", that is, the formulation of indeterminate and generic requests with the sole purpose of finding clues useful for the requesting state to begin an assessment activity[11]. The main aim is to protect the requested state's fiscal sovereignty, which would be jeopardized by excessively vague requests. Additionally, more responsibility is also required on the part of the requesting state, so that it may only resort to the exchange of information after it has already identified elements that make the other state's cooperation indispensable in a sufficiently delineated case.

Recently, for "group requests" – requests formulated not with reference to an individual and identified taxpayer, but to a class or group of taxpayers – this limit has been partly reduced. Nevertheless, the boundaries of group membership must be sufficiently outlined and circumscribed, so that it does not become an "excuse" to circumvent the ban on fishing expeditions[12].

Spontaneous exchange is less widespread. In this case, a state which in the course of its internal investigation activities comes across data relating to residents of another country that are potentially relevant to its tax administration has the right to transmit them to the other state. The latter then decides whether and how to use the data for the purposes of its internal tax system[13].

Finally, there is automatic information exchange, in other words the sharing of regularly updated databases between states, from which each tax administration can freely draw the information it needs[14]. The technical complexity of this form of

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Member States are not at liberty to engage in 'fishing expeditions' or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer".

[11] J. Malherbe, M. Beynsberger, *2011: The Year of Implementation of the Standards?*, in A. Rust, E. Fort (eds.), *Exchange of Information and Bank Secrecy* (2012).

[12] L. Papadopoulos, *Switzerland: Demarcation between an Acceptable Group Request and an Unacceptable "Fishing Expedition"*, in M. Lang et al. (eds.), *Tax Treaty Case Around The World 2017* (2018).

[13] Art. 10, para. 10, of the 2011 Directive defines spontaneous exchange as "the non-systematic communication, at any moment and without prior request, of information to another Member State". The operative discipline is then provided for in art. 9.

[14] M. Somare, V. Wohrer, *Automatic exchange of financial information under the Directive on administrative coopération in the light of the global movement towards transparency*", Intertax (2015).

cooperation conditioned its use for a long time. However, in just a few years, since the outbreak of the world economic crisis in 2008, this type of exchange of information has developed rapidly. Today, the international community clearly believes that automatic exchange is the ideal means to wage an effective fight against international tax evasion and avoidance. In the European legal system, the last decade has seen the introduction of a series of legislative instruments that have greatly expanded the use of this type of exchange.

With EU Directive 2014/107/EU, which draws on developments in the OECD and G20 in the fight against tax fraud and tax evasion, the Council made it obligatory for Member States to automatically exchange information on certain categories of income (labour income, managers' income, life insurance products, pensions and real estate income) through transmission by resident financial intermediaries[15]. Then the automatic exchange was extended to cross-border rulings and advance transfer pricing agreements[16], information gathered in application of anti-money laundering legislation[17] and lastly reportable cross-border arrangements. It was made mandatory for intermediaries, professionals or taxpayers to disclose such data to the tax authorities, for subsequent automatic exchange among the EU Member States[18].

Automatic exchange is therefore becoming the main form of tax cooperation within the EU: it ensures the elimination of the knowledge deficit between Member States, which had hitherto been exploited by some economic operators to obtain undue tax advantages; and it gives private entities and individuals – first financial institutions, now professionals and, in the future, digital

[15] COUNCIL DIRECTIVE 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.

[16] COUNCIL DIRECTIVE (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.

[17] COUNCIL DIRECTIVE (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities.

[18] COUNCIL DIRECTIVE (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

platform operators[19] – the mandate to collect information useful for the tax policies of all Member States.

That exchange on request has been overtaken by automatic information exchange shows that tax cooperation is going in the direction of limiting forms of mutual recognition (cases in which one state accepts another state's request)[20] in favour of genuinely supranational administrative procedures[21]. The automatic nature of the sharing of data and information between States presupposes agreement on the identification of platforms for the collection of such data, procedures for accessing these platforms and rules for the use of the stored information. Hence, from the purely bilateral logic of exchange on request, we have therefore moved on to a multilateral system based on a set of rules and procedures shared between States.

3. Obligations of the states involved in the information exchange

In both the international and European contexts, restrictions are progressively being placed on the freedom of states to cooperate in tax matters. Indeed, those states receiving a request to exchange information must follow it up even if this

[19] Proposal for a COUNCIL DIRECTIVE amending Directive 2011/16/EU on administrative cooperation in the field of taxation, 15.7.2020, COM(2020) 314 final

[20] It is worth noting that, according to one author, the development of the principle of mutual recognition for tax purposes within the EU runs counter to the legitimate expectations of Member States with regards to a non-harmonized field (J. Ghosh, *Tax Law and the Internal Market: A Critique of the Principle of Mutual Recognition*, Cambridge Y.B. Eur. Legal Stud. 1899 (2014)). However, the Member States' resistance against mutual recognition also covers a field such as VAT, which has already been harmonized, according to P. Genschel, *Why no mutual recognition of VAT? Regulation, taxation and the integration of the EU's internal market for goods*, J. Eur. Pub. Pol'y 743 (2007).

[21] See F. Lafarge, *EU law implementation through administrative cooperation between Member States*, Riv. it. dir. pubbl. comunit. 119 (2010). A wide study concerning the interactions between national tax law, EU law and international law, not limited to the issues under discussion in the present article, can be found in G. Bizioli, *Il processo di integrazione dei principi tributari nel rapporto fra ordinamento costituzionale, comunitario e diritto internazionale* (2008).

information is of no interest for the application of its domestic tax provisions[22].

Bank secrecy cannot be used to justify the non-cooperation of one state with another. Article 18(2) of Directive 2011/16/EU now expressly prevents Member States from refusing to exchange information solely on the grounds that the information is held by a bank, other financial institution, agent or person acting in a fiduciary capacity. The new wording therefore seems to considerably restrict state discretion in exchanging information despite the latter being covered by banking secrecy in national law. The fact that the "era of banking secrecy" is now at an end[23] is confirmed by the rise of automatic information exchange as the standard for tax cooperation in the EU system. As currently outlined, this standard includes the obligation for the financial institutions of each participating state to collect the data in their possession concerning residents of other states. This must then be provided to the government authorities on a regular basis, so that the latter can upload the information on the common database.

Hence, the Directive asserts that the mere reception from another state of a request that meets some formal requirements places the requested state under obligation. Therefore, this instrument lays out a system which implicitly recognizes the administrative act containing the information request[24].

Unlike the international system, in certain circumstances the EU system makes it obligatory for a Member State to use information exchange when the case subject to assessment is linked to another Member State. This duty stems from the function of tax cooperation within the EU system. Indeed, from the outset, the purpose of tax cooperation between Member States has not been to combat evasive practices alone. Instead, it has been interpreted in a broader sense, as a means of promoting the establishment and correct functioning of the common market.

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[22] Art. 18 of 2011 Directive.

[23] Reference is made to the final communiqué of the G-20 summit in London, Action Plan for Recovery and Reform, of 2 April 2009, where paragraph 15, point 7, states that, as a result of the agreements made by the participating States, "the era of banking secrecy is over".

[24] See S. Dorigo, *Mutual recognition versus transnational administration in tax law: is fiscal sovereignty still alive?*, Rev. Eur. Admin. L. 111 (2020).

Article 94 of the EC Treaty, now article 115 of the TFEU (significantly, the legal basis of Directive 77/799/EEC, the first act regulating the exchange of information between Member States), expressly envisages the issuance of directives for the approximation of national laws, regulations or administrative provisions concerning direct taxation, in the event the latter directly affect the establishment or functioning of the internal market[25]. Consequently, it can be argued that the instrument in question was designed not only to play a negative role, namely, to defend the European system against distortions by economic operators, but first and foremost to play a positive role in promoting the objectives of the Treaty, namely to achieve the fundamental freedoms of the common market[26].

The link between tax cooperation and the defence of fundamental freedoms has therefore led the Court of Justice to emphasize the opportunity for Member States to make use of the exchange of information whenever the acquisition of such information appears relevant in order to avoid situations likely to affect the enjoyment of one of those freedoms[27]. Hence, it appears possible to maintain this obligation, which is closely linked to the original objectives of European integration, even in the context of automatic exchange as provided for in Directive 2014/107/EU.

[25] The article reads as follows: «Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market».

[26] The Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee about "Co-ordinating Member States' direct tax systems in the Internal Market" expressly acknowledged the importance of administrative cooperation between the Member States as a means not only of preventing abuses, but above all of ensuring the elimination of all forms of discrimination and double taxation as obstacles to Community freedoms.

[27] Judgment of the Court (Grand Chamber) of 27 January 2009, *Hein Persche v Finanzamt Lüdenscheid*, Case C-318/07, European Court Reports 2009 I-00359, ECLI:EU:C:2009:33.

4. Limits to the use of information received

The information exchanged shall enjoy a high degree of confidentiality in the receiving state in order to prevent misuse outside the objectives pursued through the cooperation procedure. Thus, Article 16 of the 2011 Directive lays down that information communicated between Member States be covered by the obligation of official secrecy. Moreover, it enjoys the protection extended to similar information under the national law of the Member State which received it. However, specific provisions against the misuse of taxpayers' data are missing from European legislation, especially with regard to the protection of privacy. Rather, after referring in general terms to the applicability of Directive 95/46/EC on data protection (now replaced by Regulation 2016/679), article 25 of the Directive expressly states that the rights set out therein may be legitimately limited in the course of an exchange of information when an important economic and financial interest of the Member State or the Union, "including in tax matters", needs to be safeguarded.

The receiving state has wide discretion in the use of the information exchanged for its domestic purposes. The supplying state cannot condition or limit the discretion of the other state in the use of such information, provided that this use remains within proceedings for the assessment and collection of taxes[28].

A question arises with regard to the possible use of the information exchanged during criminal trials in the receiving state for crimes (tax or other crimes, for example, money laundering of profits from a tax offence) which could be proven by such data. It must be considered that such use is in principle not excluded, provided that it takes place in accordance with strict conditions. Indeed, Article 16 of Directive 2011/16/EU clarifies that "with the permission of the competent authority of the Member State communicating information pursuant to this Directive, and only in so far as this is allowed under the legislation of the Member State of the competent authority receiving the information, information and documents received pursuant to this Directive may be used for other purposes than those referred to in paragraph 1 [the administration and collection of taxes covered by the Directive]. Such permission shall be granted if the information

[28] Art. 16, para. 1.

can be used for similar purposes in the Member State of the competent authority communicating the information" [29].

The use of the information exchanged for tax purposes is therefore not permitted in different areas unless the state that provided it gives its express consent and its national legislation allows such use: this prevents the data exchanged from being used in criminal proceedings in prejudice to the general rules and provisions governing defendants' rights[30].

5. Taxpayer's protection during information exchange: a brief overview on international tax law.

According to what has been observed so far, information exchange is usually between states. In essence, it is an instrument to facilitate relations between the tax authorities of two or more states in order to acquire information useful for the determination of a taxpayer's tax liability if this information cannot be found within a single system. There are, however, further persons who are involved in the information exchange procedures: the taxpayer and third parties in possession of data concerning the former. In theory, the taxpayer should be granted rights of information and intervention during the procedure in order to preserve his/her right of defence. So far, however, states have given the issue little attention: the main concern has been the effectiveness of the information exchange, so as to achieve fair taxation, in the belief that allowing some form of intervention by the other interested party would jeopardize this purpose[31].

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[29] S. Dorigo, P. Mastellone, *Lotta alla criminalità economica*, in F. Amatucci, R. Cordeiro Guerra (eds.), *L'evasione e l'elusione fiscale in ambito nazionale e internazionale* (2016).

[30] See C. Sacchetto, *Lo scambio di informazioni in materia fiscale. Collegamenti con il procedimento penale. L'approccio italiano*, Riv. dir. tribut. intern. 92 (2009).

[31] P. Mastellone, *Exchange of information versus protection of taxpayers' rights: the evident imbalance impedes achieving a fair international tax environment*, Journal of Int'l Tax Tr. & Corp. Plan. 77 (2017). However, it has been held that "stronger powers for tax authorities to cooperate in cross-border scenarios worldwide should march hand-in-hand with a stronger protection of taxpayers' basic rights" (P. Pistone, *Coordinating the Action of Regional and Global Players during the Shift from Bilateralism to Multilateralism in International Tax Law*, World Tax J. (2014)).

If, in the past, such an approach might have been understandable, given the public nature of the tax relationship and the perceived prevalence of the State's interest over other individual positions involved, today the situation has profoundly changed. There is a growing consensus that the rights granted to the individual under international law must also be invoked when that individual takes on the role of taxpayer[32]. These are rights that are due to each individual as such and cannot be circumscribed in the case where they are to be invoked against a public subject who is the bearer of a collective interest.

Thus, on this basis, it is growingly argued that certain fundamental rights, which the international conventions on human rights attribute to each individual, must be respected also within the tax relation between the taxpayer and the State. In particular, the right of the former to effective protection has been highlighted, both during the administrative procedure aimed at assessing the tax debt and during the proceedings arising from the appeal against the assessment notice[33].

However, this changed approach is struggling to establish itself in the area of international tax cooperation, and at present the practical implementation of the rights of the person subject to exchange of information appears to be largely inadequate. This, moreover, seems to be the result of the same approach manifested within the supranational bodies that have, in various contexts, dictated the rules on the exchange of information.

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[32] The indicated interpretation has been developed particularly with regard to the rights enshrined in the European Convention on Human Rights. About this topic, see the various essays in F. Bilancia, C. Califano, L. Del Federico, P. Puoti, *Convenzione europea dei diritti dell'uomo e giustizia tributaria italiana* (2014). It seems relevant in this context the analysis of G. Tesauro, *Giusto processo e processo tributario*, Rass. trib. 22 (2006), which is rooted on the influence of the ECHR over the procedural rights, always difficult to permeate by international influences.

[33] See Article 6 of the European Convention on Human Rights, which, in enshrining the right of everyone to a fair trial, provides for protection which, as has been recognised over time by the case-law of the European Court of Human Rights, also applies to the procedural stage prior to trial. The Court has repeatedly recognised, albeit not always in a straightforward manner, that this protection also applies in the tax field. (Jussila v. Finland, 23-11-2006). More recently, the Strasbourg Court has held that the guarantees of a fair trial provided for in Article 6 of the Convention also apply to the investigation stage, prior to the commencement of the actual trial (Ravon v. France, 21-2-2008).

None of the legal texts governing the exchange of information devotes specific attention to this issue. In fact, neither Article 26 of the OECD Model nor the Strasbourg Convention adequately outlines this fundamental aspect. The OECD Model is even silent on the matter, while the Convention merely refers, in Article 21, to the need to safeguard the rights and protections afforded to persons under the laws or administrative practice of the requested State. These are obviously generic formulas, which do not make it possible to identify the specific rights that the individual should be able to exercise in the course of the information exchange procedure. It is true that the amendments to the Strasbourg Convention, adopted with the Paris Protocol of 2010, seem to better express, in the initial recitals, the need for cooperation between States in this matter to ensure, in any event, "adequate protection of the rights of taxpayers". The nature of such rights, which, according to the Explanatory Report to Article 1 of the Convention, must be applied also in the procedural phase consisting in the "prosecution before an administrative authority and imposition of administrative penalties", is also clarified in the recent 2011 Commentary, which acknowledges that within this formula should be understood as including the "rights secured to persons that may flow from applicable international agreements on human rights".

However, the vagueness of both the catalogue of rights that would thus be rendered operative, and of the tools available to the taxpayer to avail himself of them, make the statement of principle theoretical, albeit acceptable.

6. The EU approach and the jurisprudence of the EU Court of Justice before *État luxembourgeois*.

European Union legislation on information exchange does not provide specific measures protecting the rights of the persons whose information is exchanged. Directive 2011/16/EU, as well as the amending Directives, contain a reference to the need for the cooperation procedure to respect “fundamental rights” and to observe “the principles recognized in particular by the Charter of

Fundamental Rights of the European Union, including the right to the protection of personal data" [34].

In the context of the Union, on the basis of what can be inferred from the Charter of Fundamental Rights, which is an integral part of EU law and therefore mandatory for member states and EU institutions, it has been held that the taxpayer should be allowed to be informed about the existence of the exchange procedure in order to effectively defend his/her rights[35]. However, to date, there are no rules that actually implement the protection of those involved in the information exchange, be they the taxpayer or third parties holding the information.

However, the case law of the Court of Justice gives an impulse to overcome these limits. In the *Sabou* judgment[36], the court initially denied that the Directives on information exchange could give rise to rights that the taxpayer could exercise immediately in the course of the procedure. According to the court, the right of defence is, however, protected in the subsequent stage of the procedure, as regulated by the individual state systems[37]. Nevertheless, it remained unclear whether, at that stage, the taxpayer could challenge the legality of the procedure of information exchange between states.

In the *Berlioz* judgment[38], while acknowledging that the procedure for the exchange of information takes place between

[34] See recital 28 of the 2011 Directive and recital 17 of the 2014 Directive.

[35] The possibility to affirm the taxpayer's right to be informed and hence to participate to an exchange of information procedure under art. 47 of the Charter of Fundamental Freedoms is advocated by F. Fernández Marín, *The Right of Defence and the exchange of tax information ruled by EU law*, Studi tribut. europei 25 (2018). More in general, on the impact of EU Charter of Fundamental Rights on the rights of taxpayers see P. Pistone, *The EU Charter of Fundamental Rights, General Principles of EU Law and Taxation*, in B. J. M. Terra, et al. (eds.), *European Tax Law – Volume 1: General Topics and Direct Taxation* (2018).

[36] ECJ (Grand Chamber) of 22.10.2013 – C-276/12, ECLI:EU:C:2013:678, *Sabou*.

[37] On the *Sabou* judgement, see F. Chaouche, W. Haslehner, *Cross-Border Exchange of Tax Information and Fundamental Rights*, in W. Haslehner, G. Kofler & A. Rust (eds.), *EU Tax Law and Policy in the 21st Century* (2017), at 188 ff.

[38] Judgment of the court (Grand Chamber),16 May 2017, *Berlioz Investment Fund S.A. v Directeur de l'administration des contributions directes*, ECLI:EU:C:2017:373. For a comment on this judgment, see A. Pantazatou, *Fundamental Rights in the Era of Information Exchange - The Berlioz Case (C-682/15)*, in M. Lang, P. Pistone, A. Rust, J. Schuch, K. Staringer, O. Storck (eds.), *CJEU: Recent Developments in Direct Taxation* (2018); and J.F. Pinto Nogueira, F.A. Garcia Prats, W.C.

states, the Grand Chamber of the Court of Justice reaffirmed the importance of respecting "the fundamental rights guaranteed in the legal order of the Union", including those enshrined in article 47 of the Charter of Fundamental Rights[39]. Consequently, EU law requires each state to allow third parties who have been ordered to hand over documents relating to the taxpayer in the course of an international cooperation procedure to challenge both the legitimacy of decisions imposing a penalty for the failure to hand over such documents and any flaws in the request for international administrative assistance before the judicial authorities of their state of residence[40].

In order to ensure the effectiveness of this right, the court then recognized the right of these third parties to access the documents subject to the inter-state cooperation procedure. On this point, the Grand Chamber highlighted the necessity not to alter the "principle of equality of arms, which is a corollary of the very concept of fair trial"[41]. Therefore, there is a balance between the two opposing requirements (of the state and of the private subject), considering that the outcome must not completely sacrifice one requirement to the other.

The *Sabou* and *Berlioz* judgements both held that the taxpayer's rights -i.e. the right pertaining to the person under investigation in the requesting State- could be adequately guaranteed in the latter State, after the closure of the exchange of information procedure, by challenging the assessment based on the data exchanged. *Berlioz*, in contrast to the previous decision, goes so far as to recognise a right of the third party holding information on the taxpayer to immediate judicial protection against the request for tax cooperation between the two Member

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Haslehner, V. Heydt, E. Kemmeren, G. Kofler, M. Lang, J. Lüdicke, P. Pistone, S. Raventos-Calvo, E. Raingeard de la Blétière, I. Richelle, A. Rust, R. Shiers, *OS ECJ-TF 3/2017 on the Decision of the Court of Justice of the European Union of 16 May 2017 in Berlioz Investment Fund SA (Case C-682/15), Concerning the Right to Judicial Review Under Article 47 of the EU Charter of Fundamental Rights in Cases of Cross-Border Mutual Assistance in Tax Matters*, 58 Eur. Tax'n 2/3 (2018). On that case, see also M. Eliantonio, P. Mazzotti, *Transnational Judicial Review in Horizontal Composite Procedures: Berlioz, Donnellan, and the Constitutional Law of the Union*, Eur. Papers 41 (2020).

[39] Para. 49.

[40] Para. 59.

[41] Para. 96.

States, resulting in an order against him to produce such information. However, there are a number of points which continue to give rise to doubts: first, the deferred procedural protection of the taxpayer may come at a time when his/her rights have already been compromised; second, the impossibility for him/her to challenge the legality of the request for tax cooperation before the courts of the State of the third party holding the information conflicts with other fundamental rights, other than the right to effective judicial protection, such as the right to protection of privacy and the proper processing of his personal data.

In these respects, therefore, the Berlioz judgment also appeared inadequate and more guaranteeing decisions were awaited from the Court of Justice.

7. The judgement of the Court of Justice in *État luxembourgeois*: one step forward and two steps back.

The opportunity for a broadening of the protection of those involved in the information exchange procedure came from the most recent ruling of the Grand Chamber on joined cases C-245/19 and C-246/19[42]. The case involved a Spanish taxpayer, who was subject to a tax audit in her home country also with reference to investments held abroad through corporate vehicles resident in Luxembourg. In order to reconstruct these investments, Spain sent a request for exchange of information to the Luxembourg tax authorities, on the basis of which the local authorities asked the companies to provide a series of information useful for the investigation. As in the Berlioz case, therefore, the rights of both the taxpayer under investigation in his country of residence (Spain) and the Luxembourg entities holding the information concerning that taxpayer were at stake.

In her submissions to the Court, Advocate General Kokott strongly argued that the rights of the taxpayer should be protected in the State of residence of the information holder in two

[42] Judgment of the Court (Grand Chamber) of 6 October 2020, État luxembourgeois v B and Others. Requests for a preliminary ruling from the Cour administrative (Luxembourg), ECLI:EU:C:2020:795.

respects[43]. After confirming the approach already taken in *Berlioz*, according to which "*the addressee of an information order issued in the context of an exchange between tax authorities of Member States pursuant to Directive 2011/16 is entitled, under Article 47 of the Charter, to judicial review of the legality of that decision*"[44], the Advocate General had upheld the taxpayer's right to challenge directly the acts of the information exchange procedure, which "*concerns information on accounts, account balances, other assets and shareholdings of a natural person, that is to say, personal data*"[45]. Consequently, with regard to these data the right to the protection of one's personal data as laid down in Article 8 of the Charter of Fundamental Rights is taken into account, since "t*he obligation of the addressee of the information order to transmit this data to the tax administration constitutes, in itself, an interference with the taxpayer's fundamental right*"[46].

According to the Advocate General, therefore, it is necessary - as required both by Article 47 of the Charter and by the provisions (Articles 7 and 8 thereof) concerning respect for private life - that the taxpayer be allowed to challenge directly the request for exchange of information, as well as the consequent orders to produce information addressed by the authorities of the requested State to the holder of the information, since it is not sufficient to protect the former's rights by means of a deferred challenge to the act of assessment based on the data exchanged. As stated in the AG Conclusions, in fact, if in the requesting State such information were not considered relevant and therefore no assessment was issued, the taxpayer would be left without judicial protection against a violation of her right to privacy which has already occurred.

In the view of Advocate General Kokott, therefore, the *Berlioz* case-law should be completely overtaken, in particular by recognising the full right of the taxpayer - not only procedurally but also, as has been said, substantively - to challenge before the courts of the requested State the lawfulness of the request for information in the name of the right to protection of privacy and

[43] Opinion of Advocate General Kokott, delivered on 2 July 2020, ECLI:EU:C:2020:516.
[44] Para. 58.
[45] Para. 64.
[46] Para. 65.

personal data recognised by the Charter of Fundamental Rights of the European Union. Had this position been upheld by the Court, we would today be in a position to talk about the full recognition of taxpayers' rights in information exchange procedures in the EU system. On the contrary, the ECJ maintained a cautious stance, partly going beyond the limits of its own precedents, but nevertheless avoiding a general opening in favour of the taxpayer as the Advocate General had requested.

The court ruled, in continuity with the precedent cited above, that where, upon receipt of a request for information from another Member State, the state authorities require a resident to disclose information held on a taxpayer involved in an international cooperation procedure, that resident must be allowed to challenge the lawfulness of the decision and the subsequent request before the national court[47].

On the contrary, according to the Court the taxpayers involved in the investigation from which the information exchange request originated do not hold the same right. Although, theoretically, article 47 of the Charter grants the taxpayer the right to effective judicial protection in procedures concerning his/her data, this does not justify his/her direct action against the decision of the requested State addressed to a third party which owns the taxpayer's data. In fact, according to the court, the taxpayer has the right to effective protection before the authorities of his/her state of residence, and can exercise it against any assessment based on exchanged data[48].

However, that right, which the court reaffirms in continuity with the *Sabou* ruling, seems now to have acquired a broader scope. As such, the taxpayer must also in any case be given the possibility of asserting, before his/her national court, the flaws of the original request and contesting the consequent decision issued by the requested authorities against the holder of his/her data.

The judgment in question, therefore, on the one hand reaffirms the conclusions of the previous *Berlioz* ruling with regard both the direct right of the holder of the information and the indirect one of the taxpayer. On the other hand, however, it extends protection to the taxpayer involved in the information

[47] Para. 58.
[48] Para. 83.

exchange procedure, allowing him/her – although only once the international cooperation procedure has been concluded – to question the requesting state's original request for assistance.

Therefore, an albeit indirect judicial protection is envisaged for the taxpayer with respect to the acts of the information exchange procedure.

The judgment of the ECJ in joined Cases C-245/19 and C-246/19 therefore remains ambiguous. It recognises that the right of a taxpayer to challenge before a court the grounds for a request for exchange of information between two Member States concerns not only the procedural aspect (i.e. the right to an effective remedy under Article 47 of the Charter), but above all the substantive aspect, the former being the means of protecting the right of each person to respect for his private life[49]. However, the Court did not have the courage to go so far as to recognise the possibility for the taxpayer to have direct protection against the acts of the international cooperation procedure before the courts of the requested State. In short, the taxpayer must wait until the information exchanged is the basis of an assessment by the tax authorities of his own State in order to challenge, by way of an appeal against that assessment, the defects in the original request which gave rise to the information exchange procedure.

This is an unsatisfactory solution, since it overlooks both the tardiness of the protection moved forward to the moment of notification of the assessment, and even more the possibility that the violation of substantive rights (those under Articles 7 and 8 of the Charter) remains for the taxpayer without any possibility of remedy, in the event that those data are either not considered relevant for the motivation of the assessment, or even do not lead to the issuance of any tax act against the taxpayer. On the contrary, whatever the outcome of the tax investigation by the requesting State, the fact that the taxpayer's data have been subjected to improper circulation and use constitutes a violation of fundamental rights which - in the absence of a challengeable act following the exchange of information - becomes definitive.

[49] Exchange of information procedures put under pressure the taxpayer's right to privacy. For an analysis before *État luxembourgeois* see F. Debelva, I. Mosquera, *Privacy and Confidentiality in Exchange of Information Procedures: Some Uncertainties, Many Issues, but Few Solutions*, Intertax 362 (2017).

The timidity of the Court of Justice in the *État luxembourgeois* case shows that, even in a context that has always endeavoured to limit the typical imbalance in tax relations by enhancing the rights of the taxpayer, there is still a long way to go to fully equalise the positions of the public and private parties.

8. Conclusions: the effects of European case law on the Italian tax system.

The exchange of information procedure requires a fair balance between the need for effective cooperation between tax authorities and the protection of taxpayers' fundamental rights[50]. Although this principle seems to be valid in general, the practice shows a quite different approach. The recent case law of the CJEU remain ambiguous and that attitude risks to feed some "reactionary" approaches which are typical in the Italian legal system. It seems then appropriate to conclude our analysis with a quick look at the Italian domestic law, on which the *État luxembourgeois* judgment may have an influence that could not be entirely positive.

The Italian Constitution does not provide specific norms with regard to international cooperation in tax matters. However, the constitutional system recognizes and guarantees some inviolable rights to individuals even when they act as taxpayers. Apart from general rules included in the Constitution which protect the freedom of persons, domicile and correspondence, it may be recalled that Law No. 212/2000 (the "Taxpayer's Rights Charter") provides for various rights to be exercised during the administrative procedure of investigation and assessment, and therefore also in connection with an exchange of information procedure[51]. The law is considered as an instrument realizing some fundamental principles envisaged in the Constitution and

[50] P. Selicato, *Scambio di informazioni, contraddittorio e Statuto del contribuente*, Rass. trib. 321 (2012).

[51] L. Del Federico, *Tutela del contribuente ed integrazione giuridica europea* (2010), at 279, emphasizes the role of art. 12 as a norm strengthening the principle of proportionality to be followed during a tax inspection; nothing prevents the invocation of such guarantee for the taxpayer also during an exchange of information procedure

therefore having a special force, in the hierarchy of domestic norms, towards other ordinary laws.

The same rights can also be invoked by taxpayers under the main treaties on human rights, although -as already said- these instruments do not expressly mention the tax relationship between states and individuals: human rights, as recognized under international law, have to be respected if the individuals who demand them have the status of taxpayers before the domestic tax authorities[52].

Notwithstanding the different opinion based on the special nature of the relationship between the state and taxpayers, which should be unequal because of the predominance of the former's public interest, the applicability of the fair trial principles during the tax controversies and even in the preceding administrative phase of investigation is gaining preponderance, also thanks to the jurisprudence of the ECtHR and its effect on the Italian legal system.

Despite this clear system of rules, the taxpayer has very rare opportunities to be involved in a procedure for exchange of information in Italian practice. If Italy receives a request, it has to gather information according to its domestic rules and transmit it to the requesting authorities. The taxpayer has no right to be informed about this request and normally the Italian authorities do not inform him either. Therefore, if the information is already in the hands of the tax administration, it is transmitted to the other state without the taxpayer's involvement; if a specific investigation is needed, then it is conducted as a purely domestic one and the taxpayer is not made aware of its aim to provide information to a foreign state. This is also true if the information is requested by Italy to a foreign state: in both cases, a specific involvement of the taxpayer is not allowed and the latter does not have the possibility of disputing the exchange of information or even of controlling the way in which the procedure is put in place.

It is clear that the situation does not change in cases of automatic or spontaneous exchange of information. Therefore it follows that the first and basically the only involvement of the

[52] See S. Dorigo, R. Cordeiro Guerra, *Taxpayers' rights during tax procedures as human rights*, in G. Kofler, M. Maduro & P. Pistone (eds.), *Human Rights and Taxation in Europe and the World* (2011).

taxpayer takes place during the judicial phase in the Tax Court and after the notification of an assessment based on the information exchanged. However, this protection seems to be tardy and not completely effective. As shown by the various judicial cases decided by Italian tax courts with regard to the "stolen lists"[53], the trial begins after the fulfilment of the exchange of information procedure and, therefore, at a time when the violation of the taxpayer's right cannot be entirely redressed. The latter's interest, in fact, is that information not legally gathered is not shared between the competent authorities: when the assessment is notified and the appeal is filed, the information has just been transmitted and the substantial effects of the violation seem not to be completely removed.

Moreover, even in this situation the taxpayer does not have the right to take cognizance of all the documents exchanged, but only of those on which the assessment is based. As a judgment of the Italian Council of State explains[54], the former is not in a position to have access to the acts of the procedure; therefore he/she cannot adequately protect his/her rights and interests as he/she would if he/she could review all the documents – even those not explicitly referred to in the assessment – and the related procedure in order to question the correctness of the latter and the conclusions drawn by the Revenue Agency.

Such an outcome raises many doubts in the light of the rights that the *Statuto dei diritti del contribuente* and the various international and European instruments on the protection of

[53] Reference is made to the Italian case law following the transmission of lists of clients of some banks located in states with extensive bank secrecy, stolen by untrustworthy employees and then sold to foreign states. This practice highlights the contrast, not yet resolved, between two different positions. On the one hand, the fight against tax evasion justifies the abandoning of the traditional limits to exchange of information – and in particular those concerning bank secrecy – in the name of the need to avoid the erosion of taxable income; on the other hand, the taxpayer's fundamental rights have to be protected, especially those related to his active participation in the exchange of information procedure and timely awareness of all the documents transmitted. After initial uncertainties, the Italian Supreme Court stated that the correctness of the procedure through which Italy has acquired the information is sufficient to make the information lawfully usable, regardless of what has happened before. On this trend, see P. Mastellone, *Tutela del contribuente nei confronti delle prove illecitamente acquisite all'estero*, Dir. e prat. tribut. 791 (2013).

[54] See the decision of the Italian Council of State, section IV, 9-12-2011, n. 6472.

human rights today grant to all individuals, even when acting as taxpayers. The approach of the Italian administration (followed by many judges until now) seems to emphasize the supremacy of the public interest to collect taxes and to efficiently cooperate with other sovereign states at the international level over the protection of the interests of persons (be they the taxpayer or also other individuals or companies keeping the requested information concerning the former) variously involved in the procedure.

On the contrary, the principles clearly show that there are no real and persuasive reasons to deny the existence of taxpayers' rights which may be invoked during the exchange of information procedures. Such rights, necessarily modelled on those which in international instruments for the protection of human rights form part of the right to a fair trial, can and must stand together with the recognition of the original sovereignty of states concerning the definition of the domestic tax system and the management of its international relations.

The limits that the EU Court of Justice continues to place on the full recognition of the taxpayer's participation rights in the information exchange phases are likely to reinforce the restrictive attitude of the tax administration and tax judges in Italy. This is a negative effect, which risks enhancing only the instrumental profile of judicial protection, forgetting that, behind and before the right to an effective remedy, there are substantive rights (i.e. the right to privacy and respect to private life) that have to be adequately protected.

DISSENTING OPINIONS BETWEEN COLLEGIALITY AND PLURALISM. THE ITALIAN CONSTITUTIONAL COURT AND THE U.S. SUPREME COURT

Alessandro Marinaro[*]

Abstract

This article aims to analyse the approach of the Italian Constitutional Court to internal dissent and to its (absent) externalisation, utilising both the extensive literature emerged from the decades-long national debate on the introduction of dissenting opinions and the comparison with the radically different Supreme Court of the United States. Indeed, the technique of comparison proves to be particularly suitable to trace the nexus between the absence of externalised dissent in the Constitutional Court and the very nature of the Court itself.

In light of these considerations, the comparison with the United States allows to highlight both how deep-rooted the absence of externalised dissent is in the contemporary Italian system of constitutional justice and how its introduction would require a wide array of complex structural changes.

Therefore, it is concluded that the presence or absence of externalised dissent should be considered and treated as a dependent variable in relation to the system as a whole, rather than an independent one. If the presence of externalised dissent does not emerge as a structural need from the system itself, the impact of its introduction risks to be materially irrelevant or superfluous, if not counterproductive.

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1. The Italian Model of Constitutional Adjudication and the Debate on Dissenting Opinions

1.1. Introduction

This work is focused on the delicate theme of judicial dissent within the realm of constitutional adjudication, more specifically, with regard to the particular case of the Italian Constitutional Court (ItCC). It has to be considered that the Constitutional Court does not admit any form of externalised judicial dissent, and this makes of it an extremely useful object to be analysed in the perspective of the debate between the reasons for secrecy and the ones for externalisation of dissenting opinions.

However, the ultimate purpose of this analysis is to explore the approach of the Italian Constitutional Court to judicial dissent, utilising both the rich literature originated from Italian debate on the introduction of dissenting opinions and the comparison with a radically different institution such as the US Supreme Court (SCOTUS). Indeed, the comparative elements are extremely useful to highlight the close connection between the absence of externalised dissent in the Italian Constitutional Court and the peculiar nature of the Court itself[1].

[1] "What is right for one system may not be right for another. In civil-law systems, the nameless, stylized, judgment, and the disallowance of dissent are thought to foster the public perception of the law as dependably stable and secure. The common-law tradition, on the other hand, prizes the independence of the individual judge to speak in her or his own voice and the transparency of

As a methodological choice, the introductory part is devoted to the reconstruction of the scholarly, judicial and public debate on the introduction of externalised dissent within the Court which has taken place in the decades following the framing of the 1948 Republican Constitution. The purpose of this reconstruction is to review diachronically the most relevant pieces of literature, theories and approaches that have emerged from the various phases of the still ongoing debate, which are necessary in order to build any critical reflection on the topic.

The analysis continues through the comparison between the Italian Constitutional Court and the US Supreme Court (SCOTUS), with the latter representing the opposite side of the spectrum concerning the externalisation of dissent. Beyond comparing the different experiences of the two courts, also exploring the decisive influence that selected elements, practices and characteristics have on the secrecy or externalisation of internal dissent. Examples of such elements include the role of different nomination mechanisms, the relevance given to the individuality of judges and, most importantly, the powerful implications of concepts such as collegiality on one side, and pluralism on the other.

A further critical reflection is exposed in the conclusive part of the article, by exploring the decisive influence of historical circumstances and political ideologies on the two courts' divergent approaches towards judicial dissent, while the findings and implications of the whole analysis are discussed and evaluated in a future perspective.

1.2. The Constitution and the Post-War Phase between Consolidation and Reform

A complete (even if synthetic) historical reconstruction of the Italian debate on dissenting opinions has to consider the framing of the 1948 Republican Constitution as a privileged starting point for research. However, as a second consideration it must be said that the near totality of the existing materials (particularly the ones regarding the embryonic phases of the debate) is written in Italian. This, unfortunately, shows the lack of studies and publications oriented towards an international

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the judicial process", reported from R. Bader Ginsburg, *The Role of Dissenting Opinions*, 95 Minn. L. Rev. 3 (2010).

audience, especially when analysing the connection between the nature of the Italian Constitutional Court and the framing of the Constitution in the perspective of judicial dissent.

The origins of the debate can be traced back to the earliest phases of post-war constitutional framing thanks to the authoritative volume edited by Costantino Mortati in 1964[2]. In the preface of the volume, Mortati himself wrote about a rejected proposal which tended to the introduction of externalised dissent in the (not yet established) Constitutional Court[3]. Two are the phases mentioned by Mortati in the preface: the first regarding the discussion of the *constitutional project*[4] and the second explicitly referring to the debate within the Chamber of Deputies on the constitutional law n. 87 of March the 11th, 1953[5]. Mortati was highly critical of the motivations for rejection expressed within the Chamber of Deputies: firstly, with regard to the *extraneity of the publicity of votes to the Italian legal tradition* and secondly to the risk of political partisanship of judgements.

To the second motivation for rejection, Mortati replied with the relatively minor (one third) proportion of judges elected by parliament with respect to the two thirds nominated by *super partes* organs such as the President of the Republic or the highest echelons of the ordinary judiciary[6]. He also expressed his confidence in the guarantees for judicial independence present in article 135 of the Constitution, such as the ban on the re-election of

[2] C. Mortati, *Le opinioni dissenzienti dei giudici costituzionali ed internazionali* (1964).

[3] See C. Mortati, *Prefazione*, in C. Mortati (ed.), *Le opinioni dissenzienti dei giudici costituzionali ed internazionali* (1964).

[4] "*Progetto sulla Costituzione*" in the original text. See the original proceedings at: http://legislature.camera.it/frameset.asp?content=%2Faltre%5Fsezionism%2F304%2F8964%2Fdocumentotesto%2Easp%3F.

[5] Relation of the Special Commission of the Chamber of Deputies on the legislative proposal "Norme sulla costituzione ed il funzionamento della Corte costituzionale", in *Camera dei Deputati. I Legislatura, Documenti, disegni di legge e relazioni*, A.P. n. 469, 34 (see the original relation at the following web-address: http://legislature.camera.it/chiosco.asp?source=/altre_sezionism/8793/8874/8875/documentotesto.asp&content=/_dati/leg01/lavori/schedela/trovaschedacamera.asp?pdl=469).

[6] The core influence of nomination mechanisms will be treated more in depth during the second section.

judges[7]. Mortati was adamantly confident of the moral and scientific exceptional qualities that constitutional judges should have had. His reading was much closer to common law interpretations of judicial legitimacy[8], grounded in the adherence to popular sentiment of judgments and in the social conscience and moral qualities of judges. Particularly meaningful is the passage in which the true foundation of the authoritativeness of the Court is explicitly said to derive from its close adherence to popular sentiment[9].

The critique to the first motivation came later than the one to the second in the structure of the preface. The alleged extraneity to the Italian legal tradition of externalised judicial dissent is defined by Mortati as historically unfounded. He redirected the reader to Vittorio Denti's essay on the practice of externalised judicial dissent in several courts of pre-unification Italian states[10] contained in the same volume[11], defining the adoption of dissenting opinions within the Constitutional Court a return to the origins rather than an abrupt change[12]. Mortati's analysis and critique to the initial rejection of externalised dissent is extraordinarily important in light of the continuation of the still unfinished debate for two reasons.

The first depends on the crucial role covered by Mortati himself not only in the study and interpretation of the Constitution, but in its framing. Not only member of the Constituent Assembly, he also had been, most importantly, active part of the *Commission of the 75*, instituted with the task of drafting the initial project for a republican constitution, and of the

[7] C. Mortati, *Prefazione*, cit. at 2. For a commentary to article 135 see also: V. Falzone, F. Palermo & F. Cosentino, *La Costituzione della Repubblica italiana illustrata con i lavori preparatori* (1954).

[8] The diverging interpretations of what constitutes judicial legitimacy in the context of legal systems will be also discussed in the second section.

[9] "*…da una stretta adesione al sentimento popolare*" in the original text.

[10] V. Denti, *Per il ritorno al 'voto di scissura' nelle decisioni giudiziarie*, in C. Mortati (ed.), *Le opinioni dissenzienti dei giudici costituzionali ed internazionali* (1964).

[11] For more historical details on the same topic see also: G. Gorla, *Le opinioni non segrete dei giudici nelle tradizioni dell'Italia preunitaria*, 105 Il Foro Italiano 97-104 (1982), and recently: M.G. di Renzo Villata, *Collegialità/motivazione/'voto di scissura': quali le ragioni storiche della nostra 'multiforme' tradizione?*, in N. Zanon and G. Ragone (eds.), *The Dissenting Opinion* (2019), 41-87.

[12] C. Mortati, *Prefazione*, cit. at 2.

Committee of the 18[13], responsible for the coordination of the three subgroups of the former[14]. The exceptionally active role of the Committee of the 18 (or Redaction Committee) cannot be underestimated. For example, according to Leopoldo Elia, it became much more of a political organ than a mere technical commission, probably representing *the most active and decisive element in the process of constitutional framing*. Notwithstanding its decisiveness, the Committee of the 18 worked in a regime of non-publicity and secrecy[15]. For these reasons, Mortati's account and critique of what happened during the framing of the constitutional project, in confidentiality and separately from the *plenum* of the Constituent Assembly, is of vital importance. Furthermore, Mortati was also member of the Constitutional Court from 1960 to 1972, and vice-president in the latest period.

The second reason is based on the decisive impact of his early critique and involvement in constitutional framing on the rest of the Italian debate on dissenting opinions. It can be said that, together with other authors that will be mentioned later, several of his arguments in favour of externalised dissent heavily conditioned the debate over the following decades. Examples of this are the coherence and clarity of constitutional judgements, the dynamism given by dissenting opinions to an indivisible constitutional court (with respect to structurally more flexible ordinary courts) and the evolutionary character of constitutions and of their interpretation[16]. Notwithstanding the contradictory nature of his closeness to *living* and *popular* constitutionalism and his advocacy for the strictly jurisdictional nature of the Court highlighted by Di Martino[17], Mortati's critique still represents the first cornerstone of the debate on externalised dissent in Italy.

Together with Mortati, the most relevant voices in the post-

[13] For a detailed account of the structure and composition of the Commission and the Committee, see also: V. Falzone, F. Palermo & F. Cosentino, *La Costituzione della Repubblica italiana*, cit. at 7.

[14] L. Paladin, *Per una storia costituzionale dell'Italia repubblicana* (2004).

[15] L. Elia, *La commissione dei 75, il dibattito costituzionale e l'elaborazione dello schema di costituzione,* 14 Il parlamento italiano 1861-1988 128 (1989).

[16] C. Mortati, *Prefazione*, cit. at 2. Especially relevant on this point is the connection between Mortati's interpretation and the theories of *living constitution* emerged in the United States from the 1920's onwards.

[17] A. Di Martino, *Le opinioni dissenzienti dei giudici costituzionali: uno studio comparativo* (2016).

war phase of the debate are scholars such as Piero Calamandrei, Mauro Cappelletti, Giuliano Amato, Vittorio Denti[18], Paolo Barile[19] Francesco Carnelutti[20] and Virgilio Andrioli[21]. Noteworthy are also the chronologically earliest academic publications on the theme of dissenting opinions by Vaccaro and Giordano[22], and the concrete attempt of introduction carried out by judge Bracci during the drafting of the Integrative Norms for the Court in 1956[23]. For what concerns Calamandrei, who also had been member of the Constituent Assembly, of the Commission and of

[18] V. Denti, *La Corte costituzionale e la collegialità della motivazione*, 6 Riv. Dir. Proc. 434-436 (1961); V. Denti, *Risposta al questionario: Per un miglioramento della comprensione e della funzionalità della giurisprudenza costituzionale*, 4 Dem. Dir. 514-517 (1963); V. Denti, *Per il ritorno*, cit. at 10. In these essays Denti highlighted the variegated pre-unification Italian experiences with regard to the *voto di scissura*, contrasting it with the imported French-Napoleonic bureaucratised model and the 1865 post-unification Civil Code, and encouraged a return to the *personalisation* of judgments.

[19] P. Barile. *Risposta al questionario: Per un miglioramento della comprensione e della funzionalità della giurisprudenza costituzionale*, 4 Dem. Dir. 515-518 (1963). In his essay included in *Democrazia e Diritto* Barile, similarly to others, emphasised the potentially evolutionary function of externalised and personalised dissent. Also his interpretation seemed very close to a *living constitution* type of theoretical approach.

[20] F. Carnelutti, *Risposta al questionario: Per un miglioramento della comprensione e della funzionalità della giurisprudenza costituzionale*, 4 Dem. Dir. 514-515 (1963). Carnelutti's interesting proposal brought to the extreme consequences other more moderate interpretations of externalised dissent: following the Swiss model, he retained any form of secrecy to be useless in the context of constitutional adjudication. This proposal remains particularly interesting, since it has not been put forward in the debate anymore by similarly authoritative voices.

[21] V. Andrioli, *Motivazione collegiale e dissensi dei giudici di minoranza*, 4 Dem. Dir. 512-513 (1963), published again in V. Andrioli, *Studi sulla giustizia costituzionale* (1992).

[22] R. Giordano, *La motivazione della sentenza e l'istituto del dissenso nella pratica della Corte Suprema degli Stati Uniti*, 2 Rass. Dir. Publ. 153 (1950); R. Vaccaro, *Dissent e concurrences nella prassi della Suprema Corte degli Stati Uniti*, 4 Foro Pad. 9 (1951). It is interesting, in particular, to see Vaccaro's reflection on the origins and evolution of externalised dissent in the American context from the Marshall Court onwards, and Giordano's analysis of the question of partisan appointments in the Supreme Court in relation to the principle of constitutional check and balances. Curiously enough, these two essays are the only comparative effort antecedent to the establishment of the Italian Constitutional Court.

[23] P. Barile, *Risposta al questionario*, cit. at 19.

the Committee, dissenting opinions were strictly connected with judicial responsibility and democratic accountability, running counter to the emergence of intellectual laziness, conformism and *bureaucratic indifference*[24]. Cappelletti underlined the correlation between publicity of dissent and liberal-democratic ideologies on one side, and between secrecy and illiberal regimes-ideologies on the other[25]. With regard to Amato[26], he emphasised the peculiar nature of constitutional interpretation with respect to the interpretation of codes and statute law. The former subject to teleological ad evolutionary interpretations, strong interpretative contrasts and political influences, while the latter tending towards logical deduction and textualism. Amato also recognised the function of catalyst for public opinion that externalised dissent covered in the experience of the US Supreme Court, identifying the practice with an exercise of democratic maturity and with a deeply rooted social conscience, while rejecting or minimising the frequent accusations to the Court of excessive partisanship[27].

Eventually, it can be said that the general orientation in this historical phase had been the one of critique to the collegial *status quo*, with a diffused positive attitude towards the introduction of dissenting opinions prevailing in the context of academia. The most interesting theories and proposals with regard to introduction have probably been represented by the theses of completely public deliberation[28], anonymous dissenting opinions or with a quorum of judges to be allowed[29], and the adoption of

[24] P. Calamandrei, *Elogio dei giudici scritto da un avvocato*, 5th ed. (1989), 267-273.
[25] M. Cappelletti, *Ideologie nel diritto processuale*, 5 Riv. Trim. Dir. e Proc. Civ. 214-215 (1962).
[26] At the time only 26 years old, and currently member of the Constitutional Court since 2013.
[27] G. Amato, *Risposta al questionario: Per un miglioramento della comprensione e della funzionalità della giurisprudenza costituzionale*, 4 Dem. Dir. 108-109 (1963); G. Amato, *Osservazioni sulla "dissenting opinion*, in C. Mortati (ed.), *Le opinioni dissenzienti dei giudici costituzionali ed internazionali* (1964), 24-26.
[28] F. Carnelutti, *Risposta al questionario*, cit. at 20.
[29] C. Mortati, *Prefazione*, cit. at 2. As Chief Justice Marshall, who favoured majority over *seriatim* opinions in the early phases in the history of the US Supreme Court, Mortati understood that more fragmentation (the presence of externalised dissent) could have made the consolidation of the Court more difficult. On the contrary, he proposed of introducing dissenting opinions after the Constitutional Court had enough gained social prestige and institutional solidity.

dissenting opinions only after a necessary period of consolidation for the newly established Court[30].

1.3. The Phase of Renewed Interest

The decades that followed the consolidation of the Constitutional Court saw the emergence of a more variegated spectrum of positions in the scholarly and political debate. Gustavo Zagrebelsky[31], Stefano Rodotà[32] and Alessandro Pizzorusso[33] assessed positively the introduction of dissenting opinions, while more critical voices (even if almost never entirely contrary to forms of externalised dissent) came from Aldo Sandulli[34], Leopoldo Elia[35] and Giuseppe Branca[36].

Zagrebelsky's arguments seemed to echoe the ones of Calamandrei on judicial and institutional responsibility, and the ones of Mortati on the connection between the dynamism of constitutional justice and the *political culture* of the country[37], while Rodotà critiqued several of the Court's judgments as excessively opaque in style and scarcely rational in motivations. Furthermore, in his interpretation, externalised dissenting opinions could have strengthened, instead of weakening, the independence of the Court as an institution and of individual judges[38], emphasising the correlation between secrecy and the temptations of partisanship. He also critiqued the role of pre-eminence that the President of the Court had assumed, at least with regard to public opinion, in the

[30] C. Mortati, *Considerazioni sul problema dell'introduzione nelle pronunce delle Corte costituzionale italiana*, in *La giustizia costituzionale* (1966).
[31] G. Zagrebelsky, *Corte costituzionale e principio d'uguaglianza*, in N. Occhiocupo (ed.), *La Corte costituzionale tra norma giuridica e realtà sociale*, (1978).
[32] S. Rodotà, *La Corte, la politica, l'organizzazione sociale*, in P. Barile, E. Cheli & S. Grassi (eds.), *Corte costituzionale e sviluppo della forma di governo in Italia* (1982).
[33] A. Pizzorusso, *Intervento*, in N. Occhiocupo (ed.), *La Corte costituzionale tra norma giuridica e realtà sociale* (1978).
[34] A. Sandulli, *Intervento*, in Aa. Vv. *La giustizia costituzionale* (1966); A. Sandulli, *Voto segreto o palese dei giudici costituzionali*, Corriere della Sera (May 8, 1973).
[35] L. Elia, *La Corte nel quadro dei poteri costituzionali*, in P. Barile, E. Cheli & S. Grassi (eds.), *Corte costituzionale e sviluppo della forma di governo in Italia* (1982).
[36] G. Branca, *Collegialità nei giudizi della Corte costituzionale* (1970).
[37] Expression which seems to recall Mortati's appeal to the adherence of constitutionalism to *popular sentiment*.
[38] The overtones of the concept of independence will be treated more in depth in the second section in light of the comparison with the US Supreme Court.

interpretation of judgments[39]. Rodotà's case is particularly interesting, since his reflections on the theme ultimately gave way to a concrete legislative proposal in favour of the introduction of externalised dissent. As a member of the Chamber of Deputies, Rodotà presented a legislative proposal for the introduction of public and motivated dissenting or concurring opinions[40]. The proposal was not successful, but it remained one of the most relevant concrete attempts to challenge the status quo of collegial secrecy.

Another relevant legislative proposal had been registered nearly ten years before, in 1973, presented by Francesco De Martino to the Chamber of Deputies, but suddenly retired without clear motivations[41]. Rodotà had also been a protagonist in the debate preceding the retired proposal, together with Aldo Sandulli and Enzo Cheli. It is interesting to notice how the debate between them occurred in a relatively short period of time (between March and May of 1973) and via newspaper articles[42], instead through the more formal channels of academic publications and seminars. The positions expressed by Sandulli, as already mentioned, were, also in this context, significantly more critical, underlining the potentially negative implications and repercussions of externalised dissent on the political and

[39] S. Rodotà, *L'opinione dissenziente dei giudici costituzionali*, 24 Pol. Dir. 637 (1979); S. Rodotà, *La Corte*, cit. at 32. More on the function of the President of the Court will be said in the second section in light of the comparison with the Chief Justice of the US Supreme Court.

[40] Legislative proposal presented by deputy Rodotà on February 6, 1981: A.C. 2329 "Menzione delle opinioni difformi dei giudici nelle pronunce della Corte costituzionale" (see the original proposal at: http://legislature.camera.it/chiosco.asp?source=/altre_sezionism/9988/10010/10011/documentotesto.asp&content=/_dati/leg08/lavori/schedela/trovaschedacamera.asp?pdl=2329.

[41] Legislative proposal presented by deputy De Martino [et al.] on July 9, 1973: "Modificazioni dell'articolo 135 della Costituzione" (see the original proposal at:
http://legislature.camera.it/chiosco.asp?cp=1&position=VI%20Legislatura%20/%20I%20Deputati&content=deputati/legislaturepreceden ti/Leg06/framedeputato.asp?Deputato=1d200301.

[42] S. Rodotà, *Abolire il segreto sul voto dei giudici*, Il Giorno (March 31, 1973); E. Cheli, *Render noti i motivi del dissenso in giudizio*, Corriere della Sera, (April 8, 1973); A. Sandulli, *Voto segreto*, cit. at 34.

institutional equilibrium of the Republic[43]. Other arguments against introduction were represented by the potential fragmentation and weakening of the Court's authoritativeness, by the necessity of differentiating the Court from the political arena[44] and even by the fact that, up to that moment, the model followed by the Court had proved to be adequately efficient[45].

As already mentioned, another scholar who did not reject entirely the possibility of adopting dissenting opinions, even if extremely sceptical towards the success of adoption, was Giuseppe Branca. His main contribution to the debate on dissenting opinions was represented by a lecture delivered in 1970 on the theme of collegiality, then published. According to Branca's interpretation, the collegial foundations of the Court were necessary to the survival of a lively debate in the council chamber. The concrete participative effort of all judges of the Court to the same process of decision making made judgments more sensible to interpretative nuances, incentivised compromise and stimulated the incorporation of minority positions in final decisions and motivations[46]. Notwithstanding his appreciation for the principle of collegiality, Branca also recognised that the introduction of dissenting opinions could also have pushed judges not to "hide" behind collegial decisions. It can be said that the reflection recently made by Di Martino on this period highlights very clearly how the contributions given by these authors served as a bridge between the decades, connecting the latest repercussions of the early phases of the debate with the passage to the travailed 1990's[47].

In fact, the life of the Constitutional Court traversed a period of challenges between the end of the 1980's and the course of 1990's. It can be said that the intensity and the influence of the debate on externalised dissent ran parallel to it. The 1990's saw a higher level of organisation and institutionalisation with regard to the scholarly debate of the previous decades, with the two most

[43]A. Sandulli, *Intervento*, cit. at 34. Furthermore, several parts of the second section will be devoted to theme of abstractness or adherence to specific, practical contexts with respect to "pros and cons" of externalised dissent.
[44] L. Elia, *La Corte*, cit. at 35.
[45] A. Sandulli, *Voto segreto*, cit. at 34
[46] G. Branca, *Collegialità*, cit. at 36.
[47] A. Di Martino, *Le opinioni dissenzienti*, cit. at 17.

relevant sources being the seminar of 1993 organised by the Court itself[48] and the volume by Saulle Panizza published in 1998[49]. One factor among others distinguished the type of scholarship of those years from its previous developments: the increasing relevance and usefulness of comparative studies, both with regard to common and civil law systems[50]. For clear historical reasons, this is particularly evident in comparison with the initial phases of debate around constitutional framing, when the limited comparative resources available were examined conservatively, prioritising research on the characteristics of other systems that had *not* to be emulated.[51] On the contrary, between the end of the 1980's and the early 1990's, the comparative approach shifted remarkably in the direction of looking for positive models and adaptable elements in other legal systems[52].

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[48] A. Anzon (ed.), *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993.* (1995).

[49] S. Panizza, *L'introduzione dell'opinione dissenziente nel sistema italiano di giustizia Costituzionale* (1998).

[50] Two particularly useful experiences were represented by two European courts, the German *Bundesverfassungsgericht* with the *Sondervotum* and by the Spanish *Tribunal constitucional* with the *voto particular*.

[51] L. Paladin, *Per una storia costituzionale*, cit. at 14.

[52] V. Varano, *A proposito dell'eventuale introduzione delle opinioni dissenzienti nelle pronunce della Corte costituzionale: considerazioni sull'esperienza americana*, in A. Anzon (ed.), *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993* (1995). V. Vigoriti, *Corte costituzionale e 'dissenting opinions'*, in A. Anzon (ed.), *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993* (1995). J.P. Greenbaum, *Osservazioni sul ruolo delle opinioni dissenzienti nella giurisprudenza della Corte Suprema statunitense*, in A. Anzon (ed.), *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993* (1995); J. Luther, *L'esperienza del voto dissenziente nel Bundesverfassungsgericht*, in A. Anzon (ed.), *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993* (1995); M. Siclari, *L'istituto dell'opinione dissenziente in Spagna*, in A. Anzon (ed.), *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993* (1995); F. Novarese, *Dissenting opinion" e Corte Europea dei diritti dell'Uomo*, in A. Anzon (ed.), *L'opinione dissenziente. Atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993* (1995). Remarkable was also the variegated anthology of case law and dissenting opinions from foreign and international experiences reported and commented in the same volume, encompassing the US Supreme Court, the German *BVerfG*, the Spanish *Tribunal Constitucional* and the European Court of Human Rights.

The choice of combining the reflection on the normative problem of introduction at the national level[53] with a substantial amount of international contributions was a clear evidence of this trend. Particularly significant was also the direct involvement of the Court in the organisation of the seminar, with President Casavola's brief, but compelling preface to the volume, emphasising the continuity of the initiative with Mortati's thought and reflections in the 1960's[54].

However, the debate on externalised dissent in the 1990's was characterised by the prevalence of contributions favourable to introduction, and the seminar of 1993 seemed to be a prelude to its adoption within the Court, also in relation to the bipolar-majoritarian twist that the political system took at the time. With regard to this point, dissenting opinions seemed to represent an additional protection for the expression of pluralism even though, eventually, the concern for partisan manipulation of judges, protagonism and self-promotion proved to be stronger, instead. This was evidenced by both the failure of the constitutional reform of 1997[55] and the decline of reformist enthusiasm towards the end

[53] On this point see in particular: S. Bartole, *Opinioni dissenzienti: problemi istituzionali e cautele procedurali*, in A. Anzon (ed.), *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993* (1995); S. Fois, *Le opinioni dissenzienti: problemi e prospettive di soluzione*, in A. Anzon (ed.), *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993* (1995); R. Romboli, *L'introduzione dell'opinione dissenziente nei giudici costituzionali: strumento normativo, aspetti procedurali e ragioni di opportunità*, in A. Anzon (ed.), *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993* (1995); A. Ruggeri. *Per la introduzione del dissent nei giudizi di costituzionalità: problemi di tecnica della normazione*, in A. Anzon (ed.), *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993* (1995), 89-111.

[54] F.P. Casavola, *Preface*, in A. Anzon (ed.), *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993* (1995).

[55] The reform project elaborated by a bicameral joint commission envisaged the introduction of dissenting opinions in the Constitutional Court by modifying article 136 of the Constitution. It also contained other relevant amendments, such as direct appeal (on the model of the German *Verfassungbeschwerde* or of the Spanish and *derecho de amparo*), an increase in the number of judges from fifteen to twenty (with the unprecedented participation of regions in the nomination mechanism), appeal for parliamentarian minorities and the verification of credentials.

of the decade[56]. Such a decline has been evidenced by the critical dimension of Panizza's monography, in which the negative repercussions of reform in the direction of externalised dissent seemed to prevail. His scepticism depended on the increased caseload, the dilution of collegiality, the modified nomination mechanism and composition that the Court would have experienced with the 1997 reform, characteristics which would have altered its sources of legitimacy and made the political soul of the Court prevail on its jurisdictional one, thereby undermining its authority and cohesion[57].

1.4. More recent developments

In 2002, four years after the failure of the 1997 proposal, the Court deliberated against the introduction of dissenting opinions via modification of the Integrative Norms. Even in the cases of broader procedural revisions, such as in 2004 and 2008, the Court preferred to uphold the current form of collegiality[58]. Furthermore, a legislative proposal presented by former President of the Republic Francesco Cossiga in 2004 also failed[59]. On the top of these failed attempts of reform, the period seemed to witness a general shift the in the approach towards externalised dissent, pursuing and emphasising the trend already observable at the end of the previous decade. Both the Court and the academia adopted a range of more circumspect and critical attitudes, especially if compared with the ones characterising earlier phases of the

[56] On these problematic points: A. Di Martino, *Le opinioni dissenzienti*, cit. at 17.

[57] S. Panizza, *L'introduzione*, cit. at 49. For an exhaustive discussion on the oscillations between the political and the jurisdictional souls of the Court see: R. Basile, *Anima giurisdizionale e anima politica del giudice delle leggi nell'evoluzione del processo costituzionale* (2017); R Romboli (ed.), *Ricordando Alessandro Pizzorusso. Il pendolo della Corte. Le oscillazioni della Corte costituzionale tra l'anima 'politica' e quella 'giurisdizionale'* (2016).

[58] A. Di Martino, *Le opinioni dissenzienti*, cit. at 17.

[59] A.S. 2690, Legislative proposal presented by senator Cossiga, notified to the Presidency on January 29, 2004. The proposal envisaged the introduction of dissenting opinions in both the Constitutional Court and at the highest levels of the judiciary. The initiative was probably sparked by a controversial decision of the Court (n. 24 of 2004) which declared the unconstitutionality of the suspension of trials against the highest offices of the State during their mandates (the so-called *Lodo Schifani*). For further details, see: A. Di Martino, *Le opinioni dissenzienti*, cit. at 17. For the original text of Cossiga's proposal at the Senate see at: http://www.senato.it/leg/14/BGT/Schede/Ddliter/20834.htm.

debate. As already mentioned, the crisis of traditional, mass political parties in the 1990's, the emergence of bipolar tendencies on the Italian political scene and the frequent accusations of partisanship to the Court, especially by the centre-right majorities during the XIV and the XVI legislatures, had all contributed to reinforce the idea of a strong, defensive collegiality to fend off political attacks and instrumentalisations[60].

The most striking case related to this shift in the general attitude was Gustavo Zagrebelsky's "conversion" to the side of pure collegiality[61]. Already in his press conference as President of the Court, in 2004, he vigorously supported the difference of vote from deliberation and the absolute detachment of decision-making dynamics in Court from the nature of political cleavages[62]. The same concepts permeated his post-2004 publications, in which he underlined the crucial need for cooperation between judges, collegial deliberation and the research of the broadest consensus possible within the council chamber. This implied the minimisation of all forms of protagonism and fragmentation, insulating of the Court from the rewards and penalties of the political game and accentuating its strongly jurisdictional nature[63].

Zagrebelsky's latest positions were close to the ones of the political philosopher Pasquale Pasquino[64] who, together with

[60] F. Bonini, *La Corte nel maggioritario*, 14 Percorsi Cost. 109 (2010); A. Di Martino, *Le opinioni dissenzienti*, cit. at 17.

[61] Notably after his mandate as constitutional judge (1995-2004) and President of the Court (2004).

[62] G. Zagrebelsky, *La giustizia costituzionale nel 2003. Relazione del Presidente Gustavo Zagrebelsky*, www.cortecostituzionale.it (April 2, 2004).

[63] G. Zagrebelsky, *La Corte costituzionale italiana*, in P. Pasquino & B. Randazzo (eds.), *Come decidono le corti costituzionali* (2009); G. Zagrebelsky & V. Marcenò, *Giustizia costituzionale. Oggetti, procedimenti, decisioni* (2012). For a targeted critique of Zagrebelsky's post-2004 interpretation, especially in light of the successful experience of the German *BVerfG*, see also: A. Di Martino, *Le opinioni dissenzienti*, cit. at 17.

[64] See, on these themes in particular: P. Pasquino, *Il giudice e il voto*, 5 Il Mulino, 803 (2003); P. Pasquino, *Votare e deliberare*, 1 Fil. Pol. 103 (2006); P. Pasquino, *Introduzione*, in P. Pasquino, B. Randazzo (eds.), *Come decidono le corti costituzionali* (2009); P. Pasquino & S. Lieto, *Metamorfosi della giustizia costituzionale in Italia*, 68 Quad. Cost. 232 (2015); P. Pasquino & S. Lieto, *La Corte costituzionale ed il principio di collegialità*, 12 Federalismi.it 1 (2016); P. Pasquino, *How Constitutional Courts Make Decisions*, in Vv. Aa., *Mélanges en honneur du Professeur Philippe Lauvaux* (2020).

Barbara Randazzo, edited the volume *Come decidono le corti costituzionali* (2009), containing the contributions to the international conference held in 2007 in Milan[65], which remembered, in its structure and purposes[66], the aforementioned seminar of 1993, even if with a more comparative and social science focus on the nature of collegial decision-making itself[67]. These initiatives were followed by another seminar organised by the Court in June 2009[68] and a failed legislative proposal by senator Linda Lanzillotta in 2010[69]. The renewed attention on

[65] Encompassed within the broader context of the national research project "Dalla Corte dei diritti alla Corte dei conflitti: recenti sviluppi nella giurisprudenza e nel ruolo della Corte costituzionale" coordinated by the former President of the Court (2004-2005) Valerio Onida.

[66] The structure of the conference (and of the volume) envisaged a substantial number of comparative contributions from the Supreme Court of Israel, the German *BVerfG*, the Spanish *Tribunal Constitucional*, and the French *Conseil constitutionnel*, several interventions by (then) current and former members of the Constitutional Court such as Sabino Cassese, Leopoldo Elia, Ugo de Siervo and Valerio Onida, with an introduction by Pasquino himself. Furthermore, in the volume of 2009, there had been the addition of an appendix with contributions from another conference held in Rome, in May 2008. The contributions (in French) regarded the decisional processes in other types of courts such as the French *Cour de cassation* and *Conseil d'Etat*, and the Appellate Body of World Trade Organisation.

[67] On this particular aspect, see: S. Cassese, *Les organes collégiaux et leur processus de decision. Introduction*, in P. Pasquino & B. Randazzo (eds.), *Come decidono le corti costituzionali* (2009); P. Pasquino, *Légitimité et processus décisionnel des cours de justice*, in P. Pasquino & B. Randazzo (eds.), *Come decidono le corti costituzionali* (2009).

[68] Seminar introduced and preceded by Sabino Cassese's lecture on dissenting opinions, see: S. Cassese, *Lezione sulla cosiddetta 'opinione dissenziente'*, 4 Quaderni di Dir. Cost. 1-17 (2009). The constitutionalist, after a comparative analysis, concluded by expressing his scepticism towards the need for the Court to adopt forms of externalised dissent. Among the interventions in the seminar of June 22, 2009, particularly interesting had been the one of the member of the Court Maria Rita Saulle, see: M.R. Saulle, *Intervento del giudice costituzionale Prof.ssa Maria Rita Saulle*, www.cortecostituzionale.it (2009).

[69] A.S. 1952, "Modifiche alla legge 11 marzo 1987, e alla legge 31 dicembre 2009, n.196, in materia di istruttoria e trasparenza dei giudizi di legittimità costituzionale". The proposal envisaged the modification of the constitutional law n.87 of 1953 (see the original proposal at: http://www.senato.it/leg/17/BGT/Schede/Ddliter/45737.htm.) On both the proposal and the seminar see: C. Favaretto, *Le conseguenze finanziarie delle decisioni della Corte costituzionale e l'opinione dissenziente nell'A.S. 1952: una*

collegiality and the generally sceptical climate towards dissenting opinions were further reinforced by the declarations released by the presidents of the Court in their annual press conferences[70].

Another distinctive characteristic of this phase of the debate was the growing importance given to the study of the episodic manifestations of internal dissent within the Court[71] and, in general, of the possible procedural or informal "cracks" in the walls of collegiality[72]. However, it has to be observed that the most recent waves of academic publications have been generally supporting the introduction of dissenting opinions in the Italian system of constitutional adjudication and have been characterised by great confidence in the positive role of externalised dissent[73]. Furthermore, these studies have been based on a strongly comparative methodology, usually geared towards a progressive-

reazione alla sentenza 70/2015?, 2 Osservatoriosullefonti.it 5 (2015); A. Di Martino, *Le opinioni dissenzienti*, cit. at 17.

[70] Most notably: G. Zagrebelsky, *La giustizia costituzionale nel 2003*, cit. at 62; V. Onida, *La giustizia costituzionale nel 2004. Introduzione del Presidente Valerio Onida, Relazione sulla giurisprudenza del 2004*, www.cortecostituzionale.it (January, 2005). For more examples see: A. Di Martino, *Le opinioni dissenzienti*, cit. at 17.

[71] For an in-depth discussion of the practices and episodes of internal dissent within the Constitutional Court: A. Di Martino, *Le opinioni dissenzienti*, cit. at 17.

[72] A remarkable impact on the public opinion has been achieved by the controversial Cassese's *Dentro la Corte*. See: S. Cassese, *Dentro la Corte. Diario di un giudice costituzionale* (2012).

[73] Most notably on constitutional adjudication: A. Di Martino, *Le opinioni dissenzienti*, cit. at 17; E. Ferioli, *Le Dissenting Opinion nella giustizia costituzionale europea di matrice kelseniana*, 3 Il Mulino 687 (2017); E. Ferioli, *Dissenso e dialogo nella giustizia costituzionale* (2018); M. D'Amico, *The Italian Constitutional Court and the Absence of Dissent: Criticisms and Perspectives*, in N. Zanon & G. Ragone (eds.), *The Dissenting Opinion* (2019); on the most studied "crack" in the secrecy of the council chamber, the episodic non-coincidence between the chosen rapporteur-judge and the opinion-writer judge, see also: S. Panizza, *Could there be an Italian way for Introducing Dissenting Opinions? The Decision-Making Process in the Italian Constitutional Court through Discrepancies between the Rapporteur Judge and the Opinion-Writer Judge*, in N. Zanon & G. Ragone (eds.), *The Dissenting Opinion* ed. (2019). For a markedly European perspective see: K. Kelemen, *Judicial Dissent in European Constitutional Courts* (2018) and from a sociological perspective see: L. Corso, *Opinione dissenziente, interpretazione costituzionale e costituzionalismo popolare*, 1 Soc. Dir. 27 (2011). For a discussion on the introduction of dissenting opinions beyond constitutional adjudication and in the ordinary judiciary within the Italian legal system see also: C. Asprella, *L'opinione dissenziente del giudice* (2012); F. Falato, *Segreto della camera di consiglio ed opinione dissenziente* (2016).

reformist interpretation of comparison between legal systems. These approaches have been putting themselves in continuity with traditional pro-dissent arguments of the past decades, even if often running the risk of minimising both the influence of historical contexts on those arguments and the role of practical considerations on the political and institutional present[74].

2. The Principle of Collegiality and the Disclosure of Dissent: Between Italy and the United States

2.1. Critical Remarks on Methodological Approaches

The possibility for judges in constitutional or supreme courts to manifest and articulate the physiological presence of dissent outside the court has been object of multiple interpretations and controversies, especially from the comparative perspective. Comparing systems that allow dissenting opinions with systems that do not is commonly adopted as the most useful comparative technique, generally finalised at identifying beneficial and detrimental effects caused by the presence of dissenting opinions or of their absence within the national systems considered. The vastly accepted scheme followed to carry out this type of comparative analysis is usually structured in a series of separate historical evolutions and concluded with comparative reflections on the present. If there is any kind of shortcoming in this approach, the most relevant one might consist in the fact that each one of the single parts of the analysis could be taken in isolation from all the other ones and stand alone.

This is an indicator of the lack of interdependence, within the same work, between historical research and the strictly comparative (more or less explicitly prescriptive), reflections on the present. The two are almost unconsciously considered as separate and autonomous. This way of thinking is most likely to be the cause of the next shortcoming of this approach to comparison. The conclusions to similar comparative studies typically imply elements of evaluation and prescription structured on a *cost-benefit* model, weighing *pros and cons*. They commonly treat the presence-absence of dissenting opinions as an *independent*

[74] A critical reflection on the structure and methodology of these studies will be provided at the outset of the second section.

variable influencing *dependent* variables such as legitimacy, transparency, independence or freedom of expression applied to courts. The problematic aspect is that the nature of such dependent variables has to be put into question, as the different meanings they assume in different cultures and legal systems rarely influence the final outcomes of the comparative studies in which they are treated.

However, this is both simplistic and simplified with respect to several works that have treated, although in a relatively marginal way, these differences of meaning and interpretation. Taking Kelemen[75] as one of the most recent examples, it is clear that the author considers and compares these differences, but also that in multiple occasions still reasons as if uniformity had existed. This is not an argument against the possibility of general evaluations, but against the effectiveness of evaluation without an extensive consideration of those dependent variables and therefore, against prescriptions which are not tailored to specific systems. The reason for this might be that the existing semantic differences in the characteristics treated as dependent variables *are* often the causes behind the presence or the absence of dissenting opinions (usually treated as the independent variable) across different systems.

One thing is to evaluate the impact of single elements such as dissenting opinions *as such*, and another one is to theorise the potential impact of single elements on the equilibrium of a specific system *as it is* in a given historical moment. Any proposal for reform should be seriously considering not only the peculiarities of a given system, but also the potential repercussions of change on the remaining elements of the existing political, institutional and cultural equilibrium. If there are any cost-benefit analyses to be made, they should be made in response to specific needs and tailored to the contexts in which those needs arise. The question to be asked is not what impact does the presence-absence of dissenting opinions has *on legal systems*, but what impact does the presence-absence of dissenting opinions has *on a specific legal system*.

The rest of this paper will be devoted to a tentative case study on how a comparative analysis could be carried out

[75] See: K. Kelemen, *Judicial Dissent*, cit. at 73.

inverting those that are commonly utilised as dependent variables with the usually independent one. The independent variables will be the overtones of concepts such as individuality, legitimacy and independence, while the dependent variable will be the presence-absence of dissenting opinions. The two objects of the comparison will be the Italian Constitutional Court and the Supreme Court of the United States, positioned at the opposite sides of the spectrum[76] in terms of disclosure of judicial dissent.

2.2. Composition and the Disclosure of Dissent

The bulk of the comparative analysis will be carried out, as already mentioned, inverting the usually *dependent* variables with the usually *independent* one. However, this cannot be done without comparing the *identities* of the two courts, the Italian Constitutional Court (ItCC) and the Supreme Court of the United States (SCOTUS). The rather ambiguous expression *identity of the court* which is used here refers to all the factors that influence its material composition. Given that courts are composed of individual judges, the first element to analyse is how these individuals are appointed to become members of courts. To frame the comparison in this way means not only to examine the institutional mechanisms through which individuals become members of the court, but seeking to understand which kind of legitimacy are those institutional mechanisms bound to entrust upon future judges. To examine the way in which individuals become part of the court is, in reality, a tentative to comprehend the role of the court as an institution in a given political system or in a given society.

Article 135 of the Italian Constitution[77] envisages a

[76] For an extremely interesting visual rendition of such spectrum see: S. Harding, "*Collegiality" in Comparative Context*, in V. Barsotti, P. Carozza, M. Cartabia, A. Simoncini (eds.), *Dialogues on Italian Constitutional Justice. A Comparative Perspective* (2020). In such a scheme, most interestingly, the US Supreme Court is placed in the middle-left of the spectrum of collegiality, resulting as the "most collegial of the least collegial" systems (when compared with seriatim opinion with conferencing and without conferencing), while the Italian Constitutional Court would result as the second most collegial system (after *per curiam* opinions with no authorial attribution), closer to the right end of the spectrum (most collegial).

[77] For a detailed account of the proceedings of the Constituent Assembly regarding the drafting of article 135, see again: V. Falzone, F. Palermo & F.

Constitutional Court composed by fifteen judges, and their nomination mechanism reveals the ideological choices of the post-WWII Constituent Assembly[78] as well as the historical-cultural trajectory followed by Republican Italy. Five judges appointed by the President of the Republic, five by Parliament in joint sitting, and five by the highest ordinary and administrative ranks of the judiciary[79]. Not only does the tripartite structure of appointments

Cosentino, *La Costituzione della Repubblica italiana*, cit. at 7, on the debate around the composition of the Court in the Assembly). Especially interesting is to observe how the original project on the Constitution envisaged a Court composed by a half of ordinary judges, a quarter of law professors and attorneys, and a quarter of citizens over the age of forty. In a second phase, beyond the current tripartite solution, two divergent blueprints of composition emerged. One entirely dependent from the two chambers of Parliament, and another (proposed by Codacci Pisanelli) formed by the administrative Court of Accounts in joint chambers, together with twelve additional members elected by Parliament. The *jurisdictional* solution (notoriously supported by Mortati and echoed by Ambrosini) prevailed on the *political* alternative (all members elected by Parliament, supported, for example, by Lami Starnuti and Gullo). For the original proceedings of the Constituent Assembly on the debate around the composition of the Court see the afternoon session of November 28, 1947, A.C. 2646-2651
(http://legislature.camera.it/frameset.asp?content=%2Faltre%5Fsezionism%2F304%2F8964%2Fdocumentotesto%2Easp%3F).

[78] For an exhaustive description of the constitutional provisions regulating the composition of the Court, see: E. Balocchi, *Corte costituzionale*, in 4 *Noviss. Dig. It.*, 972 (1959); F. Pierandrei, *Corte costituzionale*, in 10 *Enc. Dir.* 890 (1962); G. La Greca, *Corte costituzionale*, in 4 *Digesto, Disc. Pubbl.*, 205 (1989); M.R. Morelli, *Artt. 134-137*, in V. Crisafulli & L. Paladin (eds.), *Commentario breve alla Costituzione* (1990); F. Gambini, *Art. 135*, in V. Crisafulli, L. Paladin, S. Bartole & R. Bin (eds.), *Commentario breve alla Costituzione* (2008), G.M. Sbrana, *La composizione, l'organizzazione e il funzionamento della Corte costituzionale*, 11 Dir. & Quest. Pubbl. 375 (2001); In English and directed towards an international audience see also: M. Cappelletti, J.H. Merryman, J.M. Perillo, *The Italian Legal System: an Introduction* (1967); D.S. Dengler, *The Italian Constitutional Court: Safeguard of the Constitution*, 19 Dick. J. Inte'l L. 363 (2001); M.A. Livingston, P. G. Monateri & F. Parisi, *The Italian Legal System: an Introduction* (2016); V. Barsotti, P.G. Carozza, M. Cartabia & P. Simoncini, *Italian Constitutional Justice in Global Context* (2017); G.F. Ferrari (ed.), *Introduction to Italian Public Law* (2018). For a review and summary of Barsotti et al. see also: N. Lupo, *The Italian Constitutional Court in Global Constitutional Adjudication*, 66 Am. J. Comp. L. 713 (2018).

[79] See K. Kelemen, *Judicial Dissent*, cit. at 73. On the last point Kelemen's critique provides an insight on how the rationale of nomination mechanisms can directly influence the presence-absence of dissenting opinions. Given that one

reflect the double nature of the court (partly jurisdictional, partly political[80]), but also Montesquieu's traditional division of powers[81]. It can be said that also the American system is profoundly inspired by Montesquieu's division of powers, and that the US division of powers might represent a "purer", more clear-cut version of it, since the Italian President is not technically part of the Executive. In the US, the President also appoints SCOTUS Justices with the advice and assent of the Senate[82].

At this point, the most relevant divergence is that while the Italian system tries to achieve a proportional synthesis of the three branches (both elected and non-elected) within the composition of the court, the US system reserves a special role for presidential

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third of the members of the Court come from the ordinary judiciary, they are "in particular not prepared to write separate opinions, and do not support their introduction". It is interesting to notice how in this case the author of the comparative analysis uses the absence of dissenting opinions as a dependent variable, but then limits the line of reasoning to the singling out of the systemic resistances to the introduction of dissenting opinions in the ItCC. In fact, the author does not regulate prescriptions accordingly, eventually returning to consider (in this case the introduction) the presence of dissenting opinions as the independent variable, able to heighten the levels of "legitimacy" or "independence" of the court, to improve its performances.

[80] In the context of Italian constitutional framing, the jurisdictional nature of the Court clearly prevailed on the political one. A useful example of this line of thought is given by Fabbri's intervention in the Constituent Assembly's afternoon session of November 29, 1947, emphasising the need, for the Court, not to take the place of Parliament and, for the constitutional judge, not to be "an immediate refraction of Parliament, a spokesman of occasional majorities' ideological positions". According to Fabbri, if the Court becomes a reproduction of Parliament, it ceases to be the judge of Parliament's acts, contradicting its nature and its purpose. For the original text of the intervention see A.C. 2680-2681, cit.

[81] G.M. Sbrana, *La composizione*, cit. at 78; V. Barsotti, P.G. Carozza, M. Cartabia & P. Simoncini, *Italian Constitutional Justice* cit. at 78. The tripartite, mixed nomination mechanism, however, descends not so much from the Montesquieuian division of powers, but from the necessity to create a coexistence between *jurisdictional* and *political* elements within the Court, representing a complex (and tentative) act of balancing, or integration, between technical-juridical competences and political consciousness.

[82] J. O. Frosini, *Constitutional Justice*, in G.F. Ferrari (ed.), *Introduction to Italian Public Law* (2018). The distinction adopted in the volume is the one between *appointment-based* systems, *election-based* systems and *mixed* systems, in which the SCOTUS is classified in the first category and the ItCC in the third; E. Ferioli, *Dissenso e dialogo*, cit. at 73.

appointment[83] (by the elected Executive). In fact, the way in which the composition of the SCOTUS mirrors a miniaturised, unelected version of a parliament in a majoritarian, bipartisan political system is extremely interesting[84]. The emphasis on competition and accountability proper of a FPP (first-past-the-post) system is echoed by the nature of the Court even if its members are unelected (but still derive their legitimacy from presidential appointment). Exactly as in a parliament, a known majority "passes" the binding part of the judgment, while pluralism is secured through externalised dissent and freedom of expression is granted to the opposition. The opinion supported by the majority becomes binding, while dissent (the "opposition" within the parliamentary analogy) is canalised towards future decisions (and potential future majorities), fuelling the public debate.

On the contrary, in the case of the ItCC, the political nature of parliamentary nominations is counterbalanced by both explicit professional qualification requirements (only judges of the highest courts, law professors and attorneys of at least twenty years'

[83] For a critical assessment of the restrained discretion of presidential appointments see again: R. Giordano, *La motivazione*, cit. at 166.

[84] Even if presidents have usually sought to appoint Justices from their own political party, and those who shared their political and philosophical views, it has always been relatively easy to trace "patterns" in appointments, dependent on historical conjunctures or social-political necessities. As reported by the Supreme Court Historical Society (founded by Chief Justice Burger in 1974): "The presidents' choices for appointment to the Court have all been lawyers, although there is no constitutional or legal requirement to that effect. George Washington established a pattern of geographical distribution, with three southerners and three northerners from six different states … With the passage of years, the make-up of the Court has tended to reflect the dominant threads in the weave of American society. All the Justices were protestants until 1835, when President Andrew Jackson chose Roger B. Taney, a Catholic, as Chief Justice. President Woodrow Wilson appointed the first Jew, Louis D. Brandeis, as an Associate Justice in 1916. The first African-American Justice, and only the second Justice to lie in state in the Great Hall following his death, was Thurgood Marshall, who was appointed by president Lyndon B. Johnson in 1967. The first nomination of an Italian-American was that of Justice Antonin Scalia, who ascended to the high bench in 1986. The invisible wall that had kept women off the Court was shattered in 1981 when President Reagan nominated Sandra Day O'Connor, a 51-year-old judge on the Arizona Court of Appeals." See: *The Supreme Court Historical Society - How the Court Works - Selecting Justices*, in https://supremecourthistory.org/htcw_selectingJustices.html (accessed January 22, 2020).

experience are eligible), by the *technical* appointments depending on the Court of Cassation, the Court of Accounts and the Council of State and, in addition to that, also by presidential appointments, mainly because of the peculiar role of the President within the institutional framework[85]. What probably strikes the most about this elaborated mechanism is that even in its eminently political part presents what could be defined as a sort of institutionalised, deeply engrained *embedded proportionality*[86]. The instruments to achieve this result are extremely high parliamentary quorums (higher than the ones needed to elect the President) and practices such as the distribution of parliamentary appointments along the proportional influences of parties or the informal consultation with sitting members of the court for presidential appointments. These are all consensus-seeking dynamics, deliberately oriented towards proportionality, compromise and mediation, guided by the overarching need of achieving a reliable *synthesis* of both a set of constitutional values and a spectrum of political positions. What also strikes in comparison with the US system, although with regard to the outcomes of the nomination process, is that, as observed by Barsotti et. al, "only on a few occasions have certain appointments been criticised"[87].

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[85] See: G.M. Sbrana, *La composizione*, cit. at 78 for details on the role of the President of the Republic in light of the composition of the Court. The connection between the peculiar role of Head of State and the Court's nature and composition is deeper than it is usually thought. In fact, the constitutionally *super partes* President (elected indirectly by the two chambers of Parliament in joint sitting) appoints five judges by means of a presidential act (with the Prime Minister's countersignature). These appointments are intended to be (and usually are) an act of balancing with respect to the eminently political five parliamentary nominations, especially because of the *non-political* role of the President as the guarantor of the constitutional order and institutional framework of the Republic.

[86] For a description of the first composition of the Court, see again: G. La Greca, *Corte costituzionale*, cit. at 211-212. This sort of *embedded proportionality* was reproduced through the establishment of a convention between political parties which had dominated both the Constituent Assembly and the post-war proportional electoral system, according to which two judges had to be nominated by the Christian-Democrats, one by the Communists, one by the Socialists and one by minority parties. This partition came to be identified by Zagrebelsky as a *patrimonial conception* parliamentary nomination (see: G. Zagrebelsky, *La Giustizia Costituzionale* (1988), 74.).

[87] V. Barsotti, P.G. Carozza, M. Cartabia & P. Simoncini, *Italian Constitutional Justice* cit. at 78.

There are also other relevant characteristics to be considered in order to single out structural differences and their deeper implications. An example is provided by the figures of the Chief Justice and of the President of the Court. Already in this case, terminology serves an as indicator: what is called *Chief Justice* in the SCOTUS is called *President of the Court* in the ItCC. The President of the Court's principal function is to represent the Court and, several times, the President's personal prestige has contributed not only to represent, but to protect the Court's interests and its prerogatives[88]. Also, it is almost impossible to single out the "eras" of the ItCC, as in the case of SCOTUS, by identifying them with the name of a President or Chief Justice.[89]

[88] For a detailed discussion on the powers, prerogatives and functions of the President of the Court, see: T. Martines, *I poteri del Presidente*, 32 Giur. Cost. 1211 (1981); G. Azzariti, *Il ruolo del Presidente della Corte costituzionale nella dinamica del sistema costituzionale italiano*, in P. Costanzo (ed.), *L'organizzazione e il funzionamento della Corte costituzionale* (1996); G.M. Sbrana, *La composizione*, cit. at 78; P. Passaglia, *Presidenzialismo e "collegialità" nel procedimento decisorio della Corte costituzionale*, in Vv. Aa. (eds.), *Studi in onore di Luigi Arcidiacono* (2011). Especially in Sbrana's analysis, the role of the President is emphasised with regard to the public "defence" of the Court (and of its collegial nature) from external attacks or interferences. This characteristic is especially relevant with regard to Shetreet's notion of *external* independence, intended as independence from other institutions or powers (see: S. Shetreet, *Judicial Independence and Accountability, Judiciaries in Comparative Perspective* (2011)). Passaglia's essay, on the other hand, is particularly useful to understand the Court's "form of government", and the significance of the presidential power to initiate and direct the discussion in the council chamber. His account of the presidential function is important to discern the possible overtones of collegiality, which can be strongly conditioned by the action of a President. However, the elements of *presidentialism* within the decisional process of the Court are mitigated by the extremely short duration of terms and by the internal election of Presidents based on seniority.

[89] For an overview of the "eras" corresponding to the different phases in the activity of the Court since its establishment see: V. Barsotti, P.G. Carozza, M. Cartabia & P. Simoncini, *Italian Constitutional Justice* cit. at 78. It is interesting to see how the different periods come to be mainly identified with the Court's type of activity and its relationality towards other institutions and powers in the system rather than with the personalities of Justices or Chief Justices. However, some identifiable trends corresponding to determined presidencies have existed in the history of the Court, particularly with regard to the role of Presidents in press conferences or interviews. For a discussion on this point see also: S. Rodotà, *La svolta politica della Corte costituzionale*, 1 Pol. dir. 37 (1970); M.C. Grisolia, *Alcune osservazioni sul potere di esternazione del Presidente della*

This is a consequence of the three-year, renewable term[90] envisaged for the President of the ItCC, even if established practice tends to limit appointments to only forty-five days, and only four Presidents of the ItCC have completed their full term of office as Presidents[91]. These elements, together with the nine-year, non-renewable term of ItCC judges[92], are even more strikingly is contrast with SCOTUS Justices' life tenure[93] and the commonplace identification of "eras" in the history of the Court with the names of Chief Justices[94].

However, Both ItCC presidents and SCOTUS chief Justices have substantial influence, with the tasks of publicly representing their court in external relations, choosing rapporteurs (ItCC), casting decisive votes (ItCC) or assigning cases to individual Justices for the drafting of the *opinion of the Court* (SCOTUS)[95].

Furthermore, Chief Justices are directly appointed by the US President (with the advice of the Senate), while ItCC

Corte costituzionale, in R. Romboli (ed.), *La giustizia costituzionale a una svolta* (1991).

[90] G.M. Sbrana, *La composizione*, cit. at 78. Sbrana reports that only three Presidents have been re-elected: Ambrosini in 1966, Elia in 1984 and Saja in 1990.

[91] V. Barsotti, P.G. Carozza, M. Cartabia & P. Simoncini, *Italian Constitutional Justice* cit. at 78.

[92] For historical profiles on the term of ItCC judges, see again: V. Falzone, F. Palermo & F. Cosentino, *La Costituzione della Repubblica italiana*, cit. at 7. Curiously enough, the duration of the term was originally increased from seven to twelve years during the debate on article 135 in the Constituent Assembly, and then reduced again to the current nine years after 1967. Furthermore, at the outset, judges were envisaged to be *non-immediately* eligible for re-election, with an unspecified *cooling-off* period.

[93] It is important, however, to historically contextualise these choices. Life tenure for SCOTUS Justices was established at the end of the 18th century. Average life expectancy at the age of twenty for white males in 1790-99 United States has been estimated around 41.4 years: see K. Kunze, *The Effects of Age Composition and Changes in Vital Rates on Nineteenth Century Population Estimates from New Data* (1979), 214 reported in J.D. Hacker, *Decennial Life Tables for the White Population of the United States, 1790-1900*, *Historical methods* (U.S. National Library of Medicine, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2885717/#R55).

[94] For a discussion on the enormously impactful *social leadership* function that the Chief Justice's figure can have, see also: B. Schwartz, *Super Chief, Earl Warren and His Supreme Court: Judicial Biography* (1983).

[95] K. Kelemen, *Judicial Dissent*, cit. at 73.

Presidents are elected by their peers (usually on the basis of seniority). These elements are not so relevant with regard to the function of Presidents and Chief Justices as such, but rather with regard to the broader understanding that the two legal systems and cultures have of the role of *individuality*. It has to be added, once again, that the best example is provided by the fundamental difference between the impact that a nine-year non-renewable term and life tenure have on a court[96].

The previous line of reasoning on consensus-seeking dynamics can be extended to the fact that the both the practice of electing ItCC Presidents for terms much shorter than the prescribed three years and the unwritten custom of electing the most senior judge can also be interpreted as intentional constraints to the role of individuality within the Court. The customary election of the most senior member as President is intentionally divorced from the logic of party politics. The peculiar nomination mechanisms of the ItCC appear as deliberately aimed at reducing as much as possible the influence of *majority* (referred to both political majorities and majorities in internal decision making) and *individuality* on the Court. Meanwhile, SCOTUS nomination mechanisms seem to amplify as much as possible their impact. On that note, the proportional or majoritarian nature of political systems seems to retain a substantial influence on the composition and the nature of the respective courts.

Another revealing difference between the two processes is reflected by secrecy in the case of the ItCC and openness in the case of the SCOTUS. The nomination of ItCC judges remains within the "technical-political" sphere, while the nomination of SCOTUS Justices is subject to substantial popular attention and media coverage. On this point, it can be said that the bifurcation between the two courts on the degree of openness to the interaction with the public, and to media coverage in general, is

[96] In 1969, Chief Justice Hughes suggested to the *New York Times* that "by virtue of the distinctive function of the Court, the Chief Justice of the United States is the most important judicial officer in the world". See, H.J. Abraham, *The Judicial Process* (1968). Notwithstanding functional similarities, quoting Hughes enhances our understanding of the extremely different roles played by *individuality* in the two courts. See also, on this point, the distinction between *strong* individuality and *moderate* individuality adopted in: E. Ferioli, *Dissenso e dialogo*, cit. at 73.

not limited to composition and nomination mechanisms, but extends to almost every other fundamental aspect of decision making, to what Pasquino defines as their *mode of production* of constitutional opinions and judgments[97].

2.3. Pluralism in the Context of the US Supreme Court

If the previous part of the analysis has been devoted to the *identity* of the two courts, examining who and how becomes a member, this part is devoted to comparing their *essence*. If *identity* stood for composition, *essence* stands for the courts' natures as decision-making bodies. The distinction which has been utilised is the same developed by Pasquino[98], which is particularly accurate if placed in the trajectory of the elements already analysed. The distinction is the one between *pluralist* and *collegial* courts[99].As already mentioned in the precedent section, all courts are composed by individual members, but the pluralist-collegial distinction is largely based on the different conceptions of which role should the court in charge of constitutional adjudication occupy in a given legal system and society[100]. The SCOTUS, exemplifying the concept of pluralist court, expresses its nature in the aggregation of the individualities of nine Justices, while the in

[97] P. Pasquino, *How Constitutional Courts Make Decisions*, cit. at 64.

[98]P. Pasquino, *The New Separation of Powers: Horizontal Accountability*, 1 IJPL 157 (2015).

[99]P. Pasquino, *How Constitutional Courts Make Decisions*, cit. at 64. "The United States Supreme Court is the most revealing example of what can be classified as a pluralist court. But since all the high courts are panel courts in contrast to courts characterized by monocratic judges, it is necessary to define what I mean by this conceptual distinction: pluralist vs. collegial court. The easiest way to explain this dichotomy is to claim that it is important to distinguish courts that *speak with one voice*, thanks to the undisclosed votes of its members, from courts where the Justices have a clear *public persona* – and who "teach from the bench", addressing as specific individuals to an external public, thanks to dissenting and concurring opinions. The Austrian, Italian, French and Belgian Constitutional Courts, likewise the Court of Justice of the European Union in Luxembourg, are instantiations of what I call a collegial court, whereas most of the courts of the ex-British Commonwealth are simply pluralist courts."

[100] See: G. Bisogni, *La 'forma' di un 'conflitto'. Brevi osservazione sul dibattito italiano intorno all'opinione dissenziente*, 1 Ars int. 51 (2015). It is extremely useful to remind, as remarked in Bisogni's essay, that the debate on dissenting opinions is subordinated to the fundamental question of which place and function should the constitutional judge occupy in society.

ItCC, a strictly collegial court, the role of individualities is almost totally absorbed by the constraints of collegiality. As Pasquino remarks, within the decisional mechanism of the SCOTUS[101], exchanges of opinions between Justices are essentially written[102], while in the case of the ItCC, face-to-face deliberation is much more developed. The purpose of meetings in the *conference room* tends more towards the registration of convergences and divergences, the formation of defined majorities and minorities, than towards persuasion and compromise[103]. However, changes following from interaction in the conference room are not rare but, especially with regard to concurrences and dissents, they resemble more to the results of *negotiation* than of *deliberation* processes[104].

There are also significant terminological and stylistic differences with regard to the *outcomes* of decision-making processes. The two final "products" are characterised by different names, structures and styles[105], which reflect the profoundly

[101] For more detailed descriptions of the decisional process see: H.J. Abraham, *The Judicial Process*, cit. at 96; K.H. Nadelmann, *Il dissenso nelle decisoni giudiziarie: pubblicità contro segretezza*, in C. Mortati (ed.), *Le opinioni dissenzienti dei giudici costituzionali ed internazionali* (1964); K. Zo Bell, *L'espressione dei giudizi separati nella Suprema Corte*, in C. Mortati (ed.), *Le opinioni dissenzienti dei giudici costituzionali ed internazionali* (1964); B. Woodward, S. Armstrong, *The Brethren: inside the Supreme Court* (2005); C. Sunstein, *Unanimity and Disagreement on the Supreme Court,* 100 Cornell L. Rev. 770 (2015).

[102] P. Pasquino, *How Constitutional Courts Make Decisions*, cit. at 64.

[103] See in particular the words of Justice Rehnquist reported in: R.A. Posner, *How Judges Think* (2010) and S. Cassese, *Lezione*, cit. at 68. Cassese's interpretation is particularly interesting if contrasted with Pasquino's pluralist-collegial categorisation. He comments the decisional process of the SCOTUS regarding it as a manifestation of (extremely) *weak collegiality* (especially in contrast with British *seriatim* opinions), therefore placing it, with regard to collegial courts, on different sides of the same spectrum rather than in distinct categories.

[104] See: A. Anzon, *Forma delle sentenze e voti particolari: le esperienze di giudici costituzionali e internazionali a confronto*, in A. Anzon (ed.), *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993* (1995), 175-176; J.P. Greenbaum, *Osservazioni*, cit. at 189-200; A. Scalia, *Remarks on Dissenting Opinions*, in A. Anzon (ed.), *L'opinione dissenziente. atti del seminario svoltosi in Roma, Palazzo Della Consulta, nei giorni 5 e 6 novembre 1993* (1995).

[105] On this point see in particular: V. Varano, *A proposito dell'eventuale introduzione*, cit. at 52; V. Vigoriti, *Corte costituzionale*, cit. at 52. For an in-depth comparative analysis of styles and structures see also: A. Anzon, *Forma delle sentenze*, cit. at 104; A. Di Martino, *Le opinioni dissenzienti*, cit. at 17; P. Passaglia,

different nature of the two courts in general, and their attitude towards dissent in particular. In the case of both courts, technical language mirrors the respective legal cultures. Every section of SCOTUS judgments has a markedly *personal* character, while ItCC judgments a have a visibly unitary and impersonal one[106]. It is not by accident that one talks of *opinion* in the American context and of *decision* (*sentenza*) in the Italian context.

Terminological divergences also disclose the presence of completely different approaches to the judicial profession intended more generally. In common law systems, and therefore in the US, "a judge takes responsibility for what *he* thinks and writes, and this responsibility is openly attributed to him by the judgments and the published Reports"[107]. The structure and the style of judgments are never unitary, and even the opinion of the Court is constituted by a sum of distinct and separate voices, which maintain their strong individualities even in the case of agreement or convergence[108].

In this context, the explicitly partisan nomination mechanism and life tenure of Justices also point towards the direction of an individualistic understanding of independence, within a system that values more the independence of the single

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La struttura delle decisioni dei giudizi costituzionale: un confronto fra la tradizione di civil law e quella di common law, in D. Dalfino (ed.), *Scritti dedicati a Maurizio Converso* (2016). Particularly relevant here is not only the academic, argumentative, style which permeates the tone of SCOTUS Justices' opinions, but also the typographic homogeneity between the opinion of the Court, concurring and dissenting opinions, the presence of footnotes and the lack of fixed formulas or expressions identifying specific parts of judgments. The decisional process of the SCOTUS has not to appear to the public as a unitary act, but as the reasoned account of a dispute between scholars, not dissimilar from what happens in a scholarly debate or academic conference.

[106] See again: A. Anzon, *Forma delle sentenze*, cit. at 104. It is fundamental to notice how even the opinion of the Court has maintained, since its introduction by John Marshall, a personal nature which is highly dependent on which justice is writing. Even the opinion of the Court is extremely flexible, changing according to clearly recognisable personal styles and argumentations. The research of stylistic and argumentative impersonality, which a necessity in the ItCC, is completely absent from SCOTUS judgments.

[107] P.S. Atiyah, *Judgments in England*, in Vv. Aa. (eds.) *La sentenza in Europa: metodo, tecnica e stile: atti del convegno internazionale per l'inaugurazione della nuova sede della facoltà. Ferrara 10-12 ottobre 1985* (1988).

[108] S. Panizza, *L'introduzione*, cit. at 49.

member of the Court, than the independence of the Court as an organ. Consequentially, the central difference with the ItCC consists in the fact that *independence* is not understood as insulation from politics, but rather as individual responsibility and individual freedom of expression. The key aspect of *pluralist* independence is the independence of Justices from fellow Justices rather than the independence of the Court from politics and public opinion[109]. This distinction has been interpreted as the one between *external* and *internal* independence or between *institutional* and *individual* independence[110]. From the American perspective, to inhibit separate writing or externalised dissent would not only violate judicial independence, but also encroach upon the Court's institutional and social legitimacy.

Therefore, the emphasis on individual independence, responsibility and personality also expose the common law understanding of judicial legitimacy within the context of the SCOTUS. In relation to that, the specific social legitimacy or acceptability of judgments is strictly connected to the backgrounds[111] and personalities of Justices. This is especially evident in the choice of which Justice will write and "give personality" to the opinion of the Court in relation to the specific case[112]. The focus on the style and on the linguistic register of judgments and dissents in the case of the SCOTUS cannot be underestimated[113]. One of the strongest indicators of pluralism in the Court is the presence of visible, recognisable stylistic differences, elements of rhetorical uniqueness which can clearly be

[109] On the question of independence and responsibility, it is extremely interesting to analyse Justice Ginsburg's uniquely comparative approach to the defence of externalised dissent: R. Bader Ginsburg, *Remarks on Writing Separately*, 65 Wash. L. Rev. 133 (1990); R. Bader Ginsburg, *Speaking in a Judicial Voice*, 67 NYU L. Rev. 1185 (1992); R. Bader Ginsburg, *The Role of Dissenting Opinions*, cit at 1.

[110] For a study on the conceptual distinction between internal and external independence see again: S. Shetreet, *Judicial Independence*, cit. at 88.

[111] For insights on the connection between SCOTUS Justices' writing styles, theories of constitutional interpretation and personal backgrounds see also: L. Corso, *Opinione dissenziente*, cit. at 41-49.

[112] See the example in A. Anzon, *Forma delle sentenze*, cit. at 104; originally contained in H.J. Abraham, *The Judicial Process*, cit. at 218.

[113] See, for a commentary on various theories on constitutional interpretation such as originalism, textualism, judicial restraint or activism: A. Di Martino, *Le opinioni dissenzienti,* cit. at 17.

attributed to one personality or the other, or to one interpretative approach or the other, such as judicial activism or restraint[114]. In this context, stylistic pluralism is nothing but the other side of the Court's pluralist nature.

It can also be observed that the SCOTUS and the system in which it is positioned, have a structural tendency to create "celebrities" by revealing the personalities of individual Justices, together with their legal opinions, to the broader public. Individuality is already a fundamental element within the Court, but the surrounding political environment, public opinion and the media tend to bring, in more than one case, the consequences of pluralism to the extremes, especially through the action of the media. Not only legal scholars, but also television programs, newspapers and websites analyse, publicise and make predictions on the most important cases to be decided[115].

However, even well before the era of mass or digital media, Justices such as Marshall, Johnson, Daniel, Holmes, Curtis, Brandeis and others gained the status of "celebrities" in the public narrative of the Court. In the course of the 20th century, the growingly hegemonic role of the United States, combined with the size of the country and its economy, together with the development of ever more sophisticated media have developed this narrative up to levels which are unparalleled in the rest of the world. Some have even come to define this unique narrative surrounding the SCOTUS as a *cult of celebrity*[116]. On this particular aspect, the comparison with the relatively anonymous ItCC (and with similar courts) is almost superfluous, given that the visibility of individual personalities is restrained by all procedural rules, institutional mechanisms and informal practices.

These characteristics derive not only from a certain approach to the judicial legitimacy, but from a certain approach to *political* legitimacy. The emphasis on voting and on the disclosure

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114 This has led to the formation of a sort of distinctive and recognisable "literary genre" attributable to SCOTUS Justices. See: R.A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 Y.J.L.H. 201 (1990); for a concise review of the stylistic and jurisprudential relevance of selected *great dissenters* see: A. Di Martino, *Le opinioni dissenzienti*, cit. at 17.

115 K. Kelemen, *Judicial Dissent*, cit. at 73.

116 C.S. Lerner, N.R. Lund, *Judicial Duty and the Supreme Court's Cult of Celebrity*, 78 G. Wash. L. Rev. 1255 (2009).

of votes, the partisan nature of appointments and the focus on explicit and clearly recognisable political-interpretative orientations and writing styles[117] all point in the direction of a *majoritarian* understanding of legitimacy. In light of the previous considerations, this reasoning can also be extended to both the notions of *input* and *output* legitimacy[118] that is, to both composition and decision-making. Legitimacy, in the case of the SCOTUS, derives *from* the preservation and the exaltation of interpretative pluralism, which is widely regarded upon as one of the bulwarks of social, political and territorial pluralism in the country[119]. The SCOTUS is not a collegial, but a pluralist organ, composed of strong individualities: separate writing and public dissent are at the core of its nature. They are to be considered as *dependent* variables in the analysis, with respect to the prevailing legal culture, socio-political context and institutional equilibria, just as their absence within the collegial ItCC.

2.4. Collegiality in the Context of the Italian Constitutional Court

The opposite side of the coin is represented by the ItCC, founded on the principle of collegiality. Already from terminology, the word *decision* used to identify the final judgment reflects the collegial nature of the Court, in opposition with the usage of *opinion*. As observed by Kelemen: "In continental Europe, under the traditionally dominant influence of the French and German legal cultures, judgments are delivered in the name of the people, the republic or the monarch. They are seemingly unanimous decisions. In these systems there is no possibility for the judge to dissent publicly for her/his colleagues. The court must show unity"[120]. The absence of dissenting opinions in the latter is not only historically derived from the civil law tradition and from the "one voice" historical trajectory of French *ordonnances royales*[121], but designed to strengthen the collegial

[117] P. Pasquino, *How Constitutional Courts Make Decisions*, cit. at 64.
[118] W. Sadurski, *Constitutional Court in Transition Processes: Legitimacy and Democratization*, 53 Sydney Law School Legal Studies Research Paper 4 (2011).
[119] E. Ferioli, *Dissenso e dialogo*, cit. at 73.
[120] K. Kelemen, *Judicial Dissent*, cit. at 73.
[121] For critical accounts of the origins and of the historical developments of collegial courts see: S. Cassese, *Lezione*, cit. at 68; S. Cassese, *Les organes*, cit. at

nature of the Court, deliberately incentivising the research for consensus and compromise in case of divergences.

This unity is not forced nor fictional unanimity. It has been frequently pointed out that "Even if unanimity would be imposed by procedural rules, it is sometimes hard to achieve that in practice. And there is more: it would clearly violate judicial independence. Judges are expected to make their decisions based on the law and according to their conscience"[122]. This is true to the extent that unanimity is, indeed, hard to achieve in more than some cases. However, in this statement the author marginalises the importance of context, considering the violation of judicial independence from a common law understanding of judicial independence. Notwithstanding the author's recognition that "one should keep in mind that the pros and cons of disclosing judicial dissent have to be evaluated in the context of one concrete jurisdiction"[123], the implicit assumption seems to remain that once the disclosure of dissent is made possible, the rest of the system in question will take care of itself and adapt, "evolve" in the same direction without previously (or contemporarily) reforming also the tenure of judges, the composition, the jurisdiction of the Court, its sources of legitimacy and its position in the institutional framework (in short, its *identity* and *essence*). Even if the author gives extensive recognition to the meaning of collegiality in other parts of the analysis[124], statements like the one above exclude the

67; P. Pasquino, *Légitimité*, cit. at 67; A. Di Martino, *Le opinioni dissenzienti*, cit. at 17; K. Kelemen, *Judicial Dissent*, cit. at 73. On the historical derivation of secret deliberation and "strong" collegiality from the bureaucratisation of the judicial role see: A. Bevere, *Dal giudice-funzionario al giudice-organo della comunità: riflessioni in margine alla sentenza sulla responsabilità del giudice*, 32 Giur. Cost. 106 (1989), in a commentary to the controversial sentence n. 18, 1989 of the Constitutional Court; M. Taruffo, *Il modello burocratico di amministrazione della giustizia*, 21 Dem. Dir. 12 (1993); L. Pace, *La dissenting opinion. Considerazioni storico-comparatistiche*, in L. Pace, S. Santucci, G. Serges (eds.), *Momenti di storia della giustizia* (2011); A. Di Martino, *Le opinioni dissenzienti*, cit. at 17; E. Ferioli, *Dissenso e dialogo*, cit. at 73.

[122] K. Kelemen, *Judicial Dissent*, cit. at 73.

[123] *Ibidem*.

[124] This is often true in the cases of several of the most recent publications, see: L. Corso, *Opinioni dissenzienti*, cit.; A. Di Martino, *Le opinioni dissenzienti*, cit.; at 17; F. Falato, *Segreto*, cit. at 73; K. Kelemen, *Judicial Dissent*, cit. at 73; E. Ferioli, *Dissenso e dialogo*, cit. at 73; in which the history, the meaning or the implications of collegiality are extensively discussed, but in which the concrete

collegial perspective from the picture.

Collegiality implies that it is the court as an organ to speak, not the individual judges, and also that it is the court as a whole to be independent from other powers, not the individual judges to be independent from each other within the court. While the subject within the pluralist discourse is the figure of the individual Justice, the subject in the collegial discourse is the Court itself as an organ. A consequence of the principle of collegiality, as observed by Zagrebelsky[125], is the idea that the position of the individual judge only counts within internal deliberations, and that the objective of the deliberation process should result in the synthesis, the mediation between the positions present in the Court. Such a decision-making process prevents judges from *self-marking* with regard to specific sections of the public opinion and political parties. Following this conception, the absence of externalised dissent would constitute a violation of judicial independence in a pluralist court, but not in a collegial one.

It can be deduced, from the extremely synthetic overview in the first section, that almost all the reasons in favour of introduction in the Italian debate on public dissent are strictly related to the quality, the richness and the *purity* of the interpretative reasoning. A plurality of opinions shows the complexity of constitutional interpretation more clearly, contributes to the dynamism of case law, makes the legal reasoning sharper, polishing it from the not unfrequently opaque language of compromise[126]. These favourable reasons are broadly accepted as more than valid. Their only problematic aspect is their *absolute* character. These motivations are valid *as such*, but their impact varies accordingly to the context to which they are applied. Especially in the course of the Italian debate, it is interesting to observe how the reasons for introduction mostly have this

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risks or potential negative repercussions of externalised dissent are underplayed with respect to potential benefits. On the contrary, other contemporary authors, such as Zagrebelsky, Pasquino or Cassese have constantly tended to the overplay the risks, uncertainties, and collateral effects of externalised dissent within the system.

125 G. Zagrebelsky, *La Corte costituzionale*, cit. at 63; G. Zagrebelsky & V. Marcenò, *Giustizia costituzionale*, cit. at 63.

126 D. Tega, *La Corte Costituzionale vista da vicino Intervista di Diletta Tega a Gaetano Silvestri*, 33 Quad. cost. 757 (2014) reported in K. Kelemen, *Judicial Dissent*, cit. at 73.

absolute character, while most of the "conservative" ones depend on and are inseparable from the context's specificities and imperfections, emphasising the risk of downturns or negative repercussions on the rest of the system[127].

Furthermore, it has to be observed how the Italian debate on externalised dissent has always followed the torsions of the political system, with alternations of historical phases in which dissenting opinions would have increased the prestige of the Court, and ones in which it would have weakened or fragmented its authoritativeness. There have been phases in which strong collegiality has been felt as a need to give stability and security to the political-institutional system in phases of turmoil. To contextualise also means to picture the Court as an organ in the totality of the system, giving enough weight in the reasoning to historical conjunctures and practical considerations about the system as a whole[128].

However, even when the importance of contextualisation is being recognised, the evaluation of pros and cons continues to present some problematic aspects. An example of this is provided by the ban on the re-election of judges: "…if judges can publish their dissent, the possibility of re-election becomes even more dangerous to their independence. This has sometimes been used as an argument against dissenting opinions. However, it should

[127] See again the synthesis of the Italian debate on externalised dissent in the first section.

[128] For an analysis of this type see: A. Di Martino, *Le opinioni dissenzienti*, cit. at 17. Di Martino, reporting and commenting the observations by Lanchester (see: F. Lanchester, *Intervento - Pensare la Corte costituzionale. La prospettiva storica per la comprensione giuridica*, 2 Nomos 3 (2015). agreed with the interpretation of Mortati's favour towards dissenting opinions and Zagrebelsky's defensive attitude towards them as an ongoing debate on the *normalisation* of the Italian political system. According to both Lanchester and Di Martino, the defence of secrecy and collegiality in the Constitutional Court coincides with the "special" situation of Italy as a *protected democracy*, in which the peculiarities and imperfections of the political system are precluding its normalisation and producing a particular kind of mistrust (mistrust implicitly expressed by Zagrebelsky and other defenders of the *status quo*, according to Lanchester) in the evolution of the system. In Lanchester's analysis, Mortati had been favourable to the normalisation of the system, while Zagrebelsky (after his experience in the Court) to the "protection" of the system, motivated by a deep mistrust in its *imperfect bipolarism* and conditioned by the presence of anti-system parties.

rather be used as an argument in favour of a ban on re-election."[129]. This argument is certainly valid, but it does not consider the possibility that judges could continue their careers following different paths and ambitions, but it is partially lacking contextualisation, since it does not recognise that a ban on re-election is not as effective as life tenure in preserving independence while retaining public dissent.

In the case of the comparison between the United States and Italy, the clearest example would be provided by the current Italian President of the Republic, Sergio Mattarella, constitutional judge from 2011 and President from 2015 (even before the end of the nine-year term). Life tenure precludes SCOTUS Justices from other career paths, while the impossibility of re-election does not give the same assurance in the case of the ItCC. With similar precedents, the introduction of dissenting opinions in the ItCC would also extend the problem beyond re-nomination or election (which is already prohibited), calling into question the fixed nature of terms, which is deeply grounded in the institutional equilibrium of the Italian Republic, as life tenure is in the United States.

3. Final Reflections and Evolutionary Perspectives

3.1. On the Influence of History and Ideology

The attitudes of the two systems towards the disclosure of dissent are extremely difficult to modify since they are inseparable from constitutions themselves. Pluralism and collegiality in the two courts primarily depend on the historical, ideological and cultural elements that shaped both the US Constitution of 1787 (and the Bill of Rights of 1791) and the Italian Republican Constitution of 1948, their interpretation and their material application.

The strongly pluralist nature of the SCOTUS can be attributed to two crucial elements. The first one is not textually present in the Constitution, and it is the influence of the English common law judiciary. Notwithstanding the evolution during the Court Marshall and the emergence of the opinion of the Court, the pluralism characterising the SCOTUS descends directly from the

[129] K. Kelemen, *Judicial Dissent*, cit. at 73.

model of the House of Lords, of the King's Bench and on their traditionally individual, *seriatim* opinions[130]. The second element is the particular importance assumed by freedom of speech among the constitutional principles contained in the Bill of Rights. In fact, freedom of speech is one of the pillars of the First Amendment to the Constitution. Furthermore, the concepts of freedom of speech and of free *marketplace of ideas* have permeated so much the jurisdiction of the Court that the absence of the active contribution of Justices to the public debate through concurring and dissenting opinions would be nearly unthinkable.

The notion of *marketplace of ideas* has deep social, economic and cultural roots in the Anglo-American sphere. It is, in fact, conducible to the transposition of the Anglo-American variant of capitalism into the domain of human expression. Historically, the origins of the analogy to the economic marketplace can be traced back to the early phases of capitalism in England, more precisely, to the height of the struggle between absolutism-feudalism and parliamentarianism-capitalism represented by the English Civil War. Philosophically, the free competition of ideas as a means to separate truths from falsehoods can be traced back to John Milton and his *Areopagitica* (1644)[131]. It is clear that the belief that no one alone knows the truth, or that no one idea alone embodies either the truth or its antithesis[132] constitutes the ideological bedrock of

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[130] For a more detailed comparative historical account of the connection between common law English courts and the American legal system in the perspective of externalised dissent see also: G.F. Ferrari, A. Di Giovine, P. Carrozza, *Diritto Costituzionale Comparato* (2014); A. Di Martino, *Le opinioni dissenzienti*, cit. at 17; L. Pegoraro & A. Rinella, *Sistemi Costituzionali Comparati* (2017); E. Ferioli, *Dissenso e dialogo*, cit. at 73.

[131] S. Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, in 1 Duke L.J. 3 (1984). The link might appear far-fetched, but the SCOTUS has directly referred to Milton's *Areopagitica* in its First Amendment case law four times in the last century: in *New York Times Co. v. Sullivan* (376 U.S. 254, 279 1963), *Times v. City of Chicago* (365 U.S. 43, 67, 82, 84 1960), *Eisenstadt v. Baird* (405 U.S. 438, 458 1971) and *Communist Party of the United States v. Subversive Activities Control Board* (367 U.S. 1, 151 1960).

[132] D. Schultz, D.L. Hudson, *Marketplace of Ideas*, in *The First Amendment Encyclopedia* (accessed January 25, 2020 at https://www.mtsu.edu/first-amendment/article/999/marketplace-of-ideas). The philosopher of 19th century liberalism, John Stuart Mill, further developed the concept, explicitly translating market competition into a theory of free speech for the first time in his essay *On Liberty* (1859), complementing political liberalism and *laissez-faire* capitalism

the SCOTUS pluralist and individualist nature.

This is also demonstrated by the evident will of both majorities and dissenters in the history of the Court to take part in the dialogue with this philosophical and ideological tradition and to actively shape it. It is not by accident that the first explicit reference to the marketplace of ideas was produced by Justice Wendell Holmes, remembered as one of the *great dissenters*[133]. Holmes' landmark dissenting opinion in *Abrams v. United States* contained a passage, which is central in understanding how the ideology of free market competition constitutes a pillar of the American model of constitutional review[134].

It is evident that these principles and beliefs are mirrored by the structure of the Court itself. If *truth emerges from competition*, preventing Justices to compete would create a contradiction at the heart of the system. Furthermore, the *marketplace of ideas* has been invoked hundredths of times by both SCOTUS Justices and federal judges within the US diffused system of constitutional review since Holmes' dissent in *Abrams* and continues to be invoked[135]. Nearly a century after Holmes, Justice Breyer in *Reed v. Town of Gilbert* reinstated the centrality of the same concept not only to the US legal system, but to American *society*[136] For these reasons, a

with free market competition of ideas. Mill also considered free competition of ideas as the best way to separate falsehoods from fact.

133 For a complete analysis of Holmes' impact on the SCOTUS in light of his dissents see again: A. Di Martino, *Le opinioni dissenzienti*, cit. at 17.

134 See: *Abrams v. United States* (250 U.S. 616 1919). "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.".

135 Only in the last fifteen years it has been invoked in *McCreary County v. American Civil Liberties Union*, 545 U.S. 844 (2005), *Randall v. Sorrell*, 548 U.S. 230 (2006), *Walker v. Texas Division, Sons of Confederate Veterans*, 115 S.Ct. 2239 (2015), *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015) and *Matal v. Tam*, 582 U.S. ___ (2017).

136 See: *Reed v. Town of Gilbert* 576 U.S. __ (2015). "Whenever government disfavours one kind of speech, it places that speech at a disadvantage, potentially interfering with the free marketplace of ideas and with an individual's ability to express thoughts and ideas that can help that individual determine the kind of society in which he wishes to live, help shape that society, and help define his place within it.".

prohibition on externalised dissent or separate writing, with the imposition of a unitary structure and impersonal style of judgments would constitute an almost indefensible contradiction in the context of the United States.

Turning to Italy, the reflection will be focused on some of the historical elements which shaped the post-WWII Republican Constitution of 1948, from which the nature and the structure of the ItCC are inseparable. Zagrebelsky gave an interesting interpretation of how the strongly collegial nature of the Constitutional Court is inextricable from the post-war transition to the Republic and from the values of the new Constitution arguing that: "There are many souls in our Constitution and, in the decision of the concrete case, these many souls must find a common ground."[137]

It might be too easy to dismiss this interpretation with the counterargument that pluralism would be better protected by a plurality of opinions[138]. Such a counterargument flows partially from the abstraction from the historical, ideological and cultural context in which the Constitution was developed, and does not concede much room to the influence of ideologies and historical circumstances. The first elements to emerge are that the Italian Constitution was drafted in the aftermath of a civil war which followed the fall of the fascist regime during WWII, while the American Constitution, almost two centuries before, followed the victory in a war of independence.

One could argue that in the case of the American transition to independence, the dominant elite constituted by big landed property managed to seize entirely the constituent power and draft *its own* constitution, permeated by its own ideology, building its own political system. The Founding Fathers could start a constitutional project in which there was not the intention nor the historical necessity to include *many souls* or to find *common grounds* between them. In addition to their rejection of monarchic absolutism (and therefore of the model of French royal courts, inherited by revolutionary France), the members of the American constituent elite had also very few incentives to build a model oriented towards the *coexistence* of ideas instead of one promoting

[137] G. Zagrebelsky, *La Corte costituzionale italiana*, cit. at 63. Author's translation.
[138] See, for example: K. Kelemen, *Judicial Dissent*, cit. at 73.

the *competition* of ideas[139].

It follows that, at least in the pre-Civil War and pre-Reconstruction era, when federal institutions (including the SCOTUS) were established and permanently consolidated, there was no pressing need of finding *common grounds* or striving towards *coexistence* between a plurality of souls in the same constitution. It is perhaps not entirely by coincidence that the closest American parallel of the *many souls* concept expressed by Zagrebelsky was introduced into the US Constitution with the amendments to the Bill of Rights[140]. However, in the wake of the *fundamental rupture* of the Civil War, the structure of Court did not experience any fundamental rupture or changes, having already been modelled and consolidated upon the original constitutional scheme.

The Italian Civil War which followed the armistice of 1943 had all the characteristics of a fundamental rupture, with the difference that it followed the disintegration of the precedent regime. The pressing historical necessity was not only the one of rebuilding a country, but of rebuilding a country's political system and its institutions along new lines. The same did not happen to federal institutions (including the SCOTUS) after the American Civil War. Indeed, one of the primary elements of difference with the post-independence Constitutional Convention in the United States was the *composition* of the post-WWII (and post-Civil War) Italian Constituent Assembly[141].

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[139] This interpretation finds support in *The Politics of Law* (2005) edited by David Kairys. In his contribution to the volume, Kairys reports how John Jay, co-author of the *The Federalist Papers* with Alexander Hamilton and James Madison, thought that "the people who own this country should govern it". See: D. Kairys (ed.), *The Politics of Law: a Progressive Critique* (2005).

[140] See D. Kairys (ed.), *The Politics of Law*, cit. at 139. Those amendments regarding "African-Americans, minorities, white men irrespective of property holdings and anyone who has reached the age of eighteen" were introduced only after "the fundamental rupture of the Civil War-after the failure of the original constitutional scheme … their adoption was not required by the Constitution or by law, nor was it inevitable.".

[141] The democratically elected assembly included the 35% of the Christian Democrats (DC), the 20% of the Socialist Party of Proletarian Unity (PSIUP), the 18% of the Communist Party (PCI) and the rest of the percentage fragmented between smaller parties (including Sardinian and Sicilian autonomist parties). See *Dipartimento per Gli Affari Interni e Territoriali, Aree tematiche*,

In addition to that, the transition to the Republic was achieved by means of a universal suffrage referendum between forms of State (1946) with deeply controversial results[142]. From both the war and the elections no clear winners emerged. The country was profoundly divided, and the monarchic or republican preference in the referendum also geographically overlapped with the North-South division[143].

An example of the compromises which resulted from the debate went from the existence of a constitutional court itself to its jurisdiction and composition[144]. The hybrid nature of the type of constitutional review of Court and of its composition derived from the compromise between divergent positions such as the emphasis on popular sovereignty or on technical-professional qualifications, or between unfettered parliamentary sovereignty and "the maximum multiplication of constitutional organs retaining parts of supreme power"[145].

However, it has to be considered that, notwithstanding the radical ideological divergences existing between the dominant forces in the Assembly, the common element of fear towards the possibility of fragmentation or future authoritarian downturns prevailed. It prevailed on both the sides of the ideological spectrum[146]. In a situation which had no clear winners, the only

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https://elezionistorico.interno.gov.it/index.php?tpel=A&dtel=02/06/1946&tpa=I&tpe=A&lev0=0&levsut0=0&es0=S&ms=S).

[142]Precisely, 54.3% of republican votes (12.717.923) and 45.7% of monarchic votes (10.719.284). See: *Dipartimento per Gli Affari Interni e Territoriali, Aree tematiche*,
https://elezionistorico.interno.gov.it/index.php?tpel=F&dtel=02/06/1946&tpa=I&tpe=A&lev0=0&levsut0=0&es0=S&ms=S).

[143]Between republican Centre-North and monarchic Centre-South-Isles. Also the Constituent Assembly was almost split in two, given that out of 566 seats the major party, the Christian Democrats (DC), retained 207 of them, with the Socialists (PSIUP, 115) and Communists (PCI, 104) retaining 219 seats combined.

[144] L. Paladin, *Per una storia costituzionale*, cit. at 14.

[145] L. Paladin, *Per una storia costituzionale*, cit. at 14 (author's translation). The social-communists, such as Togliatti, Gullo and Laconi, advocated for the democratic or entirely parliamentary election of judges, while others, such as the Catholic-democrat Mortati, stood for a system based on presidential appointment.

[146] On one side, with the constructive involvement of social-communists in a constitutional project which did not reflect the most radical of their claims, on

tolerable solution was represented by compromise at all costs. The Republican Constitution was never a *majoritarian* constitution (originated from clear majorities or winners) in which winning or losing forces could be clearly recognised, but a constitution "of everyone"[147] which even clearly antagonising forces could equally recognise as legitimate[148].

In fact, the Republican Constitution and its institutional framework were both results of this compromise. The Constitution itself became the "common ground"[149] and the synthesis of the antagonist forces that had to find a way to *coexist* within the new republican form of State. The Constitutional Court entered into function only ten years later, in 1956, but its nature and structure could not represent a contradiction with the nature of a Constitution born from compromise and founded on the pressing historical necessity of coexistence. If the Constitution had to represent a common ground, in the words of Zagrebelsky, its interpretation had to represent a common ground as well. The necessity regarding both the Constituent Assembly and the Constitutional Court was not to create the illusion of consensus, but to acknowledge the impossibility of consensus and overcome it without creating further divisions[150].

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the other side, exemplified by the willingness of Catholic-democrats and liberals not just to "contain" the decisive influence of social-communists, but to incorporate it among the different "souls" of the Constitution and of the Republic (notwithstanding the emergence of Cold War bipolarism and the dependence on the US Marshall Plan for reconstruction).

147 "*di tutti*" is the expression used by Onida in the original text.

148 V. Onida, *Costituzione Italiana*, in 4 Digesto, Disc. Pubb. 325 (1989).

149 Zagrebelsky's "*punto d'incontro*" in Italian.

150 Another fundamental difference between transitional Italy and both post-independence and post-Civil War United States was the absence of phenomena such as slavery or extensively radicalised capitalism. With the influence of these factors, a post-Civil War Reconstruction including the rewriting (not only the amendment) of the Constitution (with consequent institutional reforms at the federal level) through the universal suffrage election of a constituent assembly would have proved almost impossible to achieve. While the mostly ideological and political (non-racial) nature of the internal divisions and the relative ethnic homogeneity of the population facilitated the Italian transition to the Republican Constitution, in the United States, the vital importance of racial capitalism and the clear presence of a winning side prevented similar processes from happening. In fact, it would be an interesting thought experiment to think

3.2. Conclusions

It could be said that there is no definitive answer to the fundamental question of externalised dissent in the realm of constitutional adjudication. As reaffirmed in the initial quote from Justice Ginsburg, "what is right for one system, may not be right for another"[151]. What Ginsburg intended is no simple relativism. On the contrary, it is attention to the strong points, fallacies, peculiarities and imperfections of systems considered in their entirety. The weight of potential negative repercussions and collateral effects must not encroach upon modernisation and improvement, but modernisation and improvement must not be considered in isolation from practical contexts.

What may mean a step forward in one context or in one historical moment may be meaning ten steps back in another one. Taking up again Ginsburg's words, *what may be right in one historical moment, may not be right in another*. The example of the decades-long debate on externalised dissent in the context of the Italian system of constitutional adjudication is a powerful indicator. The historical moment in which Mortati advocated for the introduction of dissenting opinions is not identical to the one the Constitutional Court is currently experiencing. The weight of historical circumstances must be present in the equation, and the conjunctures for modifying delicate equilibria and deeply engrained practices are not always the right ones.

In light of these considerations, the comparative focus with regard to the experience of the US Supreme Court has been particularly useful in emphasising how deeply rooted the absence of externalised dissent is in the current system of Italian constitutional adjudication, and how its introduction, if taken as a serious effort, would require a series of structural changes in the system. The jurisdiction of the Court, its sources of legitimacy and of independence, its composition, nomination mechanisms and decision-making processes, the yearly number of cases decided, the terms of office for judges, the role of the President are all decisive factors that should be figuring in the equation of change.

In addition to that, it must be considered that there are

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how the US Constitution would have looked like if it had been entirely rewritten by a democratically elected assembly after the Civil War.

[151] R. Bader Ginsburg, *The Role of Dissenting Opinions*, cit. at 1.

other ways in which to implement gradual changes, without necessarily having to modify structural equilibria. An example of that is currently being offered by the Constitutional Court in relation to the organs of Italian civil society[152]. The Court, by modification of the Integrative Norms[153], moved towards the inclusion of interventions by *amici curiae* (through the production of briefs and opinions) within the proceedings of constitutional adjudication. By means of the same modifications, the Court also opened to the hearing of experts on specific subjects regarding individual cases. This could be considered as an example of gradual change deriving from needs emerging from within the system.

As already mentioned in the premises of the second section, the presence of externalised dissent (or its absence) should be considered as a *dependent* variable, rather than as an *independent* one in relation to the system as a whole. If the presence of externalised dissent does not emerge as a structural need from the system itself, the impact of its introduction risks to be materially irrelevant or superfluous, if not counterproductive.

[152] For a detailed account of the Court's decision (passed on January 8, 2020) and of its implications on the proceedings of constitutional adjudication with regard to civil society see: G. Cotturri, *Quando La Costituzione è in Movimento*, 3 Questione Giustizia 1 (2020).

[153] See: Deliberation of the President of the Constitutional Court, January 8, 2020: "Modificazioni alle Norme integrative per i giudizi davanti alla Corte costituzionale" (Gazzetta Ufficiale n. 17 published on January 22, 2020).

THE ITALIAN ENERGY SERVICES MANAGER IN THE FIGHT AGAINST CLIMATE CHANGE

Francesco Vetrò[*]

We are not God.
The earth precedes us and has been given to us
(Pope Francis , *Laudato Si'*, 67)

Abstract

The energy and environmental policies are closely tied together: the political-administrative decisions and the legal measures adopted in the field of energy affect the environmental one as well as the environmental decisions must take into account the effects that the energy sector has on the ecosystem protection. The European Union has a crucial role in the global fight against the climate changes. The target is to achieve a «climate neutrality» by 2050. As stated, given the close interrelationship between the energy policy and the environmental one, the European approach to the fight against the climate changes, could not but be an integrated type. The exceptional events occured in the energy system often arise from natural disasters and extreme weather events connected with climate changes. Those inappropriate behaviours in the energy consumption can even lead to the risk of exceptional events; therefore the so-called «risk management» in energy and environmental sectors increased its relevance. The inadequacy of ordinary tools warrant the adoption of *extra ordinem* ones. However the use of extra *ordinem measures*, which (maybe) shows a scant attention from the public powers to the prevention phase of extraordinary events, leads to the adoption of rules aimed at solving the events that could have been prevented with a proper involvement of public and private stakeholders, with technical and scientific competences. However, the so-called «risk management» is not sufficient to give a contribution to the fight against climate changes: we need political and administrative

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decisions and legal measures referred to a "previous" timeline horizon, aimed at driving the operation of the energy system towards the «climate neutrality», and at giving a contribution for the reduction, at the roots, of exceptional events. The European legal system, as implemented by the Member States, predicts many «therapeutic measures», among which the incentive for the production of energy from renewable sources and that for energy efficiency, etc. Very important is also the attention dedicated to the need to ensure adequate sustainable development in urban areas (objective 11 of the Urban agenda for Europe). In Italy, an important role in the adoption of measures to combat climate change is played by the GSE, a public company incharged with managing the incentive mechanisms aimed at promoting the development of energy efficiency and renewable sources. What is the level of cooperation between political and technical-administrative institutions? How can GSE contribute to the prevention of energy and environmental risk situations? What role can the technical-specialist services that the GSE has the right to play in favor of public administrations in the pursuit of the environmental and energy objectives determined by international and European law? The paper aims to examine, in particular, the role that one of the institutions of the national energy system (the GSE) can play in contributing to the fight against climate change.

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1. Foreword

"*An avant-goût du Choc climatique.*" This was how Philippe Descamps and Thierry Lebel defined the Covid-19 epidemiological crisis in a dossier published in *Le Monde diplomatique*. Scientists and scholars from all disciplines are increasingly maintaining that there may be a close correlation between the Coronavirus and climate change. The dramatic

consequences which the epidemic has produced and continues to produce on public healthcare are sadly too well known. Equally well known are the negative consequences which the lockdown measures adopted by virtually all the countries around the globe will produce on economic systems — even more than they have already. The Bank of Italy has noted a fall of 4.7% in Italian GDP in the first quarter, with a projected further decline of 9% by the end of the year, and a minus sign in front of household consumption (-8.8%), investment (-12.4%), exports (-15.4%), imports (-17.3%) and employment (-9.8%).

Among other things, the Covid-19 has taught us how necessary it is — should the presuppositions recur — to focus on prevention, sooner than the tackling of exceptional events. And, in fact, all the preconditions to focus efforts on preventing exceptional events related to climate change already exist, since the forecasting (or if you prefer, 'precautionary') phase has now reached unambiguous conclusions

This paper therefore sets out to examine the role of one of the institutional players involved in the governance of the Italian energy system in the fight against the climate change emergency. It refers to the organizational structure in which the 'Incentive State' for renewable energy and energy efficiency is personified — according to a current but not totally correct concept: namely, the Italian energy services manager GSE. Although aware that the fight against climate change involves — and it could not be otherwise — several sectors (agriculture, trade, transport, infrastructure, finance, etc.), the perspective to begin from is that of the energy sector.

Is the fight against climate change an emergency? What is the European Union's stance on energy governance today? What are the European Union's 'means of action' when it comes to energy to tackle climate change and achieve 'climate-neutrality' by 2050? And what measures have been taken following the Covid-19 emergency? What is the GSE? What are its functions? What is the current role of the GSE in the governance of energy geared to combating climate change? What is its legal nature? What role will it be playing in the near future? These are just some of the questions that we will try to answer.

2. From 'turbo-capitalist development' to 'sustainable development'. A brief overview

Climate change is afflicting our planet. It has provoked the occurrence of exceptional events (floods, sea-level rises, etc.) which have resulted in both economic and non-economic damage. Traditional industrial production models (focused on the use of fossil energy sources) and the energy-dependent lifestyles of most of the world's populations are no longer admissible nor tolerable. Supercharged capitalism or 'turbocapitalism' has advanced the *unregulated* realization of behaviour and activities preordained to short-sighted fulfilment of the current generation's needs, with no attention to protecting the environment and no importance being given to future generations. This anthropodestructive logic — as we all know — began to be questioned in the second half of the 20th century, after the first international theorization of the concept of sustainable development by the Brundtland Commission. In its 1987 report entitled *Our Common Future*, this commission clarified the meaning of 'sustainable development': one that can meet the needs of the current generation, without compromising the ability of future generations to fulfil their needs.

No one can now seriously doubt the close interrelationship between human activity and climate change. It has been scientifically proven. Consequently, on the basis of such a premise, the international community has gradually adopted various agreements aimed at reducing greenhouse gas emissions and preventing the harmful effects of global warming: *a)* the United Nations Convention on Climate Change of 1992 (the so-called Rio Agreement), with the related 1997 Kyoto Protocol; *b)* the Global Agenda for Sustainable Development *Transforming our World: Agenda 2030 for Sustainable Development*, adopted in 2015 by 195 UN member countries; *c)* the 2015 United Nations Framework Convention on Climate Change (Paris Agreement), and so on...

3. European energy and environmental policy choices after the Paris agreement: the Clean Energy Package, the European Green Deal and the proposed European Climate Law

Energy — as a necessary resource for all areas of human action (from industry to agriculture, from commerce to

restaurants, from transport to construction, from public services to domestic activities, from sport to communications, etc.) — is the sector that will exert more influence than any other in the fight against climate change. Energy policy and environmental policy are in fact linked in two ways: while political-administrative decisions and legal measures taken in the field of energy are reflected in the environmental sector, environmental decisions cannot fail to take into account the impact that the energy sector is destined to have on environmental protection (more than any other). In view of this, in 2016, the European Commission announced that a new energy and climate package would be adopted. The long-term goal which the European legislator has set itself to achieve is a condition of 'climate-neutrality' by 2050. However, achieving 'climate-neutrality' necessarily involves meeting certain medium-term energy targets (2030): a 40% reduction in greenhouse gas emissions compared to 1990; a 32% increase in the share of renewable sources out of the total; and a 32.5% improvement in energy efficiency. This is because activities in the European energy sector account for more than 75% of all greenhouse gas emissions.

Accordingly, the European Commission, through its Communication of 30 November 2016, no. 860, *Clean energy for all Europeans*, made it clear that "implementation of the EU's ambitious climate change commitments in Paris is a priority and depends to a great extent on the success of the transition to a clean and renewable energy system." This Communication led to an ambitious package of measures known as the 'Winter Package', or 'Clean Energy Package', with which the objectives announced by the Commission acquired greater legal weight. The package consists of eight measures: EU Regulation No. 2018/1999 on governance of the Energy Union, EU Directive 2018/2002 on energy efficiency, EU Directive 2018/2001 on promotion of renewable energies (the so-called Red II), EU Directive No. 2018/844 on energy performance in buildings, EU Regulation No. 2019/943 on the internal electricity market, EU Directive No. 2019/944 on common rules for the internal electricity market, EU Regulation No. 2019/941 on risk preparedness in the electricity sector, and EU Regulation No. 2019/942 on the establishment of an EU Agency for Cooperation between Energy Regulators (ACER).

Therefore, within the Euro-unitary system and that of the individual Member States, the instrumentality relationship between energy objectives and the goal of 'climate-neutrality' is reflected in the correlation between the measures of the Clean Energy Package and those of the European Green Deal.

4. The fight against climate change: An emergency 'in name' and 'in fact'

So far, we have spoken of the close link between energy policy and environmental policy, including the goals which the most recent Euro-unitary regulatory measures have set to tackle climate change. At this point, we need to ask ourselves: Is the fight against climate change an emergency? The question may sound extremely odd, but it is more fitting than we might imagine. The scientific community has been warning (for years) that, in the absence of rapid and effective solutions to climate change, the global average temperature would be at risk of rising by 1.5 degrees centigrade, causing the permafrost to melt, with rising seas, the spread of new infectious diseases, the emergence of new diseases, and eco-systemic damage to forests and the wetlands.

Despite this, only recently has a resolution been adopted at a European level in which a climate and environmental emergency was formally declared. Indeed, in its resolution of 28 November 2019, 2019/2930(RSP), the European Parliament, having declared a "climate and environmental emergency", stated "its commitment to take urgent action to combat and mitigate this threat before it is too late." Calling on the European Commission to "carry out a comprehensive assessment of the climate and environmental impact of all legislative and budgetary proposals and to ensure that these proposals are fully in line with the goal of limiting global warming to 1.5°C." The Italian Parliament also made a move in accordance with the European Parliament's choice with its motion number 1-00181, adopted in December 2019. In fact, with this act, the Parliament intended to commit the Italian Government to adopting initiatives, including regulations, geared to an effective impact on the fight against climate change.

4.1. (Cont'd) The physiognomic traits of the 'emergency regulation': activities, acts and organization of the emergency

The fight against climate change is an emergency in which scientific uncertainties cannot be admitted, with the result that the need for public decision-makers to inform their decisions in compliance with the 'precautionary principle' has long been exceeded: the precautionary and prudential attitude which the authorities are called upon to adopt is in fact an implementation of the prevention principle which, unlike the precautionary approach, entails the adoption of measures to avoid the occurrence of an event in relation to which there is no state of scientific uncertainty, insufficiency, or inconclusiveness. Hence the inevitable shift from the paradigm of 'risk administration' to the paradigm of 'emergency administration'.

An emergency — meaning a legally recognized emergency — posits that the ordinary powers which public decision-makers hold are neither suitable nor sufficient for concrete care of the general interest. In view of the unsuitability of 'ordinary instruments' to deal with emergencies, in these cases, the legal system allows the use of organization modules and extraordinary instruments of action. The answer given by public law to emergency situations is the 'Emergency Regulation': a set of measures and interventions (both legislative and administrative) which, adopted by a multi-form network organization, may derogate from the legal order in the name of those public interests which are (or could be) compromised due to extraordinary events of a natural origin or arising from human activities. With this definition, it is useful to dwell on three profiles: *a)* the *activity* through which emergency interventions and measures are implemented; *b)* the *acts* in which the emergency activity is expressed; *c)* the *organization* of the persons involved in the emergency regulation.

With regard to the *activity*, this is divided into three phases: forecasting, prevention, and handling of exceptional events. *Forecasting* translates into efforts by the competent authorities to determine — on the basis of scientific, technical, technological and administrative evidence — the likelihood of a risk situation arising which, in connection with exceptional events of natural or human origin, could cause damage to life, physical integrity, property,

settlements, animals, and the environment. *Prevention* consists in implementing all those measures (legislative and/or administrative) geared to avoiding, or reducing, the probability that the risk situations identified in the forecasting phase will actually occur. Finally, *handling* includes all the activities involving the adoption of measures aimed, firstly, at reducing the detrimental impact of the exceptional event on life, physical integrity, property, settlements, animals and the environment and, secondly, to encourage restoration of normal living conditions.

As far as the *acts* are concerned, an immediate distinction must be made. Those adopted during the phases of forecasting and prevention of an emerging situation are decisions taken with full respect for the ordinary parameters of legitimacy established by the legal order. In contrast, acts adopted in the handling phase are considered *extraordinary*, given that they may derogate from the legislation in force.

Finally, as regards the *organization* of the persons called to cooperate in order to tackle (anticipate, prevent and deal with) emergencies, this has certain specific characteristics. Firstly, it is 'multifaceted and complex', given that the entities (public and private) called to intervene in the various phases of the emergency activity are many (possibly too many). Secondly, it is 'twofold': in the planning and prevention phases it is a network, since it consists of a multitude of entities (public and private) which cooperate, with relations of coordination, to achieve a common goal; in the handling phase, on the other hand, it becomes a pyramid, since certain entities, by assuming a position of hierarchical superordination towards the others, have powers of order and command. Thirdly, it is a 'markedly political organization', since those with technical and scientific expertise play the role of a 'servant' towards the political players who are responsible for fixing the content, the timeframes, and the way in which the emergency is to be tackled.

5. The prevention of exceptional events related to climate change in the multi-level governance of the Energy Union, as amended by Regulation No. 2018/1999/EU: Integrated National Energy and Climate Plans (INECP) and long-term strategies

Once the characteristics of the emergency regulation have been outlined, it is possible to focus on the multi-level governance of the energy sector in relation to the climate crisis. One clarification is essential: when it comes to combating the climate crisis, the Energy Union's governance comes to the fore in the prevention phase, since it is here that the energy sector boasts special features in relation to other sectors (trade, agriculture, transport, etc.). Indeed, for the energy sector, there is no *ad hoc* discipline involving a forecasting phase nor a phase to handle exceptional events related to climate change. To date, the forecasting phase of the climate emergency regulation has seen its most authoritative outcome in the 2018 report of the *Intergovernmental Panel on Climate Change* (the United Nations body responsible for scientific research on climate change), in which it has been predicted that, in order to avert environmental disasters, it will be necessary within eleven years to limit global warming to 1.5°C and not to 2°C. This is — on closer inspection — a rate that is valid for all sectors, including energy. The phase to handle any calamitous events that may occur as a result of climate change is, instead, part of the governance of the EU Civil Protection Mechanism, established to ensure a practical, timely contribution to the handling of current or imminent disasters. It goes without saying that, like the forecasting phase, the handing phase of the emergency regulation to combat climate change is also the subject of a cross-sectoral discipline, which includes that of energy.

The energy sector involves multi-level governance. The need felt to combat change, at one with the awareness that the 2050 goal of 'climate-neutrality' necessarily begins from a decarbonized energy sector, has led the European legislator to redesign the governance of the energy sector. With Regulation No. 2018/1999/EU a mechanism to coordinate the energy and environmental policies of individual Member States had already been introduced. This regulation "lays down the necessary legislative basis for inclusive, cost-effective, transparent and

predictable governance that can ensure the achievement of the long-term objectives and targets of the Energy Union up to 2030, in line with the 2015 Paris Agreement on Climate Change".

The main feature of the Energy Union's new governance is the crucial importance it gives to cooperation. Both regional cooperation is envisaged, to the extent that each Member State should have the opportunity to comment on national plans before their final definition, in order to avoid inconsistencies and possible adverse effects on other Member States and to ensure collective achievement of the common goals, as well as cooperation between the Member States and the Union.

The main instrument for the implementation of regional and European cooperation has been identified in the Integrated National Energy and Climate Plans (INECP). These documents cover reconnaissance, planning and programming issues — taking as a timeframe a period of ten years (2021-2030) — and they are supposed to provide an overview of the current conditions of the energy system of each Member State (the so-called *reconnaissance part,* establish national objectives for each of the five dimensions of the Energy Union (so-called *planning part*) and to enact measures to enable these objectives to be achieved (so-called *programming part*).

In addition to the INECPs, the multi-level governance of the Energy Union also focuses on an expected 'long-term strategy': each Member State (by 1 January 2020 and then by 1 January 2029 and every 10 years thereafter) must draw up and announce its energy strategy to the Commission with a perspective of at least 30 years. Accordingly, this long-term strategy should be the link between intermediate energy targets (40% reduction in greenhouse gas emissions compared to 1990, a 32% increase in the amount of renewable sources, and a 32.5% improvement in energy efficiency) as the ultimate goal of 'climate-neutrality' by 2050.

6. The Energy Services Manager (GSE) in Italian energy governance geared to Europe

Italy has been one of the most successful European countries in implementing measures aimed at achieving the energy-environmental goals set for 2020. Suffice it to note that for the sixth consecutive year, the threshold of 17% of energy

consumption met by renewable energy sources was again exceeded in 2019. Much of the merit must go to the action of the Energy Services Manager (GSE), which has, among other things, "helped to activate some 2.6 billion Euro of new investments, while avoiding the emission of 43 million tons of CO_2 into the atmosphere."

The GSE is a state-owned company "which promotes sustainable development through the technical-engineering certification and verification of renewable and high-efficiency cogeneration plants; it also creates incentives for electricity produced and supplied to the grid by these plants and any measures aimed at increasing energy efficiency. In addition, it is responsible for measures to promote greater competitiveness in the natural gas market, and disseminates an energy culture compatible with the needs of the environment. It manages the national system of certificates for the release of biofuels for consumption in order to develop a sustainable biofuel chain and reduce CO_2 emissions into the atmosphere." It was established under Italian Legislative Decree no. 79 of 16 March 1999 (the so-called 'Bersani Decree'), which included the creation by Enel S.p.A. of a company to manage the national grid as well as transmitting and dispatching electricity; in its original form, the company went under the name of GRTN (National Transmission Network Manager). As a result of a reunification of ownership and management of the national transmission network, the name was changed to GSE (Energy Services Manager). The functions initially assigned to the GSE involved: *a)* the purchase and sale of CIP6 electricity; *b)* the issuing of green and white certificates; *c)* activities to implement European directives on the promotion of electricity from renewable sources; *d)* management of the company's holdings in the other companies *Gestore dei Mercati Energetici, Acquirente Unico, and Ricerca sul Sistema Energetico*. Subsequently, additional and increasingly important functions were assigned to GSE in order to promote electricity production from solar energy, develop high-efficiency cogeneration plants, and so forth.

7. The GSE's "preventive functions" in the fight against climate change: incentives and technical-administrative regulation of renewable energy and energy efficiency

The GSE's functions have changed with the arrival of indispensable new priorities in the supranational and national energy sectors. Wishing to transpose these functions into the phasic sequence of public emergency activities, it is now called upon to perform functions that find a place within the *prevention phase* in the fight against climate change. These prevention functions can be sorted into eight categories: public incentives, technical-administrative regulation, modification, public certification, technical-specialist assistance, promoting dissemination of eco-sustainable culture, energy monitoring, technical, economic and social monitoring and analysis of the effectiveness of the measures included in the Italian INECP.

As regards public incentives, it is a known fact that the costs to realize plants which use renewable energy sources, or to carry out energy efficiency interventions along with the relevant bureaucratic costs (of a different order and type), are among the main factors which led the European legislator to believe that, without incentive mechanisms, the cooperation of the business world and civil society in the fight against climate change would never be obtained. Hence the choice to provide a comprehensive series of incentive mechanisms, the management of which, in Italy, is entrusted to the GSE. There are many incentive mechanisms managed by the GSE.

A precise, detailed description here of the rules which dominate their functioning would become a pointless anthology. For this reason, we shall limit ourselves to pointing out that two types of mechanisms can be distinguished: one for incentives in the strict sense, the other for incentives in a broader sense. The incentive mechanisms in the strict sense include 'CIP6'[1], 'Green Certificates'[2], 'White Certificates', otherwise known as 'Energy

[1] This is an incentive mechanism introduced by a decision of the Inter-Ministerial Price Committee on 29 April 1992, which envisages incentive prices for electricity produced from plants powered by renewables and similar sources.

[2] Negotiable securities which the GSE issues in proportion to the energy produced by a qualified RES plant (one powered by renewable energy sources). This incentive focuses on the obligation of producers and importers of fossil

Saving Certificates'[3], the 'All-inclusive Tariff'[4], the 'Thermal Account'[5] and the 'Energy Account'[6], meanwhile, in the broader sense, incentive arrangements include 'Dedicated Collection'[7] and 'On-The-Spot Exchange'[8].

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electricity to introduce annually into the national grid a minimum proportion of electricity produced by facilities powered by renewables. Possession of Green Certificates therefore demonstrates fulfilment of this obligation: each Green Certificate certifies the production of 1MWh of renewable energy. Since 2016, the Green Certificate mechanism has been replaced by a new form of incentive: the Incentive Tariff, which consists of economic assistance granted in proportion to the amount of energy produced by an RES plant.

[3] Negotiable securities issued by the GSE to certify the achievement of energy savings through interventions and projects that increase energy efficiency in the industrial sector, network infrastructures, services, transport, but also in the civil sector

[4] An incentive mechanism to support the granting of economic contributions from the GSE, as alternatives to Green Certificates, reserved for qualified RES plants of a small size: i.e., plants with an average annual nominal power of not more than 1MWh, or 0.2MWh for wind farms. It is known as 'all-inclusive' in that its value includes an incentive component and a component to valorize the electricity supplied to the grid.

[5] An incentive mechanism consisting in the granting of economic contributions in order to encourage implementation of small-scale measures to increase energy efficiency and produce thermal energy from renewable sources, including the efficient cladding of existing buildings (insulation of walls and coverings, replacement of doors and windows and installation of brises-soleil), replacement of existing systems for winter air conditioning with higher efficiency systems (condensation boilers), installation of boilers, biomass stoves and fireplaces, and solar thermal plants also combined with solar cooling technology, and so on...

[6] A mechanism to grant economic contributions to photovoltaic and thermodynamic solar plants. Mention must also be made of the CIP6 incentive mechanism set up by a decision of the Inter-Ministerial Price Committee on 29 April 1992. By means of this mechanism – in some ways rudimentary – producers of renewable energy sources were granted the right to sell any green energy produced to the GSE, which had to pay them more than the market price.

[7] Through 'Dedicated Collection', the GSE withdraws electricity produced by RES plants, paying the producer a price for each kWh with a guaranteed minimum. That is to say, a sum whose minimum amount is determined by the regulator (ARERA), so as to avoid any fluctuations in the price of energy that might occur in the free market (hourly zonal price). The energy withdrawn by the GSE is then resold by the GSE on the market, ultimately playing the role of an intermediary between the producer and the electricity market.

[8] This is a mechanism which allows those who produce and supply energy from renewable sources to the grid to obtain compensation between the economic

This incentive mechanism is accompanied by an important technical-administrative regulation function. The requirements and arrangements to access incentive mechanisms are laid down — in general terms — by the law and by inter-ministerial decrees. Unfortunately, the excessive generality of the prescriptive and regulatory requirements can sometimes lead to uncertainty and confusion among operators. Which is why, in exercising its administrative functions, the GSE adopts 'implementing procedures': 'general administrative acts' in which the requirements, procedures, and obligations for proper and legitimate admission to incentives are described in a transparent, detailed language.

7.1. (Cont'd) Energy qualifications, audits, forecasts and monitoring

The GSE's 'preventive functions' in the fight against climate change — as mentioned already — do not merely involve incentives. It also performs functions of qualification and verification. *Qualification* means the adoption — after carrying out a technical-engineering and legal-administrative inquiry — of an 'enabling measure', in which renewable energy producers are acknowledged as carrying out actions and activities which would otherwise be precluded from them, and a 'certification act', in which the quantity of renewable energy produced by each economic operator is attested: the enabling measure consists in IAFR qualification (for plants using renewable energy sources) which constitutes the 'prerequisite' on which access to incentive mechanisms is conditional; instead, the certification act is that of IGO qualification (meaning Guarantee of Origin).

In order to ensure that incentives are granted to operators who actually carry out activities aimed at the production of renewable energy or the achievement of energy savings, the GSE has yet another important function: *control and verification*. This is a function which is currently governed by Italian Legislative Decree no. 28 of 3 march 2011 and a Ministerial Decree of 31 January 2014, in which the GSE carries out, both through documentary

value of the energy produced and fed into the grid and the economic value of the energy taken and consumed by them over a period which is, however, different from that of the production.

investigations and on-the-spot inspections, audits to ensure that operators admitted to the incentive mechanisms satisfy the requirements required by law for the duration of the incentive period, in order to avoid the inappropriate granting of public funds. No less important, moreover, are the functions of predicting the quantity of electric energy introduced into the grid and of determining the quantity of electricity that should have been produced by wind farms (aka Shortage of Wind Power).

7.2. (Cont'd) Certificates of Entry for Consumption (CEC) to promote the use of biomethane and other advanced biofuels in the transport sector

Transport is one of the sectors in which fossil fuels are still used in a major way. For this reason, the GSE is responsible for managing a special incentive mechanism for the use of biomethane and other advanced biofuels. This mechanism presupposes the existence of two players: petrol and diesel suppliers, and producers of advanced biomethane and biofuels for transport. The former are legally obliged to introduce (annually) a minimum proportion of biomethane or biofuel, calculated on the basis of the quantity of fossil fuel released for consumption that same year; failure to fulfil these obligations leads to financial administrative sanctions being imposed by the Technical Advisory Committee on Biofuels. The latter, in providing biomethane or advanced biofuels for consumption by means of roadside, motorway, or private gas stations, are entitled to be issued Certificates of Entry for Consumption (CEC) by the GSE: negotiable securities, worth Euro 375 per CEC, showing the quantity of biomethane or advanced biofuels released for consumption in the transport sector.

7.3 (continued) Promotion of an eco-friendly culture and technical and specialist services for public administrations

Given that the fight against climate change is an intergenerational challenge, the GSE also carries out activities to raise awareness of energy and environmental issues among school students of all ages. Similarly, activities to organize meetings, conferences and institutional round tables are not neglected either,

with the aim of stimulating exchanges between sector operators, trade associations, and other stakeholders.

But there is yet another important activity which the GSE carries out in the fight against climate change: technical and specialist assistance for public administrations. Public administrations (whether central, regional or local) have a key role to play in the fight against climate change. The considerable size of their 'real estate pool', the public services provided to the community (transport, public lighting, etc.) and the capital goods (electricity, gas, stationery, etc.) they need for their institutional tasks, are only a few of the items by which public administrations can contribute to the transition to a 'climate-neutrality' system. It was in view of this that the Italian legislature, with Law no. 99 of 23 July 2009 (the so-called 'Development Law'), assigned to the GSE a series of tasks which make it one of the most authoritative (perhaps *the* most authoritative) 'consultant' for public administrations in the fields of energy and the environment.

7.4. (Cont'd) Monitoring of INECP implementation, analyses and projections on the impact of energy and environmental measures

Italy's Integrated National Plan for Energy and Climate (INECP) has assigned to GSE — and it could not be otherwise — other important functions which again belong to the prevention phase in the fight against climate change. In leveraging the GSE offices' advanced technical capabilities of analysis, estimation and projection, the Italian Government has seen it as the appropriate institutional entity to monitor the concrete implementation of INECP measures, including their effectiveness in achieving the objectives set at a supranational level. Nonetheless, the INECP has also entrusted the GSE with the task of developing and identifying – in conjunction with other entities – the measures required to ensure the effectiveness of the INECP itself.

But not only. The GSE is also part of the INECP Observatory, as a technical department (also composed of the Regions, ANCI and ISPRA) whose function is to ensure advanced technical comparisons with regard to the possible implementation of the plan while monitoring implementation of the INECP measures. It is also up to the GSE to establish a monitoring platform (in which data from different sources can be merged)

that can provide information to citizens and public administrations on the effectiveness of energy-environmental policies, the level of achievement of the various targets, and the economic aspects connected with these policies, in terms of investment and impacts on employment.

8. Public intervention in the economy to accelerate the climate transition process: Big Government following the Covid-19 epidemiological crisis

Our examination of GSE's role in combating climate change could end here. But it would be incomplete, short-sighted. It would not take into account the GSE's position in a context — like the current one — in which the Covid-19 epidemiological crisis is forcing us to hastily rethink even our economic models. This need has sparked many political and institutional discussions about the amount of public resources to be used to revive European economies and about the choice of sources to cover these expenses. But two things immediately found cross-party consensus.

The first is that measures to remedy the harmful consequences of the health emergency must be geared to economic development based on respect for environmental sustainability. The second is the need for national and European public interventions of exceptional dimensions, giving rise to "a renewed role of the State in strategic sectors and in the essential common goods: The defence of the territory, this is an area where it would be essential to define the national plan for adaptation to climate change, including preparation for situations like that provoked by the pandemic, public healthcare, research and education, acceleration of energy transition and a new decarbonized, smart, and sustainable transport system."

There is no doubt that the measures the Member States and the European Union have adopted or are about to adopt — within the temporary framework of State aid to support the economy in the current Covid-19 emergency — belong precisely within this two-pronged approach. With specific reference to the European measures, in addition to the credit lines of the European Stability Mechanism (ESM) which Member States can activate under the Pandemic Support Crisis, there is the Recovery Fund, an

ambitious financing programme (renamed 'Next Generation EU') worth Euro 750 billion, plus an increase of Euro 1,100 billion within the EU Multiannual Financial Framework (MFF) for the period 2021-2027.

The widespread conviction that, at this historic moment, economic and social recovery requires the overcoming of the neoliberal paradigm 'less State more market' instead of the paradigm 'more State for the market' is therefore incontrovertible, and ends up by calling into question what has already been labelled *Big Government*: State donations, defence of state-owned assets, and a revival of public authorities.

9. The inclusive institution of the Innovator State in the transition process towards a climate-neutral system

Economic studies have long agreed that excessive market power exacerbates rising inequality, financial instability, and environmental degradation. For this reason, they identify a fresh State intervention in the economy as the only way to remedy such a situation. The Covid-19 epidemiological crisis has only further bolstered these theories: the State must intervene in the economy not to replace the market, but to cooperate with it in order to steer its functioning towards ethical and environmental values, fostering innovation and, as a result, equitable economic prosperity.

It has been noted that a country's prosperity or hardship depends neither on 'geographical factors' nor 'cultural factors', nor 'the ignorance of its rulers'. Both of these depend — according to one of the most reliable economic theories — on the type of institutions (political and economic) which supervise the functioning of society and the market. It is 'inclusive instructions' which determine the economic progress of a country. In contrast, 'extractive institutions' decree its failure.

Economic studies go even further. Indeed, it is argued that in order to initiate economic development capable of facilitating the transition to a climate-neutral system, an inclusive institution is needed that takes on the connotations proper to an 'Innovator State': it is the State which must provide measures to support technological innovations with the least environmental impact.

As we know, the energy-environmental transition process requires investment in activities with uncertain (economic) outcomes. The private entrepreneur is therefore forced to refrain from making such investments. Unless there is a variable: State intervention aimed at steering private economic initiative toward activities which can contribute to the transition to a zero-greenhouse-gas-emission system. The economic theory of the Innovator State is highly convincing. The centrality of a State intervention in the economy is fully shared, naturally, without this meaning "a denial of the existence of the private sector, from new young companies which give the dynamic impetus that leads to the emergence of new sectors (for example Google), to the important source of financing, venture capital." And even more convincing are the solutions that this theory proposes to complete what is emphatically called the 'green industrial revolution', which "needs a non-polluting energy transition, freeing us from dependence on finite energy sources (such as fossil fuels or nuclear energy) and favouring infinite, renewable energies." The role of the State is therefore necessary and indispensable, given that advanced clean technologies face many obstacles and uncertainties of success, to the point that private lenders (commercial banks, investment funds, financial intermediaries, etc.) are reluctant to support a company which wants to join the green energy sector.

Consequently, if private investors constitute *'impatient capital''* (they invest only in sectors or firms capable of ensuring short-term economic return), the State must necessarily employ '*patient capital*'': that is to say, it must support companies which intend to operate in the field of renewable energy until technological development allows them to achieve a state of self-sufficiency. It is precisely in an indication of the forms which the State's patient capital should assume that the economic theory under consideration becomes — at least in our view — enlightening. Taking into account the experiences of various countries (the United States, China, Germany, Brazil), two types of State intervention are indicated which are capable of favouring the green industrial revolution: public financing and loans from what are called 'state development banks'.

10. The Innovator State as a Public Enterprise in combating climate change

The Innovator State can identify itself — also, but not only — with 'public enterprises', which are destined to acquire fresh impetus in the near future. After the extraordinary attention seen in the early '90s, when the privatization of many public economic bodies began, the political and legal debate around them was suppressed except for limited questions to identify their applicability to the framework laid down for the 'special sectors' of public contracts. This state of affairs is bound to change. There is no doubt that public enterprises will be one of the main tools through which the State will be called upon to promote economic development in line with the fight against climate change. But just what are 'public enterprises'? The question is easy to ask but difficult to answer. Albeit with some margins of imprecision due to the need to be brief, they are those enterprises which (while pursuing social aims) are asked to exercise professionally, under the dominant influence of 'public apparati', a substantial activity in the production or exchange of goods and services on a market open to the free play of competition, while being willing to bear business risk. Moreover, on several occasions, the case-law has been able to state that the difference between a public enterprise and other kinds of public body (particularly ones governed by public law), which do not exercise economic activities, "does not lie in the organizational model adopted, but in the fact that the public enterprise is exposed to competition, operates non-essential services, and suffers or is liable to suffer commercial losses."

11. The legal nature and prospects of an 'entrepreneurializing reform' of the GSE in relation to the fight against climate change: a sustainable development bank?

Having broken down the unchanging characteristics of a public enterprise, it should be pointed out that the centrality which public enterprises are bound to assume is also confirmed by the proposal contained in a recent report prepared by the Inequality Diversity Forum, whose name is self-explanatory: "Strategic Missions for Italian Public Enterprises. An opportunity to guide the country's development". This report comes to

conclusions which can be shared: the State, through its public enterprises, must steer the economic system toward values that do not always expect an immediate economic return. However, the considerations of the report are based on a technically incorrect premise, at least as far as the GSE is concerned. Namely? Including it among the public enterprises of the Italian State.

Of course, this is not a mistake on the part of the authoritative authors of the report, but a conscious decision to delimit their field of investigation. It is no coincidence that, in the text of the document, the question "but what is meant here by 'public enterprises'?" has been asked, and that "the definition adopted in this report may, like any other, raise analytical objections, but is essential to demarcate the scope of interest". It is also stated that "a public enterprise is a productive organization in which the State has a controlling stake, that is, one which affects the company's governance, through the appointment of directors and any other proprietary prerogatives". This is clearly a description in broad brushstrokes, which is in danger of conflicting with the rather more circumscribed definition of an eminently legal nature. This investigation is not challenging a moot point. Quite the opposite. Indeed, the Inequality Diversity Forum report encourages reflection on what can be done to turn the GSE, conceivably, into a 'public enterprise' in the technical sense of the word, letting it — even more so than now — take a decisive role in implementing the Italian State's strategic missions; especially those related to sustainable development.

Therefore, we must first understand what the GSE is today from a legal point of view. It can be said — in a leisurely way — that it is a 'state-owned company', but not at the same time a public enterprise. These conclusions come from both a *positive test* (establishing the existence of the indicators of a public body) and a *negative test* (establishing the absence of the indicators of a public enterprise). Starting from the positive test, it must be said that the current organigram of the GSE is that of a public limited company in the energy sector. It may be regarded as a 'quasi-administrative company', a 'legal company' or a 'public body in a corporate form' within the 'functional and changing concept of public administration', for which the corporate form is an irrelevant element. This notion — the fruit of the pervasive influence of the Euro-unitary order — raises the problem of identifying a 'public

body'. Having passed the use of legislative techniques to strictly classify public bodies, identification of the public or private nature of a given entity requires assessment of the occurrence of the so-called 'symptomatic indicators' of advertising. In spite of several, albeit appreciable, attempts by the legislature to provide a clear definition of which subjects can be placed within the 'public perimeter', identification of these must be carried out through the use of 'dynamic' and 'functional' criteria and not criteria which are already 'static' and 'formal'. As for the GSE, all the symptomatic indicators of the public body exist: it was established by law; it is in a relationship of instrumentality with the State; it has been assigned the exercise of powers of direction and control of the State; it pursues goals of public interest; it has been attributed public powers; finally, it carries out its functions using public resources obtained by a billed payment of the ASOS component.

If the positive test confirms the nature of the GSE as a public company, the negative test will also lead to similar conclusions. Indeed, the GSE cannot be regarded as a public enterprise, given the lack of necessary requisites. Firstly, it does not produce, by law and by statute, goods or services according to (so-called economic) criteria and logic aimed at allowing earning of revenues to an extent that ensures a recouping of the costs incurred or even a profit (not even tendentially). Secondly, it does not bear any business risk, since the administrative activity of the GSE protects it from the risk of suffering commercial losses; the resources it needs are those (for the most part public) whose entry is guaranteed by a prescriptive and regulatory framework which obliges electricity users and, through incentives, the operators, to provide the GSE with the resources necessary for its operation. Thirdly, there is no competitive market for incentives to employ renewable energies (not even in power), since not even in an ideal world would it be possible to find a sufficient number of (economic) operators willing to provide resources without any expectation of a return, but solely in the general interest.

Thus, the proposal of the Inequality Diversity Forum report and the ideas offered by the economic theory of the 'Innovator State' suggest — as has already been said — making a case to reform the current organigram of the GSE. This is clearly in order to transform the 'gentle nudges' of public incentives into 'forceful

shoves' towards a zero-emission system. In this context, it would not be — in our view — impossible to exclude a possible entrepreneurializing of the GSE, which could be achieved through a transformation of the GSE into a 'public enterprise', especially a 'development bank'.

But how could such a transformation be implemented in practice? Should it be a process of integral transformation, or would a partial, targeted process be better? The second option is to be preferred. Leaving aside certain issues for the sake of simplicity, the process of privatizing (or, better, entrepreneurializing) the GSE could occur according to a two-pronged scheme: a 'fixed part' (the activities which it should continue to carry out as a public body) and a part subject to conversion (activities which could be carried out as a 'public development bank').

Let us try to explain further. The fight against climate change still needs to be paid for by private interventions capable of reducing greenhouse gas emissions. The risks to be borne by the private operator are still too high; costs that would be impossible to bear if there were no public incentives which, *unlike loans*, do not impose on the operator any obligation other than to make certain green investments; no obligation to repay the sums lent, except where they were obtained illegally, and no obligation in terms of results in the field of technological innovation. Not only that: knowledge of the actions and initiatives that can be implemented to help fight climate change is still poor; in particular, the referent is the world of public administrations: quite often, public resources to encourage energy upgrading of public buildings are ignored, for example. The dissemination and consolidation (especially among the new generations) of the culture of sustainability is decidedly satisfactory, albeit far from sufficient.

The elements referred to above suggest identifying a series of activities which the GSE could continue to carry out as a public company: for example, encouragement of (small-scale) initiatives or (small-scale) interventions linked to a low level of technological innovation, specialist technical advice for public administrations and, of course, promotion of the culture of environmental sustainability in academic, institutional, and civil society.

However, alongside the activities that the GSE could continue to carry out as a public company, there are many others which instead, would be better carried out as a 'public development bank'. We are aware that it is unlikely that everyone will agree. However, we do believe that continuing to provide incentives (we can say non-refundable) to any economic operator is (arguably) poorly productive in terms of driving technological innovation and creating a competitive, self-sufficient, renewable energy market. Even the private operator who has (or might have) the appropriate organizational, economic and technical means is not in any way induced to invest in AC. The logic of profit maximization (typical of every private entrepreneur) leads, rather, to exploit the technology already available, without identifying new and more efficient kinds. Unlike public (non-refundable) incentives, the awareness of having to honour the commitments made with a loan is a stimulus to innovation: if innovation is achieved in terms of a process or product, the commitment can be honoured sooner and better.

The economic theory of the 'Innovator State' — as we have seen — teaches that the green industrial revolution has no need of 'impatient capital' (private capital), but 'patient capital' (public capital). But 'patient capital' (that of development bank loans) is one thing; quite another is 'dormant, disinterested' capital for technological innovation in renewable energy (that of public-sector, non-refundable donations). It follows that the GSE could become — in our view — the body responsible for financing energy projects and initiatives with a high potential for technological innovation, as a 'public development bank'.

This reform could create several advantages: a reduction in the weight of incentives for renewables and energy efficiency on electricity bills, since the relative burden on the final energy customers would be reduced directly in proportion to the increase in supply available from the GSE on the market; the responsibility of economic operators to make investments in renewable energy and energy efficiency on the basis of increasingly analytical and timely industrial plans; an increase in technical and technological innovation and research, since a loan system, with a related obligation of repayment, would encourage operators to develop technologies capable of making economic initiatives in the energy and environmental sectors that were financially and economically

self-sustainable. Not to mention the fact that the 'patient claim' which the 'GSE-Development Bank' would have, in terms of an economic return on the initiatives financed could be the 'breath of life' of a wide-ranging cooperation network: in order to encourage the technological development of the funded project or initiative, the creation of a network between the funded enterprise, the GSE-Development Bank, the academic world, RSE S.p.A., other (public and private) research bodies, etc. would be easier. In the final analysis, a reform which could speed up the transition to a climate-neutral system, with companies engaged (through the support of long-term loans) in the implementation of initiatives characterized by a high level of technological innovation in the field of renewable energy and energy efficiency; initiatives that must lead to the creation of a competitive market for green energy, to completely supplant the fossil energy market.

12. Conclusions

As we have tried to demonstrate, the fight against climate change requires an effort that is as widely shared as possible. The public and private sectors must act in synergy with each other. There is no longer any time to waste. The Covid-19 epidemiological emergency is the living proof of this. At present, among the public players, a crucial role in the fight against climate change can only be played by the GSE; and the effectiveness of its action is beyond question.

This comforting fact does not, however, allow us to exclude the beginning of a reasoning on possible new models of action, perhaps aimed at enhancing its 'entrepreneurial vocation' along the lines of solutions which, having already been used in other countries, can combine technological innovation and the fight against climate change; both are indissoluble components, although public support for technological innovation applied to renewable energies in Italy is still too poorly structured, and lacks an overall vision. We therefore trust that Italy's €209 billion from the Recovery Fund can also be used to develop different public intervention models in the field of renewable energy and, more generally, in environmental sustainability; models that exceed, for certain initiatives, the logic of 'dormant capital' (grants, incentives and grant aids) to access that of 'patient capital' (long-term loans).

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ENTREPRENEURSHIP EDUCATION FROM THE EUROPEAN UNION TO THE NATIONAL LEVEL

*Angela Cossiri**

Abstract

Entrepreneurship education has been considered in the supranational ambit since 2000 by non-binding acts, aimed to propose a common line of action without imposing any legal obligation to the EU Member States. In particular, in the sphere of educational policy, Eu countries pursued and identified joint goals using an open method of coordination (OMC). In the first phase, entrepreneurship education was closely connected to economic growth. In the regulatory development, it assumed a broader meaning as a transversal skill. First of all, it is purposeful in the development of individual potential in every sphere of life; secondly, it focuses at the creation of "value for others" in financial, but also social and cultural fields. It also includes active citizenship and social and ethic awareness in processes, profiles that generally in the Italian legislation seem to be recessive. In European Countries the state of the art are rather various: while in some areas, especially in northern Europe, the experiences on entrepreneurship education are consolidated, the situation is quite different where the plans are more recent. In Italy there is a noticeable delay on many fronts, in comparison with the EU Member States' average. There is no national plan, but some episodic legislative interventions and specific actions of the Ministry of Education introduce the subject in the school system. The evidence furnished by scientific research considers that spending in entrepreneurship education is one of the highest return investments that could be made. Nevertheless the 2019 national budget law cut the allocated resources. In the post-pandemic era, we will see an upcoming expansion for this strategic achievement, according to the 30 June 2020 announce from President Von der Leyen.

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1.The emergence of entrepreneurship education in the European context: a functional tool for economic growth

Entrepreneurship education has been considered in the supranational ambit since 2000 by non-binding acts, aimed to suggest a common line of action without imposing legal obligation to the EU member States[1]. According to the European Treaties,

[1] The non-binding acts have to be intended in the contest of the division of competences between the EU and its member countries. In particular, the principle of conferral imposes that the EU can only act within the limits of the competences that have been conferred upon it by the EU treaties. The principle of subsidiarity aims to ensure that decisions are taken as closely as possible to the citizens and prescribe to verify that action at EU level is justified in light of the possibilities available at national, regional or local level. The competence here involved is conferred by Article 165 TFUE, which establish that «the Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity[…]». Article 166 TFUE establish that «The Union shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organization of vocational training. […]». The category in which these legal bases can be included is supporting competence (Article 6 TFEU): the EU can only intervene to support, coordinate or complement the action of EU countries.

each EU Country remains responsible for its own education and training systems and EU interventions in this area of competence is designed just to support action at the national level and to help face common challenges. As we can better see below, actually the EU establishes a framework for common cooperation in the fields of education and training. In general, it intends to provide opportunities to exchange best practices, disseminate knowledge and advance educational reforms at the national and local levels. These non-binding acts have a valuable political and cultural impact, raising public opinion, influencing decision-makers and policies, enhancing public debate and modifying national law.

In this introduction, it is appropriate to frame the specific topic of entrepreneurship education in the broader context of EU education cooperation and development policy, which is strongly conditioned by the original matrix of the EU, concentrated in the mercantile perspective. The general context will show some criticalities of a cultural model in which the tool arises. Emphasizing these critical issues could be useful for enhancing the potential of entrepreneurship education, through an interpretation that highlights the not related to business aspects, therefore enhancing its social implications, if it is possible.

With the Single Act of 1986 and then with the Maastricht Treaty, the idea of promoting a common framework for educational policy enters into European community law. The Lisbon European Council expresses the fundamental inspiring ideology. Education has a strategic objective in the internal market: to support the European area so that it can become the most competitive and dynamic knowledge economy in the world, capable of lasting economic growth.

In its contents EU coordination does not differ from the orientations expressed by the European Round Table of Industrialists (ERT), which has been an active lobby on this issue since the end of the 1980s[2]. In short terms, the EU focuses on the "acquisition of skills", oriented to a concrete scope. The conclusions of the Lisbon European Council identify as new basic skills the technological (information and communications

Legally binding EU acts must not require the harmonisation of EU countries' laws or regulations.

[2] See the official website https://ert.eu/ (*Education and European Competence – ERT Study on Education and Training in Europe,*1989.

technology - ICT) and linguistic ones, which have been prioritized for many years in the national educational systems. In other words, knowledge is conceived from the EU perspective as functional to economic growth. The final goal of learning is not to increase individual and collective knowledge, but to acquire know-how to spend in the job market. The aim pursued is to ensure a better adaptation of workers to business developments and its quick dynamics. From this point of view, it is possible to understand the particular enphasis on multidisciplinary or transversal skills, that could be used in different contexts.

These innovations could be read as a change of cultural paradigm: the abstract transmission of knowledge seems to be considered an obsolete perspective to overcame, preferring practical tools. Anyway, this process should be intended in the light of the kind of European competence involved, an aspect which is undervalued: the EU does not aspire to indicate a common line on education systems, but only to support the education policies of the Member States, according to its main objectives. The absolutization of this ideology is rather the result of an unnecessary interpretation, made in the national ambit, of the European intervention, which only intends to go alongside the competence of the States, fully responsible for the content of teaching. This also implies a full political responsibility of the States for the strategies expressed in the last decades in the field of education, which cannot be transferred to the supranational level.

On a concrete level, European education coordination and development policy consists of a few essential pillars connected with the general aim of EU. They have strongly influenced schools, universities and training systems in the European Countries in the last decades, sometimes monopolizing ideological orientation beyond what is required.

First of all, EU confirm that basic education should be qualitative and for everyone, although this part often remains recessive in concrete. This phase has to be followed by basic professional training. Later, long-life learning has to assists the workers throughout their lives, in order to let them adapt to the constant change of the business requests. Coherently, the European Union trys to support autonomy and competition between education systems, in order increase the ability to adapt to change more quickly, and openness to private partnership. The

link between the educational actors and institutions and the surrounding areas advances, with particular reference to the future employments of learners, whose needs should be oriented towards.

The risk of this approach is the postposing of the human driving attitude to produce evolution and change of current economic models, disadvantaging innovations and captures of new social and human needs. The context could be perceived as a static, unchangeable element to follow in its punctual necessities, renouncing to intervene on its unresolved criticalities and aporias.

The modification of language follows this process, through the replacement of the terms borrowed from the economic context (i.e. educational credits).

Probably the point of greatest convergence between active citizenship and European coordination in education is in the mobility programs, which are part of the harmonization objectives of higher education (e.g. about the duration of university courses and the system of transferable educational credits between Countries). The data show, in fact, that participants in international mobility programs such as Erasmus have in general positive effects in terms of awareness and also of greater participation in electoral consultations.

European educational policy develops along these lines also as a consequence of the peculiar economic and social environment, which has influenced the trend: the historical moment is characterized by ruthless global competition and the pursuit of technological innovation, productive of a tendency towards an increase in traditional inequalities between capital and labor[3]. We can think in particular to the phenomena of job insecurity, short-term and increasingly low-level employment, in the face of market giants operating in the global dimension, which are often difficult to subject to taxation at a national level. In this context, according to some opinions, teaching is designed on the basis of the competitiveness of businesses and human capital must be adequate for it.

Education and training for entrepreneurship is one of the strategic tool in this framework. It enters the EU lexicon with The

[3] See N. Hirtt, *A l'ombre de la Table Ronde des industriels, La politique éducative de la Commission européenne*, *Les Cahiers d'Europe*, n. 3 (2000).

European Charter for Small Enterprises[4], proposed by Enterprise DG of the European Commission and approved by the EU leaders at Feira European Council of June 2000: in this document, the Council recognized that small enterprises are the backbone of the European economy. They are not only "a key source of jobs and a breeding ground for business ideas," but also "a main driver for innovation, employment as well as social and local integration in Europe." In these words, we can read a sort of delegation to the business system of functions that traditionally should be public. The goal for the European Union, according to the Lisbon strategy, starts to be identified as becoming the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth, more and better jobs and greater social cohesion, thus requiring the creation of the best possible environment for small enterprises.

In this framework, entrepreneurship is recognized as a valuable and productive life skill, at all levels of responsibility. In order to strengthen the spirit of innovation and entrepreneurship that enables European economy to face the challenges ahead, European Union and Member States decide to work together along ten lines of action, the first of which is "Education and training for entrepreneurship"; in this ambit, four specific topics were highlighted: 1) to nurture an entrepreneurial spirit and new skills from an earlier age; 2) to include the teaching of general knowledge about business and entrepreneurship at all school levels; 3) to include specific business-related modules as an essential ingredient of education schemes at a secondary education level and in colleges and universities; 4) to develop appropriate training schemes for managers in small enterprises.

In this first step, entrepreneurship education is closely connected to the economic development of EU, an objective that justifies the "soft law" activation of the Union also in the sphere of educational policy. In particular, the goals – jointly identified in the Charter by national and supranational decision-makers – would be pursued using the open method of coordination[5] of National enterprise policies.

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[4] https://ec.europa.eu/growth/content/european-charter-small-enterprises-0_en

[5] The open method of coordination (OMC) in the European Union is a form of "soft law": the intergovernmental policy-making does not result in binding EU

In 2003 the Commission led by Romano Prodi goes on launching a public debate by approving the First Action Plan for Entrepreneurship in Europe - Green Book, which includes education as a fundamental factor:[6] according to the document, education and training should contribute to encouraging entrepreneurship, by fostering the right mind-set, awareness of career opportunities as an entrepreneur and skills. Considering that both personality and management skills are key elements for success, personal skills relevant to entrepreneurship should be taught from an early age and be maintained up to university level, where the focus can concentrate on building management capacity. Within universities, entrepreneurship training should not only be for MBA students; it should also be available for students in other fields. In particular, in technical universities entrepreneurship training may contribute to matching entrepreneurial and technological potential.

According to the final Report, "entrepreneurship education should be a full part of school *curricula*, so that all young people get a chance to learn about entrepreneurship, acquire entrepreneurial and business skills and consider whether it would be an interesting career option for them. In addition, many respondents consider entrepreneurial skills as valuable life skills that are beneficial even when someone decides upon another career"[7]. In particular, entrepreneurship education, in the current opinion, should increase the development of various useful skills and personality traits: curiosity, openness to long-life learning,

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legislative measures and it does not require EU member States to amend their laws. Instead, EU Countries, whose national policies can thus be directed towards certain common objectives, will cooperate under an intergovernmental method: their efforts are evaluated by one another, with the Commission's role being limited to surveillance. The European Parliament and the Court of Justice play no part in the OMC process. The OMC takes place in the areas in the competence of EU countries, such as employment, social protection and education.

[6] See COM(2003)27 del 21/1/2003. In this Paper the Commission promote a coordinated approach to entrepreneurship policy based on learning from the best. The document individuates three pillars for action through which barriers to business development and growth are brought down, the risks and rewards of entrepreneurship are balanced and a society that values entrepreneurship is promoted.

[7] Summary Report "The public debate following the Green Paper 'Entrepreneurship in Europe'", 19/10/2003.

proactive attitude, self-reliance and creativity, problem solving, critical thinking and inter-personal abilities. From this point of view, this milestone seems to pose a new challenge in the field of educations, that is not sufficiently understood and translated in instruments, also in the EU perspective: similar goals couldn't be obtained just teaching some new topics, but involve new methods. Seriously approaching the themes and without involving the problematic dimension of values, individual freedoms and differences, it asks for new competences of teachers and also for the combination of many different scientific knowledge, included pedagogy and psychology. According to the cited Report, the development of these aptitudes should start at primary school; at secondary school and in the course of higher education and vocational training, students should be exposed to business courses that include marketing, management and leadership skills. Such direct exposure to entrepreneurship would help future graduates to consider entrepreneurship as a valuable career option. It was strongly recommended to include entrepreneurship in all non-commercial educational paths. In higher education, curricula should systematically include entrepreneurship and management courses in non-economic curricula. To encourage this, a yearly ranking could assess EU universities in terms of their performance on education for entrepreneurship and innovation. Another suggestion was to introduce a successful American experience that makes science students work together with business students. Training the teachers, especially at primary level, was identified as a prerequisite to entrepreneurship education.

In February 2005, the Barroso Commission proposed a new start for the Lisbon Strategy, focusing the European Union's efforts on delivering stronger growth and providing more and better jobs[8]. The Integrated Guidelines for Growth and Jobs (2005-2008)[9] stresses a more entrepreneurial culture in support of SMEs,

[8] See COM(2005) 24 final, Communication to the spring European Council, "Working together for growth and jobs, A new start for the Lisbon Strategy", Communication from President Barroso in agreement with Vice-President Verheugen, 2/2/2005. The document underlines the importance of promoting a spreading knowledge through high quality education system as the best way of guaranteeing the long-term competitiveness of the Union.

[9] COM(2005) 141 final, 12/4/2005.

according to the idea that enterprises grow up better in a profitable ecosystem[10]: among others measures, Member States should reinforce entrepreneurship education and training (cross reference to the relevant employment guideline). In the European Youth Pact[11], the European Council calls on the Union and Member States, each within the limits of its own powers and in particular under the European employment strategy and under social inclusion strategy, to encourage young people to develop entrepreneurship and promoting the emergence of young entrepreneurs, also expanding the scope for students to undertake a period of study in another Member State. In 2006, the so called Oslo Agenda for Entrepreneurship Education in Europe was approved: it contains a set of specific proposals that define how to support progress in the field of entrepreneurship education through systematic and effective actions to be implemented at European, national and local levels[12].

2.Entrepreneurship education and European cooperation in the field of education

In the context of the Lisbon Strategy, the 2002 Barcelona European Council of the 'Education and Training 2010' work programme (ET 2010) established for the first time a framework for European cooperation in the field of education and training,

[10]See, *inter alia*, L. Leydesdorff, H. Etzkowitz, *The Triple Helix as a Model for Innovation Studies*, *Science and Public Policy*, 25 (3), 195-203 (1998); M. Ranga, H. Etzkowitz, *Triple Helix Systems: an Analytical Framework for Innovation Policy and Practice in the Knowledge Society, Industry and Higher Education*, vol. 27, n. 4, 237-262 (2013).

[11] Annex I, Presidency Conclusions, 22 and 23 March 2005.

[12] See COM(2006)33 final, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions "Implementing the Community Lisbon Programme: Fostering entrepreneurial mindsets through education and learning", 13/2/2006. The Agenda is an outcome of the Conference on "Entrepreneurship Education in Europe: Fostering Entrepreneurial Mindsets through Education and Learning" – an initiative of the European Commission jointly organized with the Norwegian government - held in Oslo on 26-27 October 2006, which followed the Communication from Commission. The Agenda intends to promote entrepreneurial mindsets in society, systematically and with effective actions. It is a list of concrete proposals, from which stakeholders can pick actions at the appropriate level and adapt them to the local situation.

based on common objectives and aimed primarily at supporting the improvement of national education and training systems through the development of complementary EU-level tools, mutual learning and the exchange of good practice via the open method of coordination. Cooperation under the aforementioned work programme, including the Copenhagen process and initiatives in the context of the Bologna process, have supported national reforms of lifelong learning, a general "modernization" of higher education and the development of common European instruments promoting quality, transparency and mobility in the sense highlighted before.

In the 2009 Strategic Framework for European cooperation in the education and training sector - ET 2020 - the EU Member States set specific goals to achieve within the decade. They included to promote lifelong learning and mobility, to improve the quality and effectiveness of education, to enhance equity, social cohesion and active citizenship and to encourage creativity and innovation, including entrepreneurship.

In the 2010 Europe 2020 strategy[13], the European Commission sets the goal of smart, sustainable and inclusive growth. Among the goals assigned to the Member States, aspects concerning education systems are identified. For example, States will need to reduce school dropout, secure public investments and focus school curricula on creativity, innovation and entrepreneurship.

In the context of cohesion policy, EU identifies education and training as tools to reduce the inequalities in development between different geographical areas. From this consideration, the activation of the European Structural Funds (European Social Fund and European Regional Development Fund) follows, in order to financially support the modernization of education and training systems, including the investment in infrastructures, the promotion of access to quality education, at all levels and for everyone, the improvement of access to long life learning and the strengthening of professional training systems[14].

[13] Communication from the Commission "Europe 2020, A strategy for smart, sustainable and inclusive growth", COM(2010) 2020 final, 3.3.2010.

[14] Supranational level indicates aims similar to those emerged within the United Nations. Among the 17 Sustainable Development Goals – SDGs – included in the UN 2030 Agenda, Objective 4 is entirely dedicated to education. The UN

Annually, the European Commission publishes a monitoring report to assess progress, results and challenges within the ET 2020 strategic framework. On the main indicators, the European agenda for education has made progress. However, inequalities resist and EU challenges for the future will include more attention to people with disabilities, migrants and students from disadvantaged backgrounds, especially children from poor background or social excluded context. The results of the monitoring demonstrate the weak point of the measures adopted. Education systems have as one of its essential function the promotion of equal opportunities; but education policy and tackle inequalities are first of all competences of the State in the Constitutional framework.

In the latest reports, the Commission also highlights the need to improve participation in entrepreneurship education, that still remains optional in the most of Member States.

3.The change of cultural perspective on entrepreneurship education: from a tool for economic growth to a transversal skill to create "value for others"

In the European context, entrepreneurship education is not always perceived only as strictly functional to economic growth and the start-up of business activities, as in the first phase of emergence. On the contrary, during its improvement and also thanks to the contribution of scientific economic literature, it is mainly considered a transversal competence, functional, on the first hand, for the development of individual potential in every field of work and life and, on the second hand, for the creation of "value for others" in financial, but also social and cultural fields.

Already through the Recommendation on key competences for lifelong learning[15](2006), a sense of initiative and

Action Program, signed in 2015 and divided into 169 Targets, poses a global educational challenge by 2030. According to the point 4.7, States have to ensure education to promote sustainable development, including sustainable lifestyle, human rights, gender equality, the promotion of a peaceful and non-violent culture, global citizenship and the enhancement of cultural diversity and the contribution of culture to sustainable development.

[15](2006/962/EC), Recommendation of the European Parliament and of the Council, 18/12/2006.

entrepreneurship is considered one of the eight key competences that everyone needs for personal fulfilment and development, active citizenship, social inclusion and employment. This act was replaced by a Council Recommendation in 2018[16]. According to the most recent definition, *entrepreneurship competence refers to the capacity to act upon opportunities and ideas, and to transform them into values for others*. The new definition is concentrated on the creation of value, which can be *financial, cultural or social*[17]. This competence can be applied in any sphere of life and is founded upon creativity, critical thinking and problem solving, taking initiative and perseverance and the ability to work collaboratively in order to plan and manage projects of value. Entrepreneurship competence requires knowing that there are different contexts and opportunities for turning ideas into action in personal, social and professional activities and an understanding of how these arise. Individuals should know and understand approaches to planning and managing projects, which include both processes and resources, understand of economics, should be aware of ethical principles and challenges of sustainable development and have self-awareness of their own strengths and weaknesses. In the view of the Council, entrepreneurial skills include, *inter alia*, to mobilize resources (people and things), the ability to make financial decisions relating to cost and value, to effectively communicate and negotiate with others, and to cope with uncertainty, ambiguity and risk as part of making informed decisions is essential. An entrepreneurial attitude is characterized by a sense of initiative, being forward-looking, courage and perseverance in achieving objectives, a desire to motivate others and value their ideas, empathy and taking care of people and the world, accepting responsibility and taking ethical approaches throughout the process. As we can see, next to the skills a question of values begins to emerge, focusing also on solidarity among people.

[16](2018/C 189/01).

[17] See "EntreComp: The Entrepreneurship Competence Framework", Scientific and Technical Research Reports, Publications Office of the European Union, 2016. The report identifies a common reference tool for any initiative intended to promote entrepreneurship education, to be used in different contexts also as flexible inspiration source. It consists of 3 areas of expertise, 15 skills, an 8-level progression model and a comprehensive list of 442 learning outcomes.

In spite of this enrichment, an extremely technical approach emerges from the instruments, according to the typical character of the European Union policies. This perspective seems to be dissonant with the ambitious objectives that the policy of entrepreneurship education aims to achieve, which should concern the individual as a whole in the social dimension. Such objectives, when taken seriously, seem incompatible with shortcuts and could be achieved only by educational systems that place the person, with his individuality and difference, at the center of the didactic discourse and that focus mostly on the humanistic and social aspects of knowledge. Therefore, a scheme exclusively oriented in an individual width also emerges, leaving collective dimensions in the background. "Creating value for others" requires a favorable cultural and social environment, which must be taken care of. The idea that it is possible to do it only through individual action appears rather simplistic and also illusory. On the contrary, thinking about this as a goal of private and public social organizations could be extremely interesting. Nowadays, even doing business is no longer an individual action, but requires organizational complexity and a multiplicity of team skills that should be considered.

However, the reference to the creation of "value for others" – in its multifaceted dimensionalities – give the impression to express a choice close to the inspiration of the Italian Constitution, especially the duties to undertake an activity or a function that will contribute to the material and moral progress of society, to according to capability and choice of every citizen (Article 4). This duty, included in the right to work, is connected to the more general duty of social solidarity expressed in the Article 2. Furthermore, overcoming the individual and transferring the change of perspective into a collective dimension, the innovation seems to recall the disabling of traditional economic growth index and the preference for a fair and sustainable well-being goal, inclusive of correction for inequalities, as a criterion for evaluating the progress of the society.

4.Looking for innovation in the university tradition: a new relevance for social and humanistic disciplines in the high-tech world

The Entrepreneurship 2020 Action Plan (2013)[18] identifies entrepreneurship education as one of the three pillars to support entrepreneurial growth in Europe. The European Commission in this case, starting from the evidence furnished by scientific research[19], considers that investing in entrepreneurship education is one of the highest return investments that could be made. As we can see, passing on the level of showing effectiveness, entrepreneurship education returns to be measured exclusively in terms of business. However, it seems difficult to identify how else the effectiveness of the educational action could be measured, if the holistic dimension is assumed. In this case, the effects could only be seen in the very long term and would be difficult to measure, given the complexity of the social dimension.

According to the Commission, a number of Member States has successfully introduced national strategies for entrepreneurship education or made entrepreneurial learning a mandatory part of curricula, but more is needed. Members States are invited, *inter alia,* to boost entrepreneurial training for young people and adults in education by means of Structural Funds resources in line with national job plan. Learning outcomes for all educators have to be implemented and universities should become more entrepreneurial.[20]

For universities in particular, the European Commission, in collaboration with OECD[21], developed the Guiding framework for

[18] COM (2012) 795 final, Communication from the Commission to the European Parliament, the Council, the European Economic and social Committee and the Committee of the Regions, "Entrepreneurship 2020 Action Plan, Reigniting the entrepreneurial spirit in Europe", 9/1/2013.

[19] Surveys suggest that between 15% and 20% of students who participate in a mini-company programme in secondary school will later start their own company, a figure that is about three to five times that for the general population (C. Jenner, '*Business and Education: Powerful Social Innovation Partners*', Stanford Social Innovation Review, 27/8/2012).

[20] On this specific ambit, see the recent article of M. Dabic, *Entrepreneurial University in the European Union – EU, EU, Journal of the Knowledge Economy*, 12, 115–119 (2021).

[21] The Organization for Economic Co-operation and Development (OECD) is a global international organization (actually of 36 Member States) that works «to

entrepreneurial universities[22]. The framework is designed to help interested universities assess themselves and improve their capability in epitomizing innovation throughout their research, knowledge exchanges, teaching and learning methods, models of governance and external relations.

In this framework, entrepreneurship development in formal and informal teaching and learning is considered one of the available tools: first of all, if the objective is to enhance the student's ability to think and respond entrepreneurially, many different teaching approaches could be experimented to produce the desired learning outcomes (in addition to traditional lectures), i.e. the use of mentors, living labs, cross disciplinary learning, etc. Secondly, students may also start up and run their own companies, have competitions and awards, be ambassadors for entrepreneurship and run clubs. It is therefore suggested to deliver entrepreneurship education with real entrepreneurs, whenever possible, and also use a variety of methods, including case studies, games and simulation, real experience reports by start-ups and studies of business failure. An important but often under-exploited resource for the entrepreneurial university is the collaboration with the external environment and its stakeholders (i.e. communities, local organizations and governments, etc.).

An interesting aspect is that these guidelines should be considered in all areas of university studies, as methodological innovation in facing new challenges.

Taking this pathway, therefore, means at least to invest in the methodology training of teachers, which are experts in disciplines not directly related to the world of entrepreneurship. This aspect is instead insufficiently considered. But, from this point of view, the topic poses underestimated problems, both in the EU and in the national context, where it is translated into specific actions. The question primarily concerns pedagogical science, which is called upon to make its contribution; but, in any case, it is necessary to consider the limits of the public approach

build better policies for better lives». The organization goal is to shape policies that foster prosperity, equality, opportunity and well-being for all.

[22] The "Guiding framework for entrepreneurial universities" was developed as a collaborative project between the OECD LEED Programme and the European Commission, Directorate General for Education and Culture in 2012 (the document is available in *oecd.org*).

on teaching methods: mainstream visions couldn't invade the Constitutionally protected freedom of teaching. Finally, it should be considered that innovative teaching methods, aimed at stimulating the creativity of learners, have their own autonomy, that does not require necessarily the activation of the category of entrepreneurship education. An unresolved mix-up between teaching method and content can be glimpsed from this point of view.

In this context, according to the most recent literature,[23] the humanistic disciplines – which tend to prepare an open mind-set – take on surprising new relevance in the world dominated by technology. Humanistic education could be the best basis in order to effectively tackle the biggest social and technological challenges which require critical thinking about the human context, managing complex social decision-making and organizational process, creative thinking on innovative solutions for large-scale problems, carrying out ethical considerations[24].

5.From the European "soft law" to the national level: what's going on in Italian educational system?

On April 2019, the European Parliament Committee on Culture and Education published the **Activity Report 2014-2019**, calling on the Council and the Commission to develop methodological support and tools for national education systems

[23] See J.M. Olejarz, *Liberal Arts in the Data Age*, in *Harvard Business Review*, July-August, 144 (2017); S. Hartley, *The Fuzzy and the Techie: Why the Liberal Arts Will Rule the Digital World*, Paperback (2018) which points out that the founders of companies like Airbnb, Pinterest, Slack, LinkedIn, PayPal, Stitch Fix, Reddit are people with backgrounds in the liberal arts and argues why it is false the dichotomy between human and technical sciences; G.S. Morson, M.O. Schapiro, *Cents and Sensibility: What Economics Can Learn from the Humanities. A provocative and inspiring case for a more humanistic economics*, Princeton (2017), which try to demonstrate that the humanities, especially the study of literature, offer economists ways to make their models more realistic, their predictions more accurate and their policies more effective and just; according to C. Madsbjerg, *Sensemaking. The Power of the Humanities in the Age of the Algorithm*, Hachette (2017), today's biggest success stories stem not from "quant" thinking but from deep, nuanced engagement with culture, language, and history.

[24] On the relevance of humanistic studies for the democracy, see M.C. Nussbaum, *Not for Profit: Why Democracy Needs the Humanities*, Princeton University Press (2010).

in the area of entrepreneurship education and training, including social entrepreneurship, in particular to establish entrepreneurial traineeships and exchange programmes to give young people hands-on experience, and to support partnerships between educational institutions and companies via the use of the European Fund for Strategic Investment and the European Social Fund. The report emphasizes the importance of entrepreneurial skills and competences, acknowledging the important role played by lifelong learning and international mobility, asking the Member States to promote entrepreneurial skills for young people through legislative action aimed at ensuring quality traineeships and focusing on quality learning and decent working conditions. The EP Committee also stressed the need for a comprehensive approach to entrepreneurship based on a set of transversal key competences for personal and professional purposes and encourage full engagement among all stakeholders, in particular local business associations, enterprises and educational institutions.

In the last decade, many studies and comparative analyses on public policies undertaken at national levels were produced[25]. In one of the most significant (European study, Entrepreneurship Education: A Road to Success[26]) the impact produced by both specific and broader strategies is examined, concluding that where these strategies and actions were put in place, there has been a positive impact on the persons, on the training institutes, on the economy and on society. In particular, students participating in entrepreneurship education seem to be more likely to start their own business[27] and their companies tend to be more innovative

[25] See, *inter alia*, *Entrepreneurship Education at School in Europe, Eurydice Report*, 2016 which focuses on primary education, lower and general upper secondary education and contains information for 2014/15 from 33 countries participating in the Eurydice network.

[26] *A compilation of evidence on the impact of entrepreneurship education strategies and measures*, 28/1/2015. In 2013 DG Enterprise and Industry commissioned ICF International to conduct a mapping exercise of examples of research on the impact of Entrepreneurial Education. This report presents the outcome of the mapping exercise: 91 studies from 23 countries were identified.

[27] According to the Communication of the Commission *Entrepreneurship 2020 Action Plan* (2013) mentioned above, since 2004 the percentage of European citizens who prefer self-employment to subordinate position has reduced, positioning itself well below those of the United States and China. Potential

and more successful than those led by persons without entrepreneurship education backgrounds. According to the report, entrepreneurship education alumni are at lower risk of being unemployed and have on average better jobs.

In European Countries the situations vary quite a lot. While in some States, especially in northern Europe, the experiences are dated and consolidated, but where the plans are more recent, the situation is quite different[28]. In Italy there is a noticeable delay on many fronts, in comparison with the averages of European States.

In a more general perspective, in its annual reports on the implementation of the ET 2020 strategy, the European Commission recognizes Italy's improvement in the level of education. However, some data show the Italian backwardness compared to the rest of Europe, eg. in reference to a lower share of investment in education, mostly in higher education, and the difficulty of transitioning from education system to job place, even for highly qualified people.

Also the UN 2020 Monitoring Report on 2030 Agenda and the statistic related data shows lights and shadows for the educational goal in Italy. For example, early school leaving increased, as well as INVALSI studies and research highlighted important gaps in the skills of Italian language, Mathematics and English. Educational poverty is worrying in some regions of Southern Italy. Greater effort will have to be directed at reducing gender gaps[29].

In the current pandemic context, in which the consequences of the Coronavirus health emergency on the education system

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European Union entrepreneurs find a difficult context characterized also by educational systems that do not offer the basis for a business career.

[28] Many institutions and documents furnish comparative data. Among the more recent studies, the Innovation Cluster for Entrepreneurship Education (ICEE) conduced a policy experimentation project started in January 2015 that ran until January 2018. The project was assigned by the European Commission through the Erasmus+ Programme. The cluster produced a comparative analysis of eight national strategies on entrepreneurship education (involving Belgium/Flanders, Croatia, Denmark, Estonia, Finland, Italy, Latvia, and Norway). The selected best practices are available online at the following URL: http://innovation-clusters.icee-eu.eu/ICEE/National-Strategies.

[29] See statistic data in ISTAT, *Rapporto SDGs 2020. Informazioni statistiche per l'Agenda 2030 in Italia,*istat.it and UN, *The Sustainable Development Goals Report 2020*, in un.org.

must be taken into account, education takes on more importance. School closure and digital gap may have exacerbated pre-existing deficit. Although many data are not yet available, the risk of educational poverty worsening could be underlined, especially in the disadvantaged geographical and social contexts, compromising the best tool for removing inequalities[30]. Therefore, within the framework of an economic system exceptionally stressed by the pandemic, entrepreneurship education needs to be highlighted, as a new fundamental public support for the economic growth.

We can see an upcoming expansion of this public policy. The Communication "European skills agenda for sustainable competitiveness, social fairness and resilience" (30 june 2020) from President Von der Leyen, intends to contribute to European Recovery Plan. The Agenda to support employment and social policy, in the post-pandemic era announces, among the other actions, that the Commission will launch a European Action on Entrepreneurship Skills, which focuses on development of entrepreneurial mindsets and a more resilient workforce. In this context, entrepreneurship skills at all levels of education and training will be promoted to provide students with the knowledge and motivation to encourage entrepreneurial activity. This action will complement the Commission's upcoming Action Plan for the Social Economy, that – *inter alia* – will promote entrepreneurial opportunities yielded by the social economy, such as helping local communities, striking local green deals and activating vulnerable groups.

In the context of Italian Constitutional law, as it is known, the legislative power in matters of education is shared between State and Regions. A sphere of autonomy is guaranteed to educational institutions and to Universities. In particular, it is up to the State to fix "the general rules" and the "minimum level of care", while Regions are called to focus on the normative details. Professional training, as closely linked to territorial specificities, is written as an exclusive regional competence, even often crosses other subject and need cooperation between the two levels of

[30] See Save the Children, *L'impatto del coronavirus sulla povertà educativa*, https://s3.savethechildren.it/public/files/uploads/pubblicazioni/limpatto-del-coronavirus-sulla-poverta-educativa_0.pdf; and OECD, Education at a Glance (2020).

government. The articulated criteria used for the distribution of normative power could sometimes led to legal disputes before the Constitutional Court between the involved levels of government.

For entrepreneurship education specifically, there is no national plan or strategy. However, there are some episodic legislative interventions and actions of the Ministry of Education, in the framework of the enhancement of individual skills in the school system. Although without a systematic framework, they began to introduce the culture of entrepreneurship into the Italian educational system. In particular, in 2017 the reference to the spirit of initiative and entrepreneurship was introduced in the certification of skills at the end of primary school and the first cycle of education[31]. In 2018 promotional pathways for entrepreneurship education were introduced in upper secondary school, using financial support of European structural funds.[32] Entrepreneurship education is connected, *inter alia*, to civics: according to this instrument, these skills can complement disciplinary skills, "to ensure that young people become active, creative and initiative citizens". Assuming a critical point of view, even the suggestion, it is difficult to imagine how entrepreneurial competence, in the individualistic terms in which it is effectively declined, could be linked to active citizenship, increasing awareness. Therefore, at the university level, national initiatives to support this ambit are not established, outside traditional economics courses.

In the State's main documents, the notion of entrepreneurship education is borrowed from the first Recommendation on key competences for lifelong learning, dated 2006, which lags behind the new cultural acquisitions. In consequence of this reductive point of view, the business aspects tend to prevail over humanistic and social ones. Indeed, according to the more recent common vision[33], entrepreneurship education aims at (and is useful for) the development of holistic personal soft skills and attitudes, rather than specific tools for business actions; creativity, ability to catch opportunities, to be innovative and connected with the contexts wishes to *create value for others* in *any*

[31] See Ministry of Education, Decree no. 742, 3.10.2017- Annex B.
[32] See Ministry of Education, decree no. 4244, 13.03.2018.
[33] See "EntreComp: The Entrepreneurship Competence Framework", cit.

sphere of life. So, it aims to promote active citizenship and social and ethic awareness, a profile that in the Italian legislation seems to be recessive for a long time. For example, this idea, although considered in the accompanying letter of the Ministry of Education[34], seems to not be included in the document which establishes the guidelines[35] for funded no-compulsory educational projects in this ambit, as well as in the public call[36] addressed to upper secondary schools, which are focused principally on education for business, even with attention to social responsibility.

Although the spirit of initiative is a cross-curricular competence evaluated as a result of learning in the Italian educational system[37], school-work-exchange is the main significant structural experience relevant in this field. It introduces elements of work-based learning (dual learning) into school curricula. It officially entered in action in 2005[38], as an optional activity, in all the upper secondary school courses, as well as in the post-secondary technical ones and in the tertiary academic and non-academic technical training. As a consequence of the school's autonomy, the ways in which it is implemented can greatly vary[39]

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[34] "Circolare" n. 4243 del 13/3/2018.

[35] "Educazione all'imprenditorialità. Sillabo per le scuole secondarie di secondo grado", 2018.

[36]The call (no. 2775 of 8/3/2017) asks for actions "aimed at providing students with courses in entrepreneurship education and self-employment, with particular reference to the knowledge of the opportunities and methods of doing business, with attention to all its forms (i.e. classical, social, cooperative and their articulations), to the promotion of the business culture, with particular attention to the development of the spirit of initiative, the propensity to risk, education to failure and success and awareness of the social responsibility of economic actors, to the skills for the development of a project idea in business opportunities through all its phases and to the development of organizational and relational skills such as, for example, the ability of teamwork, planning, communication". The call is in the framework of National Operative Programme for schools "skills and learning environments" (2014-2020), funded by European structural funds.

[37] At the level of primary school, the pupil should be able to demonstrate originality and spirit of initiative and carry out simple projects. At the level of lower secondary school, the student should be able to demonstrate originality and spirit of initiative, to assume responsibilities, to ask for help when is in difficulty and to provide help to those who ask.

[38]Law no. 53/2003, art. 4, and Legislative decree, no. 77/2005.

[39] Surveys on experimented models are collected by ISFOL, a public research body active on formation and labor policies:

and the experiences have not always shown to express the programme's potential.

The measure is implemented as a compulsory activity only in 2015 (by the reform so called "La buona scuola"[40]): in particular, the law fixed minimum standards for the program in the last three years of upper secondary school (200 hours in high schools and 400 hours in technical and professional schools).

However, bucking the trend, these standards were reduced by the 2019 budget law[41] (90 hours in high schools, 150 hours in technical ones, 210 hours in professional ones), which cut the resources allocated for the programme (from 100 to 42.5 million/year)[42]. The policy for the programme's guidelines, arranged by the Ministry, in August 2019 received a negative opinion by the National High Council of Public Education[43]. The opinion considers the resources as insufficient and the critical lack of consideration for disabled students. Furthermore, it's noted that from the policy's philosophy it shows how the programme is mainly aimed at favouring the acquisition of skills for occupations and the work ambient. This view is reductive with respect to the much broader meaning required of the orientation, which should be aimed at individual development in different sphere of life. In consequence of this reductive meaning, the policy prioritizes the business points of view and economic values, instead of the scientific-humanistic and social ones.

On September 2019 the Ministry of Education adopted the Guidelines on pathways for transversal skills and orientation,[44] which provides a minimum framework for schools that will implement these paths in the exercise of their autonomy. In this act the entrepreneurial skill is one of the four transversal competences individuated. The other three are: personal and social skills, in matter of citizenship and in matters of cultural

https://www.isfol.it/temi/Formazione_apprendimento/educazione-allimprenditorialita-1.

[40] Law no. 107/2015, art. 1.33.

[41] Law. No. 145/2018, art. 1, 784.

42 The law changes the name of the programme in "Pathways for transversal skills and orientation" (Percorsi per le competenze trasversali e per l'orientamento PCTO).

[43] Opinion no. 30, 28/8/2019.

[44]Ministerial Decree no. 774,4/9/2019.

awareness and expression. In this articulated framework, the four paths could become alternative and optional, while basic training on each of the different fields should be given to all students.

The entrepreneurial competence is defined, for the first time, in accordance with the recent literature, as the ability to act on the basis of ideas and opportunity and transform them into values for others. It is based on creativity, critical thinking and problem solving, initiative and perseverance, as well as the ability to work collaboratively in order to plan and manage projects that could have cultural, social or financial value. The Guidelines delegates to the school the planning of the paths, which are flexible and could be customized, as well as their organizational management. The paths could be realized in collaboration with host local subjects. One of the critical points seem to be the absence of public investment in the skills for planning the pathways as well as for mentoring, which are delegated *sic et simpliciter* to the educational institutions without specific training for teachers and school administrators[45].

[45] See V. Vinci, *Le competenze imprenditoriali degli insegnanti: sfide per la formazione, Education Sciences and Society,* Vol. 11, No 1 (2020).

DIGITALIZATION AND PUBLIC SERVICES: CRITICAL NOTES CONCERNING EMERGING WAYS OF ADMINISTRATING

*Vinicio Brigante**

Abstract

The aim of the present work is to propose a legal perspective of analysis for issues of relationships that are relevant in field of digitalization and delivery of public services, in relation to services quality, protection of citizens and businesses, and risks of destructuring a system, which in Italian law, has been marked by an enduring regulatory instability.

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1. Data sharing, competition and market. A structural reshaping beyond e-government

Modernizing and innovating public administrations and ensuring that structures remain in place are issues that, although they have been on legislators' agendas uninterruptedly for years, have not been adequately addressed, if one of aims of governments, and of Italian one in particular, is always public administration, which has been guilty of the same wrongdoings for 40 years[1].

[1] There is an extensive bibliography on the subject, and in the knowledge that it is not possible to list all studies conducted, the following are cited, C. Acocella, *Innovazione tecnologica e innovazione amministrativa. L'automazione delle decisioni nel quadro della riforma della p.a.*, in F. Liguori (ed.), *Il problema amministrativo. Aspetti di una trasformazione tentata* (2021) 185-200; about the necessary response to complexity through modernization, cf. C. Barbati, *La decisione pubblica al cospetto della complessità: il cambiamento necessario*, 1 Dir. pubbl. 15-26 (2021); cf. C. Pinelli, *Modernizzazione amministrativa, principio di legalità, interpretazione costituzionale*, 1 Dir. pubbl. 85-87 (2001); recently, after nearly twenty years, comes to similar conclusions F. Cortese, *Costituzione e nuovi principi del diritto amministrativo*, 2 Dir. amm. 329-334 (2020); A. Lazzaro, *Informazione e comunicazione digitale nel processo di modernizzazione della pubblica amministrazione*, 2 Riv. dir. med. 1-12 (2018); innovation must be read in a micro dimension, of many integrations that

Present survey would have an ambitious objective, and it is hoped that its premises will be maintained, since it will be necessary to go through different areas of public and administrative law, within principal prism of connection between digitalization and public services[2], the red thread of the discussion, with all (or almost all) applicative consequences that this entails.

The theme of digitalization of public administration, although this term is rather vague and all-encompassing, has taken

follow each other, often without an organic design, as observed by M. Clarich, *Istituzioni, nuove tecnologie, sviluppo economico*, 1 Dir. pubbl. 75, 78 (2017); with a view to the dutifulness of the objectives and the blunt weapons to achieve them in the hands of administrations, see S. Tuccillo, *Contributo allo studio della funzione amministrativa come dovere* (2016) 301-303; according to M. Cammelli, *Amministrazione e mondo nuovo: medici, cure, riforme*, 1 Dir. amm. 9-12 (2016), legal systems have three ways of reacting to administrative overload, namely reducing functions, maintaining functions by relying on private interests, and rationalizing expenditure and procedures; M. Bombardelli, *Semplificazione normativa e complessità del diritto amministrativo*, 3 Dir. pubbl. 985 (2015); M. Savino, *Le riforme amministrative: le parabole della modernizzazione dello Stato*, 2 Riv. trim. dir. pubbl. 641-690 (2015); see F. Donati, *Democrazia, pluralismo delle fonti di informazione e rivoluzione digitale*, 11 Federalismi 1-4 (2013); L. Torchia (ed.) *Il sistema amministrativo italiano* (2009) 41-50, reports, in an emblematic sense, of the extremely slow modernization; S. Cassese, *Il mondo nuovo del diritto. Un giurista e il suo tempo* (2008) 17-21; with reference to foreign legal literature, see, *ex multis*, J. Gill et al., *Public administration research and practice: a methodological manifesto*, 3-4 Tex. A&M Rev. 111-119 (1999); cf. L.D. Terry, Administrative leadership, neo-mangerialism, and the public management movement, 58 Publ. Adm. Rev. 194-200 (1998); F. Stewart, *The discontent of legalism: interest group relations in administrative regulation*, 1985 Wis. L. Rev. 655-671 (1995), in the perspective offered by administrative complexity, which cannot be ignored as a parameter, see E. Morin, *Le vie della complessità*, in G. Bocchi, M. Ceruti (eds.), *La sfida della complessità* (1986) 49-51.

[2] For an appreciation of the latest critical developments and the extent to which the topic is still of central importance, *ex multis*, cf. A. Sandulli, G. Piperata, L. Saltari, *Il ritorno del servizio alla comunità come munus publicum*, 1 Munus v-x (2020); G. Napolitano, A. Perretto (eds.), *La regolazione efficiente dei servizi pubblici locali* (2017) 265-269; with reference to precarious balances produced and possible solutions, cf. M. Calcagnile, *Monopoli e privative nei servizi di interesse economico generale*, 5 Giorn. dir. amm. 634-644 (2017); see A. Tortara, *I servizi pubblici in Italia ed in Europa* (2017) 111-136; from the perspective of the protection of subjective legal positions, cf. A. Moliterni, *Il giudice dei servizi pubblici e l''araba fenice' del criterio dell'interesse pubblico*, 2 Giorn. dir. amm 148-159 (2014); in an classic sense but unsurpassed in specific approaches, is allowed a reference to the work written by U. Pototschnig, *I pubblici servizi* (1964) 141-155.

on central importance in debate[3], and not only among scholars, and, to some extent, these consequences in legal terms have been taken to their extreme with rise of pandemic and public policies aimed at implementing a path to recovery, often with reference to digitalization[4].

The real risk is that of considering digitalization processes as a panacea for all innumerable problems that afflict public administration, even in terms of the view, investigated in this analysis, of an improvement in delivery of public services[5].

[3] The digitalization *tout court* solution does not entail the saving grace that is often inherent in reforms, but it does require courage to administer, as noted by G.D. Comporti, *Il coraggio di amministrare*, in Vv. Aa. (eds.), *Scritti per Franco Gaetano Scoca* (vol. 2, 2020) 1101-1155, 1161.

[4] The reference is made to Decree Law 16 July 2020, no. 76, concerning simplifications, which foresees an extensive use of digitalization, as one of preconditions for economic recovery after the pandemic. Concerning the relationship between simplification and digitalization in general terms, see A.G. Orofino, *La semplificazione digitale*, 1 Dir. econ. 87 (2019), increasingly, reference is made to the role of digitalization as a means of simplifying administrative procedures. However, in order for digital transformation of public administrations to bring hoped-for results, it must be carried out with caution and great awareness of problems involved, whereas such caution and awareness seem to be lacking in recent legislation; a reference may also be made to F. Liguori et al., *Liberalizzare, semlificare, dialogare. Dall'amministrazione come ostacolo all'amministrazione come alleata*, in A. Castaldo (ed.), *Quaderni CUR* (2021) 99-108; generally agree with reflections made by G. Colombini, *I decreti semplificazione e rilancio alla luce dei principi generali di contabilità pubblica ovvero dei falsari di parole*, 8 Federalismi 21-34 (2021); R. Spagnuolo Vigorita, *Semplificazione e sostituzione della legge 'Madia' al decreto legge n. 76/2020. Il ruolo dell'amministrazione nelle politiche di sviluppo economico e sociale*, 2 Munus 309-345 (2020); share considerations made by F. Pinto, *Il mito della corruzione. La realtà della malamministrazione* (2018) 11-45; the administrative problem is first and foremost a cultural and skills problem, M. Ramajoli, *Quale cultura per l'amministrazione pubblica?*, 2 Giorn. dir. amm. 187-192 (2017); administration as an obstacle, in its functions including digital and service delivery, F. Fracchia, *L'amministrazione come ostacolo*, 2 Dir. econ. 357-393 (2013).

[5] This issue obviously intercepts a proper division of responsibilities between the parties involved, for an analysis of which see P. Lazzara, *Responsabilità pubbliche e private nel sistema dei servizi di interesse economico generale*, 3 Dir. amm. 531-540 (2020); cf. D. Sorace, *Diritto delle amministrazioni pubbliche* (9th ed., 2018) 167-179; M. Delsignore, *I servizi sociali nella crisi economica*, 3 Dir. amm. 587, 594-603 (2018); with an analysis of different responsibilities linked to different forms of management, see M. Renna, S. Vaccari, *I servizi pubblici locali di interesse economico generale. Brevi riflessioni in tema di nozione, assunzione e forme di gestione a margine di un recente schema di testo unico*, in G. Sala, G. Sciullo (eds.), *Procedimen-*

It seems appropriate, starting at this point, to restrict the scope of investigation in relation to a subject that presents innumerable issues of interest for administrative law and has been subject of studies, including authoritative ones.

The aim of this work is not to analyze - among many topics of interest - controversial use of AI[6], algorithms in context of administrative activity generically understood, but to verify maintenance of articulated model of public service delivery in Italian legal framework according to use of data[7], interconnections and different e-government tools[8].

to e servizi pubblici nel diritto amministrativo in trasformazione (2017) 177-211; cf. C. Acocella, *Considerazioni sul valore della concorrenza (e sulla portata atecnica della liberalizzazione) nel settore degli appalti pubblici*, in F. Liguori, C. Acocella (eds.), *Contratti della pubblica amministrazione e politiche di liberalizzazione* (2014) 89-94; see F. Liguori, *I modelli organizzativi e gestionali dei servizi pubblici metropolitani: prime considerazioni*, 1 Munus 445-466 (2014); see, in an authoritative way, F. Merusi, *The troubled life of competition in local public services*, 1 It. J. Pub. L. 38-50 (2012); F. Donati, E. Bruti Liberati (eds.), *La regolazione dei servizi di interesse economico generale* (2009) 97-101, 105; R. Perdersini, *La riforma dei servizi pubblici: oltre le istituzioni in Stato e mercato* (2009) 95; an interesting perspective, precisely from the point of view of the investigation conducted, is provided by reading, in a classical key of this theme, by B. Sordi, *Servizi pubblici e concorrenza: su alcune fibrillazioni tra diritto comunitario e tradizione continentale*, 2 Quad. fior. 577-603 (2002).

[6] The topic has been dealt with comprehensively, references are limited to the most recent work, including G. Maira, *Intelligenza artificiale e intelligenza umana*, 7 Federalismi v-xvii (2021); see P. Otranto, *Riflessioni in tema di decisione amministrativa, intelligenza artificiale e legalità*, 7 Federalismi 187-200 (2021); R. Conti, *L'algoritmo e la nuova stagione del costituzionalismo digitale: quali le sfide per il giurista (teorico e pratico)?*, 4 Giustizia insieme 1-7 (2021); S. Del Gatto, *Potere algoritmico, digital welfare e garanzie per gli amministrati. I nodi ancora da sciogliere*, 6 Riv. it. dir. pubbl. com. 829-840 (2020); A. Di Martino, *L'amministrazione per algoritmi ed i pericoli del cambiamento in atto*, 3 Dir. econ. 599-633 (2020).

[7] As noted in the classical sense, but the theme must also be confirmed with regard to public services that are an expression of exercise of a public function, M.S. Giannini, *Certezza pubblica* (encyclopedic voice), VI Enc. dir. 269 (1960), there is a need to move from a system of sufficiently secured data to one of absolutely secured data.

[8] Recently, in a shared sense, see S. Civitarese Matteucci, *The rise of technological administration and the ragged route towards a digital administrative law*, in D. Sorace, L. Ferrara, I. Piazza (eds.), *The changing administrative law of an EU member state. The Italian case* (2020) 127-146, for whom the digital transition must be an opportunity for administrations and not yet another obstacle between the apparatus and citizens; cf. M.G. Losano, *La lunga marcia dell'informatica nelle istituzioni italiane*, in R. Cavallo Perin, D.U. Galetta (eds.), *Il diritto dell'amministrazione*

The approach to this survey bears witness to need to report on a number of critical issues concerning regulation[9] of artificial intelligence in EU law and what main criticisms are. Far from having received an organic arrangement, this topic is affected by different approaches[10].

In this direction, the EU can become a global standard-setter in the area of artificial intelligence ethics. Common EU legislative action on ethical aspects of AI could boost the internal market and establish an important strategic advantage. While numerous public and private actors around the globe have produced ethical guidelines in this field, there is currently no comprehensive

pubblica digitale (2020) iv-viii; F. Notari, *Il percorso della digitalizzazione delle amministrazioni pubbliche: ambiti normativi mobili e nuovi modelli di governance*, 1 Giorn. dir. amm. 21-25 (2020); see P. Clarizia, *La digitalizzazione della pubblica amministrazione*, 6 Giorn. dir. amm. 768-781 (2020); E. Carloni, *Algoritmi su carta. Politiche di digitalizzazione e trasformazione digitale delle amministrazioni*, 2 Dir. pubbl. 365, 370-375 (2019); J.-B. Auby, *Il diritto amministrativo di fronte alle sfide digitali*, 3-4 Ist. fed. 619-640 (2019); E. Carloni, *Digitalizzazione pubblica e differenziazione regionale*, 6 Giorn. dir. amm. 698 (2018); F. Martines, *La digitalizzatone della pubblica amministrazione*, 2 Riv. dir. med. 4-6 (2018); B. Carotti, *La digitalizzazione*, in B.G. Mattarella, E. D'Alterio (eds.), *La riforma della pubblica amministrazione. Commento alla legge 124/2015 (Madia) e ai decreti attuativi* (2017) 73-77; B. Carotti, *L'amministrazione digitale: le sfide culturali e le politiche del nuovo Codice*, 1 Giorn. dir. amm. 15 (2017); L. Torchia, S. Civitarese Matteucci, *La tecnificazione*, in L. Torchia, S. Civitarese Matteucci (eds.), *La tecnificazione della pubblica amministrazione*, in L. Ferrara, D. Sorace (eds.), *A 150 anni dall'unificazione amministrativa italiana. Studi* (vol. 4, 2016) 7-14; G. Duni, *Anniversari dell'informatica amministrativa. Origini, evoluzione e prospettive*, 2-3 Diritto e processo amministrativo 615-633 (2015); for a historical reconstruction of the early phase of the notion of e-government, see F. Bassanini, *Twenty years of administrative reforms in Italy*, 3 Rev. Econ. Cond. Italy 369, 371 (2009); for an analysis of paths of digitalization of Italian public administration, a topic not analyzed in detail in this survey, see, as bibliographical references G. Duni, *Amministrazione digitale* (encyclopedic voice), 1 Enc. dir. Ann. 13, 18 (2007); on data interconnection profiles, in a broader but still market-related perspective, cf. R.V. Sabett, *International harmonization in elecronic commerce and electronic data interchange: a proposed first step toward signing on the digital dotted line*, 46 Am. U. L. Rev. 511-536 (1996).

[9] On this subject, for all, without necessary references to EU law, please refer to M.U. Scherer, *Regulating artificial intelligence systems: risks, challanges, competencies, and strategies*, 29 Harv. J. L. Tech 354-389 (2016).

[10] European Commission, *Laying down harmonised rules on artificial intelligence and amending certain Union legislative acts*, COM (2021) 206 final, available at www.digital-strategy.ec.europa.eu (2021), a totally new scenario is emerging, involving stakeholders, an ethical plan for the use of data and a new European vision on the subject.

legal framework. The EU can profit from the absence of a competing global governance model and gain full 'first mover' advantages[11].

Current systems of fundamental values and public regulation are based on the underlying assumption that action directly or indirectly triggered and caused by a human is the main source of danger. Technology, from its basic to its increasingly sophisticated applications has always been a part of human activity and public co-existence. Hence, for example, existing regulatory provisions in all European legal systems that aim to protect society and impose liability on individuals who are engaged in particularly dangerous activities. The main aim and the challenge of the framework of ethical aspects of AI is to adapt or complement the existing system of rules so that those rules provide clear *ex-ante*, dynamic and forward-looking guidance for development and application of AI that adheres to the ethical principles and values of a given society.

In highly competitive global AI landscape, fragmented EU action on the ethics of AI could essentially mean losing a global competitive advantage and building obstacles to the cross-border movement of goods and services in internal market. *Ex-post* regulatory efforts to bring joint standards for EU internal market could potentially have high political and economic costs that could be

[11] European Parliament, *European framework on ethical aspects of artificial intelligence, robotics and related technologies*, (EPRS, European Parlaiment Research Service), avaiable at www.europarl.europa.eu (2020); with reference to the need to shape public contracts and achieve a strategic tool to develop a cooperative model between economic operators and public administrations, with the sole aim of timely implementation and efficient management of public contracts and works see G.M. Racca, *La modellazione digitale per l'integrità, l'efficienza e l'innovazione nei contratti pubblici*, 3 Ist. fed. 740-744 (2019), by adopting smart contracts, it is possible to overcome opportunistic behaviour on the part of economic operators by providing appropriate incentives for cooperation in the public interest through the transparency and traceability of all planned activities; for a doctrinal reading in Italian law, see L. Attias, G. Scorza, *La consapevolezza digitale al servizio dell'etica*, 6 Dir. inf. 1191-1197 (2019); on the subject, in general terms, for a notable contribution to the debate on the need for a European legal regime, cf. G. della Cananea, *Le 'Model rules' come esempio di codificazione innovativa*, 2 Riv. it. dir. pubbl. com. 333-346 (2018); in traditional terms on this debate, refer to work by G. Lucatello, *Etica e tecnica nell'esperienza di un giurista*, 1 Dir. soc. 535-541 (1980), with reference to the necessary intersections between technique, law, politics and ethics.

avoided by taking *ex-ante* joint regulatory action at EU level. The nature of AI technologies, AI market structure and amount of investments necessary for the research, development and uptake of those technologies indicate that efforts and regulatory actions of individual Member States would be unlikely to achieve the same benefits as joint EU action owing to the scale of their impact.

In this context, from European point of view, but not only, extremely articulated, one of fields of administrative action that can take advantage from benefits that are inherent in a proper compliance with principles of a fully interconnected public administration is undoubtedly the area of public services[12], and more

[12] For a preliminary reflection on public services provided in a digital manner, see Cons. St., Sec. V, 15 March 2019, no. 1709, on the award of the services necessary for the drafting of the preliminary project for the redevelopment of the public lighting systems of the city of Bari in a smart perspective; on the subject see also Cons. St., Sec. V, 26 October 2018, no. 6690, 11 Foro amm. 1938 (2018), a dispute over the supply, installation and maintenance of a system for the active monitoring of roadside parking spaces reserved for the disabled and for the loading and unloading of goods on the basis of a smart parking system; Cons. St., Sec. V, 17 September 2018, no. 5422, on the dispute over the supply of smart trains in stations that allow the necessary functions of on-board systems for passengers even when the engines are switched off; on the incorrect use of a project financing procedure for the installation of artificial pillars for the development of the smart city, see T.A.R. Liguria, Genova, Sec. II, 3 July 2018, no. 593; on this subject, see the interesting development offered by A. Somma, *L'Europa tra momento hamiltoniano e momento Polanyi*, 1 Nomos 2-5 (2021); in relation to public expenditure profiles and possible organizational moments, cf. A. Maltoni, *Investimenti e strumenti di investimento pubblici per la smart city*, in A. Maltoni, A. Venuri (eds.), *Smart City. L'evoluzione di un'idea* (2020) 455-480; cf. the approach offered, also in dialectical terms for the realization of legal profiles, to this subject by S. Civitarese Matteucci, *Social rights, social market economy and the European social model: tracing conceptual boundaries*, in D. Ferri, F. Cortese (eds.), *The EU Social Market Economy and the Law* (2019) 51-66; with a focus on cohesion, see S. Cassese, *Dallo sviluppo alla coesione. Storia e disciplina vigente dell'intervento pubblico per le aree insufficientemente sviluppate*, 2 Riv. trim. dir. pubbl. 579 (2018), the digitalization of administrative action, particularly in the area of public services to be implemented through cohesion policies, should disregard the territorial dimension but be oriented towards a systemic approach; cf. G. Avanzini, *Decisioni amministrative e algoritmi informatici: predeterminazione, analisi predittiva e nuove forme di intellegibilità* (2019) 71-74, concerning area of public services, exploitation of big data and interconnected administrations can lead to better cost management. In this sense, smart grids use data analysis to modulate public service according to the real needs of users, encouraging forms of self-production; on the issue of smart grids, see F. Giglioni, *La sfida della regolazione pubblica. Il caso delle smart grid*, 3 Munus 465, 468 (2013);

generally on the subject of the relationship between globalization and free market[13].

Obviously, it is not possible here to give an exhaustive account of two directly related issues, i.e. digitalization and public services, since it is precisely the latter issue that continues to arouse interest among scholars[14], albeit with fluctuating trends over last years.

Idea of a fully interconnected administration, with continuous exchange and re-use of data, offers certain advantages (but as many risks)[15] for the provision of services to community[16] (regard-

on the subject, in relation to ICT, market and social rights, please refer to G. De Minico, *Accesso a Internet tra mercato e diritti sociali nell'ordinamento europeo e nazionale*, 4 Federalismi 6 (2018) (Focus, Social rights, State and European legislation), access to the Internet and digital markets is a cross border between the public service provider and the end user; cf., also, R.V. Loo, *Digital market perfection*, 5 Mich. L. Rev. 815-884 (2019).

[13] Cf., in general terms, A. Poggi, Oltre la globalizzazione. Il bisogno di uguaglianza (2020) 14-24; G. Silvestri, *Costituzionalismo e crisi dello Stato-Nazione. Le garanzie possibili nello spazio globalizzato*, 4 Riv trim. dir. pubbl. 905-910 (2013); M. Antonioli, *Enti pubblici e strumenti finanziari: i nuovi confini della finanza globale*, 1 Dir. econ. 19 (2011); on the subject of the necessary harmonisation of markets and their legal regime, S. Cassese, *Il diritto amministrativo globale: una introduzione*, 2 Riv. trim. dir. pubbl. 331, 347 (2005), who underlines relevance and importance of joint action, including at administrative level.

[14] The reference is to work draft by M. Dugato, *La crisi del concetto di servizio pubblico locale tra apparenza e realtà*, 3 Dir. amm. 510, 521-523 (2020), who dwells on classic profiles of the topic.

[15] On this subject, cf. S. Screpanti, *Big Data, tecnologia e intelligenza artificiale*, in F. Bassanini, G. Napolitano, L. Torchia (eds.), *Lo Stato promotore. Come cambia l'intervento pubblico nell'economia* (2021) 59-63; cf. A. Police, *Nuove idee per sfide inattese*, 2 Munus v-vii (2020); F. Costantino, *Rischi e opportunità del ricorso delle amministrazioni ai Big Data*, 1 Dir. pubbl. 43 (2019), Big Data can be acquired by the administration *ex lege*, *ex officio* and on impulse of citizens and the ability to predict decisions (which in terms of public services) is clearly the most advanced frontier of the use of Big Data, and is an activity that presents enormous opportunities, and at the same time risks, even significant; A. Perrucci, *Dai Big Data all'ecosistema digitale. Dinamiche tecnologiche e di mercato e ruolo delle politiche pubbliche*, 1 An. giur. econ. 68, 78, 85 (2019); M. Orefice, *I 'Big Data': regole e concorrenza*, 4 Pol. dir. 697 (2016); U. Fantigrossi, *I dati pubblici tra Stato e mercato*, 2 Amministrare 291 (2007).

[16] In other respects, it shares concerns expressed by P. Piras, *Comunicazione e innovazione nell'amministrazione gattopardo. I social media per un nuovo rapporto cittadino-pa; nulla di fatto?*, 1 Dir. econ. 241-255, 260 (2020).

less of who provides them[17], in fact this survey focuses only on the service delivery phase).

With regard more typically to rights of users in their relations with the administration through digital tools and the network, it is evident that these do not live only in a local dimension. The 'smart' and local characterization of these rights is part of a broader concept of digital relations with administrations, and this is why the issue flows into the qualitatively different one of 'digital citizenship[18]'.

Digital citizenship entails a new way of understanding relations between administrations and citizens in a context of broader recognition of rights, albeit without an explicit constitutional anchorage, but these take shape only through the right to enjoy a first nucleus of digital services, founding relationship between administration and citizens.

Operational prerequisite for all this - although it seems trivial to underline it but, in the Italian context, the issue is far from being resolved - is a real right of access to the network, without which the whole theoretical framework would fail[19].

In context of public service provision, the assumption of the right of access to Internet[20] becomes a minimum prerequisite for

[17] Cf. A. Maltoni, *Organizzazioni pubbliche, organizzazioni private ed esercizio di funzioni amministrative. Modifiche eteroimposte all'assetto organizzativo di enti privati per la salvaguardia di interessi pubblici essenziali*, in Vv. Aa. (eds.), *Scritti per Franco Gaetano Scoca* (vol. 4, 2020) 3257-3276.

[18] See M. Caporale, *Dalle smart cities alla cittadinanza digitale*, 2 Federalismi 30-43 (2020); M.T. De Tullio, *The boundaries of democratic community in a Free Trade Order. The Case of the Internet Law*, 1 Nomos 1-20 (2020); towards a digital third sector, as noted critically by V. Berlingò, *Verso un Terzo settore digitale. Nuove prospettive di ricerca sui rapporti tra media civici e pubblica amministrazione*, 2 Munus 667-690, 701 (2019), on the obligation to make precise provision for adequate infrastructure to work towards this seemingly certain drift; see, in critical terms, P. Marsocci, *Cittadinanza digitale e potenziamento della partecipazione politica attraverso il web: un mito così recente già da sfatare*, 1 Rivista AIC 1-6 (2015).

[19] From the point of view of the rights to be guaranteed, from a general theoretical viewpoint, see S. Sica, V. Zeno-Zencovich, *Legislazione, giurisprudenza e dottrina nel diritto dell'Internet*, 3 Dir. inf. 377-380 (2010), who makes a reflection on role of Courts in this respect that remains fundamental; see, in general terms, also, A. Pinzani, *Un diritto a Internet. Il problema della creazione di un'opinione pubblica mondiale e di nuovi diritti umani per il XXI secolo*, 1 Iride 143-158 (1998).

[20] M.R. Allegri, *Il diritto di accesso a Internet: profili costituzionali*, 1 Riv. dir. med. 57-80 (2021), the impossibility of accessing Internet connectivity services produces, therefore, damage to the person represented in terms of loss of oppor-

guaranteeing equality of access to the service, a logical and indefectible link is created between these two moments. The risk, in the absence of a digital citizenship right, is a further distancing of citizen and administration, a sort of impassable wall, worse than in past.

Using new technologies in public services sector is not only a new and extraordinary technical support to performing public tasks, but has triggered a profound transformation within *modus operandi* of public services sector. Online services can be considered as an example of a new and particular way in which public administration operates, and undoubtedly raises many relevant legal issues[21].

tunities for inclusion, so much so that some years ago the courts of merit explicitly spoke of existential damage caused by the digital divide. The more technology advances, the more the consequences of the digital divide produce damage that is difficult to recover; cf. also G. D'Ippolito, *Il diritto di accesso a Internet in Italia. Dal 21 (bis) al 34-bis*, 1 Riv. dir. med. 81-102 (2021), the right of access to Internet is made up of a series of rights and a series of obligations which are also inherent in the public entity which has to take charge of them; M. Nisticò, P. Passaglia (eds.), *Internet e Costituzione* (2014) 12-22; cf. T.E. Frosini, *Access to Internet as a fundamental right*, 2 It. J. Pub. L. 225-232 (2013), the informatic freedom is qualified as a new right, resulted from the evolution of technological society, which shows a new aspect of the wellestablished idea of personal liberty. This particular right has become a claim of liberty in the active sense, perceived as the freedom to make use of computer in order to provide and obtain information of any kind or as the right to join the digital society and communicate to whoever; F. Borgia, *Riflessioni sull'accesso a Internet come diritto umano*, 4 Com. int. 395-403 (2010).

[21] Please refer to A. Masucci, *Digitalizzazione delll'amministrazione e servizi pubblici on line. Lineamenti del disegno normativo*, 1 Dir. pubbl. 119 (2019), in the context of a strategy to revive technology diffusion information was pointed out that networked public services can be used for helping to reduce administrative burdens, improving quality services in the public sector, to increase the efficiency of the internal procedure of the public institution, reduce administrative costs and citizens. On this issue, the Author highlights the positive effects of the digitization of public services, highlighted by the program '*Eu.e.Government-Actionplan 2016-2020*', from a social and economic point of view. Digitized public services can help to promote the completion of the internal market by making it possible to access public services throughout the EU, by simplifying relations between administrative bodies in the various EU countries, by promoting competition between companies that transcends national borders and by strengthening confidence in the internal market; L. Ammanati, *Regolare o non-regolare, ovvero l'economia digitale fra 'Scilla e Cariddi'*, in L. Ammanati, R.C. Panico (eds.), *I servizi pubblici: vecchi problemi e nuove regole* (2018) 101-116; G. Cam-

A preliminary question to be addressed is of a defining nature, on what is meant by online public services, because it is not only about exploiting technology and e-government in service provision, but it is a much more radical change[22]. Art. no. 7 of Digital Administration Code (hereinafter CAD) establishes that anyone has the right to use the services provided by public service providers, regardless of their legal nature, in digital form and in an integrated manner, by using telematics tools made available by public administrations.

Public services provided electronically allow a real upheaval in the relationship between supplier and users, because the service is no longer dropped from above, according to choices made by administrations but is shaped and continuously modified according to needs and requests of users, as detected by data flows that the supplier has available[23]. In this sense, the focal point does not lie in the automation of administrative decisions and procedures, but in the idea of reshaping the organisation and activity of

marota, *Servizi in rete della pubblica amministrazione* (encyclopedic voice), (Agg.) Dig. Disc. Pubbl. 6161, 6170 (2012), networked public service is a set of administrative activities whose provision takes place through the transfer and processing of information (*bits*). It must be considered that this service is a set of legal activities provided by central public administrations in telematic mode, the provision of which is, by law, a subjective right of its beneficiary or applicant; A. Latin, *Ideal versus real regulatory efficiency: implementation of uniform standards and 'fine tuning' regulatory reform*, 37 Stan. L. Rev. 1267 (1985).

[22] On this subject, the reflections carried out by M. Delsignore, *Il contingentamento dell'iniziativa economica privata* (2011) 81-90; G. Cammarota, *Servizi pubblici in rete e applicabilità dei principi classici del servizio pubblico*, in 1-2 Inf. dir. 183, 189 (2005); see L.R. Perfetti, *Contributo ad una teoria dei servizi pubblici* (2001) 33-41; R. Cavallo Perin, *I principi come disciplina giuridica del pubblico servizio tra ordinamento interno ed ordinamento europeo*, 1 Dir amm. 41-50 (2001), national and local public services are provided in ways that promote quality improvement and ensure protection of citizens and users and their participation, in forms including associations, recognised by law, in relevant evaluation procedures and definition of quality standards, a circumstance that seems to be in line with the theories set out in this paper; on economic profiles, see F. Von Hayek, *Legge legislazione e libertà: una nuova enunciazione dei principi liberali della giustizia e della economica politica* (1986) 23-30.

[23] Data management will be discussed at length during this survey, but with regard to figures see V. Berlingò, *Il fenomeno della datafication e la sua giuridicizzazione*, 3 Riv. trim. dir. pubbl. 641-654, 656 (2017); on democratic legitimacy profiles of the data, in general terms, see T. Nabachi, *The potential of deliberative democracy for public administration*, 23 Am. Rev. Pub.Adm. 1-24 (2010).

administrations (in this case, public services) around users, so as to make administrative action directed towards the provision of a service rather than the exercise of power[24]. In conclusion, it is no longer abstract general interest that is taken as a reference criterion for definition and operation of services, but expectations and needs of citizen-users. Final user becomes *raison d'être* of service itself. The public interest is increasingly serving public.

Reasons for this growing interest in digitalization of administrations both at level of international bodies and in various countries around the world are primarily attributable to close relationship between technological progress and productivity and therefore economic development of administrations, and in the area of public services in a perspective of system change, the notion of digital and interconnected administration can play a central role in this change.

In order to delimit the scope of the investigation, this part of the work aims to explore and at the same time assess the compatibility profiles of the key legal features.

This analysis is divided into two different sections: a first section concerning principles that must govern public service provision and profiles of compatibility with digitalization, and a second one on study of two strategic sectors to assess stability of interpretations offered above, with specific regard to health services - also with aspects inextricably linked to recent pandemic - and public transport sector, which has always been a trouble spot for Italian administration.

In the first section, it deals with public services, in general terms, provided in digital form and profiles of compatibility with those principles that must govern the service provision phase. The second section aims to examine profiles related to health and public transport and drifts that market forces on administrations, which must adapt their action regime to these new applications, in order to avoid a Tibetan isolation that would block the economic growth of the country.

[24] S. Civitarese Matteucci, *Umano troppo umano. Decisioni amministrative automatizzate e principio di legalità*, 1 Dir. pubbl. 9 (2019), digitalization seems to be a formidable sidekick of this concept of administrative activity, since it involves a continuous centralization and decentralization of information through multiple units, both within the organization and outside of it, allowing unprecedented forms of transparency and social control.

The assumption of this survey stands in potentially unlimited amount of data that the provider can use as a source of knowledge to make informed decisions affecting the provision of the service, in order to guide and improve it. A more aware, better-informed administration is now a given and an unavoidable condition even when looking at reforms to be implemented, and not only at national level, since the knowledge gap that is constantly present between the administration and businesses risks becoming an insurmountable obstacle to economic development.

There are, at least, two issues that arise; the first concerns data and related re-use[25], the second concerns legislation on databases, understood as the entities or bodies that manage the data available to administrations.

In this regard, it is necessary to recall the necessity that the use of data must be related to the function that the entity (public or private provider of public services in this case) performs.

The use of a fully interconnected administration for provision of public services reduces transaction costs and data collection costs and, above all, extends market access to all potential purchasers, in accordance with the principle of maximum effective opening of the administration to the market.

With reference to possible approaches with which administrations deal with the application dimension in terms of digital provision, the following emerge two typologies: the vertical one, more widespread, which deals with one or more specific aspects related to the urban dimension such as mobility, energy, transport, and the systemic one, which refers to the city as a whole, in its different dimensions, considering it a single system capable of supporting and enabling innovation[26].

[25] On the subject, see F. Pinto, *L'utilizzo delle piattaforme informatiche da parte della pubblica amministrazione: tra falsi miti e veri rischi*, 1-2 Amministrativamente 3, 7 (2018); M.P. Zerman, R. Steffenoni, *Riutilizzo commerciale dell'informazione detenuta nel settore pubblico in materia di dati ipotecari e catastali alla luce dei Trattati europei e della Direttiva 2003/98/CE (C. appello Venezia, Sez. I civ., sent. 20 marzo 2013 n. 624)*, 4 Rass. Avv. St. 51, 55 (2013); B. Ponti, *Il patrimonio informativo pubblico come risorsa. I limiti del regime italiano di riutilizzo dei dati delle pubbliche amministrazioni*, 3 Dir. pubbl. 995, 1002 (2007); for insights into a specific regional experience, see A. Cavallo et al., *A Platform for the Reuse of Public Data in Piedmont*, 1-2 Inf. dir. 433, 440 (2011).

[26] As noted in the document drawn up by Agenzia per l'Italia Digitale, *L'Intelligenza Artificiale al servizio del cittadino* (the White Book on Artificial Intel-

In this part of the survey, the first approach is preferred, to assess the strength of pillars of traditional administration duties in relation to some classic aspects of public services, such as public health and mobility. In other words, a study of a different approach to the issue of public service provision is being carried out in the light of current Italian and European legislation.

By the way, one of objectives of European Directive 2014/24/EU was to modernize procedures for selecting companies through the adoption of digital and telematic systems, which should ensure easier access to the market[27].

The subject, if analyzed from a broader perspective, involves the complex relationships between globalization, administration and market[28].

ligence), available on www.ia.italia.it (2018), it is precisely in the field of public services provided in smart form or through artificial intelligence that relevant issues need to be dealt with. First of all, it is necessary to rethink certain legal provisions with the aim of satisfying, by means of these new technologies, certain universal needs such as respect for freedoms and for the main individual and collective rights. More specifically some problems are raised by the functioning of Artificial Intelligence, that is, those of data quality and neutrality, of the responsibility of those who use algorithms, of their transparency and openness, as well as of the protection of privacy; on the subject, see the document drawn up by The IEEE Global Initiative on Ethics of Autonomous and Intelligent Systems, IEEE - Institute of Electrical and Electronics Engineers (2017); on the theme of artificial intelligence in relation to ethics of the algorithm in administrative action, see S. Crisci, *Intelligenza artificiale e etica dell'algoritmo*, 10 Foro amm. 1787- 1792 (2018).

[27] The need was already known in 2010, starting from a Communication of the European Commission, on this point, in a more detailed sense, see G. Marchianò, *Modernizzazione del mercato degli appalti pubblici nella proposta di Direttiva comunitaria (Com (2011) 896 del 20.12.2011): l'impatto sulla normativa nazionale nel settore dei servizi'* (2012) 15-31; critical rethinking of administrative action as a whole in order to be addressed from an interconnected perspective, digital, must be carried out by an analytical and statistical study of the data, please refer to A. Sandulli, *Capire il paese con dati statistici*, 3 Riv. trim. dir. pubbl. 885-888 (2014); L. Ammanati, M.A. Cabiddu, P. De Carli (eds.), *Servizi pubblici, concorrenza, diritti* (2011) 318-320; L. Torchia, *Autonomia dei soggetti e funzionalità del sistema: condizioni di qualità dell'informazione statistica*, 2 Riv. it. dir. pubbl. com. 643-645 (1999).

[28] The subject has been studied and explored in a widespread and authoritative way, only references are made to contributions that have influenced this analysis, C. Franchini, *La disciplina pubblica dell'economia tra diritto nazionale, diritto europeo e diritto globale* (2020) 63-80; with reference to traditional canons of administrative action, cf. L. Giani, *Le funzioni di regolazione del mercato*, in F.G. Sco-

Big Data[29], algorithms and artificial intelligence systems can play a strategic role in the management, development and planning of complex applications, which could improve efficiency of administrative action but risk undermining other values; real-time data analysis can be the basis for predictive systems that can implement efficiency[30].

Moreover, as has been noted in not recent times[31], techno-

ca (ed.), *Diritto amministrativo* (6th ed., 2019) 503-517; L. Casini, *Potere globale* 11-31 (2018); G. Greco, *Argomenti di diritto amministrativo* (vol. 1, 3rd ed., 2017) 364-371; F. Fracchia, *Il diritto dell'economia alla ricerca di uno spazio nell'era della globalizzazione*, 1 Dir. econ. 11 (2012); with a view to judicial protection, E. D' Alterio, *Tecniche giudiziarie di regolazione dei rapporti tra diritto europeo e diritto globale*, in Vv. Aa. (eds.), *Sistemi regolatori globali e diritto europeo* (2011) 1-22; M. D'Alberti, *Libera concorrenza e diritto amministrativo*, 3 Riv. trim. dir. pubbl. 347-354 (2004), value of competition has had an impact on many legal aspects governed by administrative law, in particular with regard to public services award. In some respects, competition rules have supplemented and amended certain traditional legal institutions of administrative law, which must be reinterpreted in full on the basis of conditioning of typical European value of free competition [for an updated interpretation of this topic, cf. M. D'Alberti, *La legge sulla concorrenza, trent'anni dopo*, 2 Munus viii-x (2020)]; cf. on the overall lack of organic design of the models, F. Merusi, *Cent'anni di municipalizzazione: dal monopolio alla ricerca della concorrenza*, 1 Dir. amm. 37-57 (2004); S. Cassese, *Lo spazio giuridico globale*, 2 Riv. trim. dir. pubbl. 323-330 (2002); P. Grossi, *Globalizzazione, diritto, scienza giuridica*, 1 Foro it. II, 151 (2002); M.R. Ferrarese, *Le istituzioni della globalizzazione. Diritto e diritti nella società transnazionale* (2000) 7-11, 18-32; E. Ferrari, *La disciplina dei servizi a rete e la dissoluzione dei servizi pubblici*, in Id. (ed.), *I servizi a rete in Europa: concorrenza tra gli operatori e garanzia dei cittadini* (2000) 11-14.

[29] Although this topic might appear to be recent and innovative, it has already been studied in past, albeit in isolated studies and under other locutions, specifically, massive amounts of data held by public administrations, as demonstrated by G. Cataldi, *Le informazioni come oggetto di attività amministrativa*, in Vv. Aa. (eds.), *Studi in memoria di Guido Zanobini*, (vol. 1, 1965) 283-296.

[30] G. Pitruzzella, *Big data, competition and privacy: a look from the antitrust perspective*, Sp. Iss. Conc. Merc. 15 (2016), in the public debate on the interplay between Big Data and competition two rather different views of the world have been developed. The first one describes Big Data as a key input controlled by dominant firms, which prevents competitors from entering the market and entrenches incumbents dominant positions, allowing them to exploit consumers. The second one describes Big Data as a commodity, something that be readily sourced from a variety of providers and that allows companies to offer innovative and better quality services to consumers.

[31] Please refer to F. Giglioni, *La 'domanda' di amministrazioni delle reti intelligenti*, 4 Ist. fed. 1049-1069 (2015); A. Perini, *Le trasformazioni in atto nel settore dei servizi di pubblica utilità: privatizzazione, concorrenza e regolazione*, 2 Dir. soc. 243 (1997).

logical developments have laid the basis for the coexistence of public and private companies in the market, causing the end of so-called natural monopolies.

The discussion is not recent, as evidenced by several analyses that have highlighted how the implementation of systems that allow data exchange can improve the action of the public administration[32]. Also in this case, as previously pointed out, one of the key aspects seems to be predictability of administrative action, to be oriented through heritage of Big Data that show behaviours and preferences of citizens (that are final users of this service).

In the preamble, it should be made clear that management and re-use of data constitutes a public service itself[33]. According to this model, each phase (acquisition, management, use, reuse of data) represents an activity[34] because it is related to relationship of exchange between a supplier (public or private, depending on who manages the database) and the user, for the transfer of an in-

[32] See A. Masucci, *Erogazione online dei servizi pubblici e teleprocedure amministrative. Disciplina giuridica e riflessi sull'azione amministrativa*, 4 Dir. pubbl. 991, 997-1002 (2003), the use of technology makes it possible to collect data in real time, which can improve the delivery of public services and facilitates the aggregation of data from different sources; in a comprative perspective, see D. Pérez-González, R. Daiz-Daiz, *Public services provided with ICT in the smart city environment: the case of Spanish cities,* in 21 Jour. Un. Comp. Sc. 248, 254 (2015), "citizens are demanding greater efficiency, sustainable development, quality of life and improvements in resource management. In order to address these questions, local authorities are considering the implementation of management models which, jointly with energy efficiency, new infrastructures and environmental protection, mainly focus on ICT".

[33] G. Carullo, *Gestione, fruizione e diffusione dei dati dell'amministrazione digitale e funzione amministrativa* (2017) 157-165, individual phases can be autonomous since they are managed by different subjects. On the contrary, services must be coordinated and linked together and this interconnection is of fundamental importance for the provision of the data dissemination service; M. Maggiolino, *Il riutilizzo dell'informazione detenuta dal settore pubblico: alcune riflessioni di politica e diritto alla concorrenza*, 6 Conc. merc. 765 (2012); please also refer to F. Vetrò, *Il servizio pubblico a rete. L'esempio paradigmatico dell'energia elettrica* (2005) 4-7, according to which, there must be a hub that directs all the elements that belong to a network, material or immaterial; L.M. Friedman, *The Law and Society*, 38 Stanf. L. Rev. 763-780 (1986).

[34] See G. Carullo, *Big Data e pubblica amministrazione nell'era delle banche dati interconnesse*, 2 Conc. merc. 181-183 (2016) each phase must satisfy a public interest which must be identified by a legislative provision, since all activities must be instrumental to the purpose for which the data is requested.

tangible asset, i.e. the data.

On this occasion, it is not possible to provide an overview of excellent analyses carried out on this core subject by Italian scholars, but it is appropriate to fix some minimum cardinal points.

Specifically, it is essential to mention two authoritative reflections, which are the precondition for the analysis carried out.

The first mention is related to the consideration that interactions between administrations and market involve a very dense and intricate series of relationships; this articulated network can benefit from a continuous sharing of data, to facilitate and encourage relationships, also from the point of view of European market[35].

The second reflection instead claims that the continuous and permanent instability of the Italian legal framework in order to award public services makes it difficult to acquire a detailed knowledge about the different ways in which the public service itself is handled[36]. Precisely because of this instability, the possibil-

[35] This analysis was carried out by G. Corso, *Riflessioni su amministrazione e mercato*, in 1 Dir. amm. 4 (2016); concerning relation between administrative authority and the market, from the point of view of the stability of the emerging legal positions, see M. Trimarchi, *Stabilità del provvedimento e certezze dei mercati*, 3 Dir. amm. 321 (2016); M. Clarich, *La riflessione scientifica attuale sulla regolazione dei mercati e la prospettiva delle 'spinte gentili'*, 2-3 Diritto e processo amministrativo 413-421 (2015); G. Amato, *Il mercato nella Costituzione*, 1 Quad. cost. 7-12 (1992); on the subject of business management between private and administrative law, see E. Capaccioli, *La gestione di affari nel diritto amministrativo* (1956) 45-56, on alleged spontaneous management of public affairs with distinctions with the different hypothesis of formalized entrustment of such public tasks. Two types of effects result, for what is relevant in this investigation, on recipients understood as mere passive terminals of services, expression of administrative function. The issue fades into the practical results that the administration is required to achieve (99).

[36] F. Merusi, *I servizi pubblici instabili* (2nd ed., 1990) 14, noted that the notion and the legal framework of the local public services were unsettled, this definition was quoted by M. Dugato, *L'imperturbabile stabilità dei servizi pubblici e l'irresistibile forza dell'ente pubblico*, 3 *Munus* 505 (2012); cf. E.M. Garcia, *Il dialogo come metodo, a proposito della ricostruzione dei servizi pubblici nella prospettiva europea*, in S. Torricelli (ed.), *Ragionando di diritto delle amministrazioni pubbliche. In occasione dell'ottantesimo compleanno di Domenico Sorace* (2020) 9-18, the need to interpret, from a methodological perspective, public services as a method of dialogue between the administration and private individuals; recenlty, see G. Piperata, *I servizi pubblici locali*, in E. Carloni, F. Cortese (eds.), *Diritto delle auto-*

ity of receiving data and information to guide this management of public services (which in Italy is often inadequate[37]) and create a smart network can be a solution to explore. A reticular model of organising public powers, and therefore also public services, is emerging, which overturns the current approach and contributes to a genuine redefinition of relations between authorities and citizens[38].

The interconnection of data and the use of ICT for provision of public services can be a tool to achieve the so-called performance administration[39]. Under this reading, rule of law, which must

nomie territoriali (2020) 455-479; see also M. Dugato, *La crisi del concetto di servizio pubblico tra apparenza e realtà*, 3 Dir. amm. 511-530 (2020); in the same direction, cf. F. Liguori, *Notazioni sulla presunta fine del dualismo tra pubblico e privato*, 1 GiustAmm 4, 6 (2014); see, in a historical way, F. Merusi, *La disciplina pubblica delle attività economiche nei 150 anni dell'unità di Italia*, 1 Dir. soc. 93-117 (2012) which notes how complex it is to find unifying traits for the discipline and its interpretation; for a manualistic reading, cf. R. Villata, *Pubblici servizi. Discussioni e problemi* (5th ed., 2008) 267-315.

[37] Recently on the subject, see the analysis conducted by P. Chirulli, *Servizi pubblici deregolamentati? Il caso del trasporto pubblico locale*, in Vv. Aa. (eds.), *Diritto amministrativo e società civile* (2020) 401-421; A. Mori, *Traiettorie di mercatizzazione e distribuzione dei rischi di esternalizzazione di servizi pubblici in Europa*, 3 St. merc. 459-471 (2019); L.R. Perfetti, *Modelli di affidamento del servizio nei trasporti pubblici locali*, in F.A. Roversi Monaco, G. Caia (eds.), *Il trasporto pubblico locale. Principi generali e disciplina di settore* (vol. 1, 2018) 91-109; G. Pizzanelli, *Innovazione tecnologica e regolazione incompiuta: il caso dei servizi di trasporto non di linea*, 1 Munus 97 (2016); from a classical perspective, on this subject, reference should simply be made to P. Alberti, *I trasporti pubblici locali. Pianificazione e modelli di gestione (Lineamenti giuridici)* (1989) 44-67.

[38] The issue of crisis and the calculability of certain legal factors, authoritatively cf. N. Irti, *La crisi della fattispecie*, in Id (ed.), *Un diritto incalcolabile* (2016) 19-21; for a general analysis on this point, see F. Rimoli, *Certezza del diritto e moltiplicazioni delle fonti: spunti per un'analisi*, in F. Modugno (ed.), *Trasformazioni della funzione legislativa* 90-92 (2000); G. Tarello, *Sul problema della crisi del diritto* (1957) 16-19.

[39] The contributions of scholars on the subject are numerous, here it is necessary to mention L. Giani, *Regolazione amministrativa e realizzazione del risultato*, in M. Immordino, A. Police (eds.), *Principio di legalità e amministrazione di risultati. Atti del Convegno, Palermo 27-28 febbraio 2003* (2004) 307-314; L. Giani, *L'operazione amministrativa nella prospettiva del risultato: nel procedimento e nel processo*, 1 Nuove Aut. 205-221 (2012); M. Cammelli, *Amministrazione di risultato*, in *Annuario AIPDA* (2002) 107-111, the inclusion of the notion of result as a parameter for evaluating administrative action has always been included in the context of good performance. In the last twenty years, direct legal agreement has been reached on the result, taken as a reference between the administration and the

govern all administrative activity, including of course public services, must be interpreted in a less formal sense, not on the basis of legislative provisions, but on the basis of the public interest actually pursued. This reading, of course, makes it possible to read provisions and principles differently and to read the digitalisation that stands between user and provider differently.

In the same way, already in 2000, European Council ordered Member States to ensure that citizens had electronic access to all public services and provided for a series of measures to facilitate the exchange of information to improve the management of administrative action, including public services, even if no decontraction of the general categories was envisaged.

It is appropriate to clarify that the improvement that can result from the use of Big Data in public services is not only about the celerity of service provision[40].

One of the most obvious improvements that can come from this smart governance[41] of public services is the chance that ser-

citizen; on the issue of continuity of supply, cf. S. Tarullo, *Buona prassi e continuità dell'amministrazione pubblica*, 4 Dir. amm. 669-672 (2012), public administration encounters in its action a limitation derived from the very way in which it repeats its action over time and thus becomes objective; G. Corso, *Amministrazione di risultati*, in Vv. Aa. (eds.), *Annuario AIPDA* (2002) 127-131, the activity of the public administration must be evaluated in the light of human and economic resources and not only on the basis of the indications given by the legislative data.

[40] Timeliness in the delivery of public services and speed in the exchange of information are values that public administration must pursue in all areas of its activity, including public services. [F. Cardarelli, *3 bis. Uso della telematica*, in M.A. Sandulli (ed.), *Codice dell'azione amministrativa* (2nd ed., 2010) 427-434, the use of interconnected databases accelerates all administrative activity and is a legal prerequisite for administrative cooperation, an expression of the general principle of loyal cooperation between public authorities]; in general terms, on timeliness of administrative activity and importance of time factor in performing public tasks, see, L. Giani, *I tempi (dell'azione e della decisione) dell'amministrazione tra certezza e affidamento*, in Vv. Aa. (eds.), *Scritti per Franco Gaetano Scoca* (vol. 3, 2020) 2461-2494; recently, see S. Vernile, *Ragionevole durata del procedimento amministrativo e "sorte" dell'atto tardivo*, 3 Dir. econ. 337-377 (2020); G.D. Comporti, *Tempus regit actionem. Contributo allo studio del diritto intertemporale dei procedimenti amministrativi* (2001) 11-34; in a classic way, cf. A. Angiuli, *Studi sulla discrezionalità amministrativa nel quando* (1988) 41-56.

[41] See, *ex multis*, R. Cavallo Perin, G.M. Racca, *Smart cities for an intelligent way of meeting social needs*, in J.-B. Auby, E. Chevalier, E. Slautsky (eds.), *The future of Administrative Law* (2020) 431-437.

vices will continuously be adapted to the requirements of citizens. This circumstance seems to be a point of landing for administrations to aim for, but it entails obvious difficulties and some critical issues.

A management of public service that adapts itself according to how users needs change (disclosed in real time through the databases held by administrations, and managed by different aims, in a single database) allows administration to continuously adapt the delivery of the service itself. The public service designed in this way becomes flexible and diversified because the adaptation of the system can become more timely (depending, of course, on the technical time required for the various sectors involved); the smart management of public services must be based on a flexible and changing virtual system.

In addition, administrations on the basis of studing data flows can differentiate provision of the service, can orient it, it can differentiate it with a view to a minimum dispersion of resources, both human and financial.

In such a system, it is clear that premises outlined in the first part of this survey must have found their proper and optimal place, in a clear regulatory context and with a body of officials prepared for this model of public service delivery.

In this pattern, based on re-use of data, public services are no longer top-down ones, are no longer related to organizational profiles, but services are designed and implemented according to needs of users.

Another typical feature of public services that is implemented through smart administration paradigm is the principle of service continuity, which goes beyond the notion of regular and continuous delivery.

In this sense, this principle of continuity must be understood as the immediate and uninterrupted availability of the service; the citizen must be able to interact with the administration (intended as a provider of the public service) at any time and from any place.

Digital public services can perform a different function according to the object of economic activity carried out, because for some enterprises the data collected are an input for production, i.e. one of the factors that contribute to the improvement of the business, while for other enterprises the data are the result of the

economic activity (i.e. the output) if the activity has as its object the collection and resale of the data.

This set of relationships between data and market becomes even more intricate if the public entity, i.e. public administration as regulator or traditional administration, is involved.

The issue seems extremely problematic[42], since it requires the search for a point of balance between many different factors, such as data as a legal asset, the protection of fair competition[43],

[42] On the subject, from a European and broader perspective, see recent editorial by G. Pitruzzella, *L'Europa del mercato e l'Europa dei diritti*, 12 Federalismi 4-6 (2019), on the evolutionary path followed at European level, with the aim of avoiding excessive sacrifice of any of the values involved.

[43] In this sense, see the considerations carried out by F. Vessia, *Big Data: dai vantaggi competitivi alle pratiche abusive*, 6 Giur. comm. 1064 (2018), in digital markets, the use of data has become crucial, even though this use can lead to abusive market practices. One of the most worrying effects of the data-driven digital economy is the trend towards concentration of market power in the hands of a few operators with large market shares and, as a result, the danger of foreclosure effects. Increased transparency in online markets can have conflicting competitive effects, both positive and negative. On the one hand, consumers can easily know the characteristics and, above all, the prices of the services and products offered on the telematic platforms by competing companies and compare them more easily, on the other hand, greater transparency and the exchange of information, which is also mirrored among operators, can have the effect of inducing an alignment of prices. The exchange of information has traditionally been one of the so-called facilitating practices, which facilitate the achievement of tacit collusive agreements (i.e. concerted practices) on the prices of products or services provided by companies that should, instead, be independent on the market by diversifying their offers as much as possible. This is due to the fact that price observability between competitors helps companies to set a unit price, while maintaining existing balances over time; on the issue of abuse of dominant position in the presence of Big Data and barriers to access to digital markets, see J. Harbour, *Section 2 in a Web 2.0 World: an expanded vision of relevant product*, in 76 Antitrust L. Journ. 769-777 (2010); on the subject it is necessary to point out the contribution as follows V. Giomi, *Mercati in attesa di mercato. La trasferibilità del provvedimento amministrativo tra ragioni pubbliche e dinamiche private* (2019) 27-34, according to which, in a broader perspective, which intercepts the issue of digital markets, the secondary market for government securities in sectors with administered markets with supply-side quotas, while responding to economic pressures based on private autonomy, affects the social profile of public interests guaranteed by quantitative planning tools. The legislative choice to provide (without regulating) for the private transferability of the authorizing title in those areas which are not subject to liberalization and which are recipients of pro-competitive measures of little impact, is in clear contrast with the logic of the system in which it is called to operate. There is a high

the optimal execution of public service, in the absence of a body of rules that takes into account all factors in relation to the current development of databases.

An innovative approach to management of public services in view of interconnection of data and therefore in implementation of a digital-form administration requires to balance different interests, but it is necessary to make a reference to individual public services, in which individual values assume different scope and importance.

Attempts aimed to examine the issue from an abstract perspective may not lead to any definitive conclusion, and this is the reason why this paper opts for a concrete analysis of different public services in order to be able to study in concrete terms the balance of the different readings involved.

It is clear that especially with regard to problem of privacy protection, question of public services provider that manages and reuses the data is primary; in other words, if data are managed by a public entity (as in the case of in house providing, a mode that can be explored by administrations, but which is structurally not compatible with digital) or by a private entity (as in the case of a service entrusted to a private firm through a public tender) makes necessary to make two different analyses. Obviously, in this study it is not possible to provide an accurate description of the complex issue of public service delivery in Italian law, but on a case by case basis, in relation to specific contexts, it will be necessary to report the current discipline, in order to provide an analysis that takes into account all the factors involved.

For these reasons, the analysis is carried out in relation to different public services, in a general reading first and then in a more strategic perspective, to be able to reach some conclusions in an inductive way.

SECTION ONE: Maintenance and compatibility of public service charter principles with progressive digitalization policies

risk that the private circulation of the authorizing measure will trigger derogatory mechanisms of resistance to the market, deconstructing from within a system of useful contingency now stabilized due to the intrinsic social protection of economic activities.

2. Service and user relations and delivery phase principles. Digitalization and complex system retention

Under Italian law, relations between provider and users are governed by various sources of regulation and protection, mainly of European origin, based on various principles, with a view to increasing protection for citizens as users.

Before tackling the investigation concerning the possible application of the current disciplines and the friction profiles, it is necessary to take into account, albeit briefly, given complexity of the subject, possible instruments of personalization (in the collective sense) and orientation of public services.

A first tool, with well-known difficulties of regulating it, is IoT (Internet of Things), which in relation to studied studied is supplemented by smart service and matering hypotheses in order to update the application framework of IoT solutions for the consumer world, with particular emphasis on Smart Home, elaborating different *ad hoc* surveys on final consumer and analyse the application framework of Industrial IoT projects (with focus on Smart Factory and Smart Logistics) through elaboration of a survey addressed to companies (both large enterprises and SMEs), deepening the most representative success stories in the main business sectors.

In terms of effects, on the horizon, but the topic seems far from even a vaguely concrete configuration, emerges data-driven regulation[44], a type of discipline, necessarily flexible or through soft-law acts that changes according to the needs of users embedded in Big Data.

In order to assess in detail existing aporias and compatibility profiles, here a juridical reference is taken to be Public Service

[44] For a first profile analysis, cf. A.G. Ferguson, *The rise of Big Data policing. Surveillance, race and the future of law enforcment* (2017) 107-129; see F. Mattasoglio, *Algoritmi e regolazione*, 2 Riv. reg. merc 226-244 (2018); A. Canepa, *Le piattaforme fra nuove dinamiche di mercato e ricerca di strumenti regolatori efficaci*, 2 Riv. reg. merc. 181-195 (2018), on risk profiles due to the need to envy networks owners, which often hides behind contractual or concessionary mechanisms that make responsibilities disappear; data-driven regulation is a remedy for the critical nature of ordinary methods of regulating economic relations, on which there is a vast bibliography, but please refer to M. Clarich, *Editoriale*, 1 Riv. reg. merc. 1-4 (2015); with reference to foreign literature, is shared the general theoretical approach offered by D. Evans et al., *Matchmakers. The new economics of mutiused platforms* (2016) 85-100.

Charter[45], adopted by DPCM 27 January 1994[46], which was followed by various provisions, mostly fragmentary, whose objective remained an agreement between providers and private users, to which technology now stands in the way, potentially destined to alter the (precarious, to be conservative) balance in the provision of public services.

This Services Charter set itself the ambitious task of improving the quality of life of users by improving and adapting the

[45] On this topic, there are many authoritative bibliographical references, among others, with a profile relating to the insolvency management of the service, cf. E. Caterini, *L'utente dei servizi pubblici e la riforma fallimentare: nuovi scenari*, 1 Rass. Dir. civ. 55-83 (2019); in general terms, see G. Mastrandrea, *Le Carte dei Servizi Ferroviari e la qualità della prestazione*, in Vv. Aa. (eds.), *Studi in memoria di Elio Fanara* (vol. 2, 2008) 197-202; B. Delfino, *La responsabilità per danni alla persona nell'erogazione di servizi pubblici* (2007) 124-141; F. Giglioni, *Le garanzie degli utenti dei servizi pubblici locali*, 2 Dir. amm. 353 (2005), Service Charter thus assigns a strong role both to service providers and to citizens in orienting all public service activities towards their mission: providing good quality service to citizen-users. In addition, it provides for ways, to be publicised in the most appropriate ways, through which citizens themselves can easily access complaints procedures concerning the violation of principles; G. Iacovone, *Tecnica, politica e (in)effettività della tutela dell'utente di servizi di pubblica utilit*à, 6 Foro amm. CDS 2085-2090 (2003); G. Vesperini, *L'attuazione della carta dei servizi pubblici in Italia*, 1 Riv. trim. dir. pubbl. 175-181 (1998), the right of the service charter, unitary for all services for material regulation of relationship and differentiated for mechanisms of implementation, is intended to ensure substantial and tendential uniformity. Risks were and are linked to the fragmentation of control techniques and apparatus, which may undermine the very unity of the apparatus and legal regime for protecting users, including in terms of the expectation of service quality; S. Battini, *La tutela dell'utente e la carta dei servizi pubblici*, 1 Riv. trim. dir. pubbl. 185 (1998); G. Vesperini, S. Battini, *La carta dei servizi pubblici. Erogazione delle prestazioni e diritti degli utenti* (1997) 223-260, 291; A. Pajno, *Servizi pubblici e tutela giurisdizionale*, 3 Dir. amm. 551 (1995), according to which the Charter should have had a merit in helping to clarify and specify a precise obligation to provide a service, and the user's guarantee lies in knowing in advance exactly what levels are required to characterise the service; L. Maresta, A. Parigi, *Analisi comparata di alcune Carte dei servizi adottate in Italia*, in *La città più bella. Guida alle Carte dei servizi pubblici* (1996) 17-44.

[46] Reference is made to Decree Law 12 May 1995, no. 163 which provides for adoption of service charters by all public service providers, including those operating under concessions or agreements; 1994 DPCM took up ideas of a study drawn up by Presidenza del Consiglio dei Ministri (Dipartimento per la funzione pubblica), *Carta dei Servizi pubblici. Proposte e materiali di studio*, in *Quaderni del Dipartimento per la funzione pubblica* (1993).

services provided[47]. According to traditional methods, as is well known, even within public services, there was a public scheme aimed at identifying the user as merely the recipient, obviously in a subordinate position, of the service, and as such incapable of influencing the quality of the service provided. The identification of the level of service quality, therefore, was linked to choices of administrative organisation entrusted exclusively to the discretion of the public body providing the service[48].

Subsequent legal proceedings to privatize and liberalize

[47] Cf. F. Bassanini, *I servizi pubblici locali tra riforma e referendum*, in Id. (ed.), *I servizi pubblici locali tra riforma e referendum* (2011) 8-9, 11, which is ahead of its time compared to later analyses, since it notes that modernising public services is also a crucial factor for quality of life and social cohesion, and that people' mobility, access to essential goods, the dissemination of information and knowledge (TLC), monitoring of environmental and social risk factors, and a growing proportion of social and health services (pending telemedicine) depend on high-quality infrastructure networks and network services.

[48] Cf. M. Calabrò, *Carta dei servizi, rapporto di utenza, qualità della vita*, 1-2 Dir. amm. 373-377 (2014), Service Charter is a tool aimed, through the predetermination of obligatory and binding performance standards, at reducing those profiles of asymmetry towards the provider, which arbitrarily justify the provision of forms of protection and make one doubt the correctness of the reconstruction of the nature of the users' legal positions in terms of subjective rights only; see, with reference to sectoral issues, L. Giani, *Il ruolo delle carte dei servizi e dell'azione per l'efficienza nella garanzia della effettività dei diritti degli individui-utenti nel settore socio-assistenziale. Il caso dei disturbi specifici dell'apprendimento*, in M.R. Spasiano, M. Calabrò (eds.), *I servizi pubblici in Italia e Argentina: un'analisi comparata* (2013) 121-131; in a specific perspective, cf. M. Interlandi, *Rilevanza giuridica della qualità dei servizi pubblici e disciplina del servizio idrico integrato nell'attuale processo di liberalizzazione e regolazione nel mercato*, 1 GiustAmm 1-12 (2012); M. Ramajoli, *La tutela degli utenti nei servizi pubblici a carattere imprenditoriale*, 3-4 Dir. amm. 383-387 (2000), admitting possible limitations, even incisive ones, on liability towards users at the moment of providing a service is in open contrast with traditional assertions according to which, in terms of public services, there is a preliminary phase of organising and planning the service, which is entirely public, and a phase of actual provision, governed exclusively by private law; G. Napolitano, *Servizi pubblici e rapporti di utenza* (2001) 45-65, 81; L. Ieva, *Il principio della qualità del servizio pubblico e la 'Carta dei Servizi'*, 3 Foro amm. 229-241 (2001), accordingly, the basic idea is to provide a different preventive protection mechanism consisting essentially of identifying organizational measures suitable for ensuring a higher level of service quality. More specifically, service charters are intended to constitute a sort of pact with citizens geared towards customer satisfaction; F. Porretta, *Una carta per l'efficienza: la carta dei servizi pubblici* (1998) 14-41, 66; F. Pugliese, *L'autorità di regolazione dei servizi pubblici essenziali. I controlli interni*, 2 Riv. trim. app. 223 (1995).

[49]this sector have led to a profound rethinking of private users and, more generally, of user relations, which have long been marked by specific rights and obligations on both sides, i.e. provider and user. In this sense, a service report emerges in which individuals are equally coordinated and a series of obligations are imposed on them[50]. Services Charter provides for and imposes a series of compulsory and binding performance standards, a sort of manifesto in which it is clearly and completely stated what the user has right to demand from a given provider.

The aim of public service quality is a precise legal obligation that can be deduced from overall system of regulations in question and, even before that, it is an important organizational obligation, which provides a measure of management capacity in a modern country, as well as indicating the stage of socio-economic development reached, and obviously digitalization is part of this line and should be a formidable ally for better service provision, provided that there is no obvious contraction of users' rights.

Among its aims is that of bringing together two sides of a legal relationship, of allowing citizens-users to become protagonists and not mere recipients of service, by actively participating in identifying quantitative and qualitative levels of the services that the provider is obliged to offer, as well as in verifying their compliance, even outside courts.

Before moving on to a detailed analysis of individual principles guiding public service provision, it is necessary to consider, on account of having introduced - by means of the law converting simplification Decree Law 2020 (Law no. 120 of September 11, 2020) - into the text of Law 7 August 1990, no. 241, the provision according to which relations between citizens and public administration are based on cooperation and good faith[51], which is obvi-

[49] Cf. F. Liguori, *Liberalizzazione, diritto comune, responsabilità. Tre saggi del cambiamento amministrativo* (2nd ed., 2019); M. Cafagno, F. Manganaro, *Unificazione amministrativa e intervento pubblico nell'economia*, 1 Dir. econ. 57-108 (2016).

[50] R. Cavallo Perin, *Servizi e interventi pubblici locali*, in R. Cavallo Perin, A. Romano (eds.), *Commentario breve al testo unico sulle autonomie locali* (2nd ed., 2006) 618-619; L. Mancini, *I contratti di utenza pubblica*, 1 Dir. amm. 113-120 (2002).

[51] This law comes to establish a concept that was developed by authoritative doctrine 50 years ago, as demonstrated in authoritative research F. Merusi, *L'affidamento del cittadino* 34-50 (1970); F. Merusi, *Buona fede e affidamento nel diritto pubblico. Dagli anni Trenta all'alternanza* (2001); moreover, this approach has

ously also applicable to stage of provision of the public service, even if provided in digital form.

On the one hand, depersonalising users avoids and prevents violations due to discrimination, but on the other hand, there seems to be little room for collaboration and participation. This consideration arises from a belief that collaboration and participation would be reduced by digitalization, almost nullified.

In digital public service delivery, participation and dialectics seem to be reduced, as the provider can disregard several aspects that it has to guarantee in the traditional public service, without a prior adversarial process that, in any case, would be marginally useful[52].

Reached this point in this survey it seems appropriate to examine strength of individual principles of Services Charter in order to understand how much digitalization may alter or foster the legal regime and how much it affects the quality-of-service delivery.

2.1 Ensuring equal rights for users: a potential landing place and a bitter reality

The first priority referred to in Service Charter is equality between users, a corollary of equality between citizens as enshrined in Art. no. 3 of Constitution.

The aim of this provision is to ensure that public service provision is inspired by equal rights for users. Rules concerning relations between users and public services and access to public services must be the same for all. No distinction during provision

also been taken by administrative justice, *ex multis*, recently, see TAR Lazio, Rome, Sec. II, 13 January 2021, no. 410, 1 Amministrativista (2021), since good faith places limits upon exercise of a right, ownership of that right in no way confers an unconditional power to engage in formally permissible conduct. On the contrary, on account of solidarity and objective good faith, law confers a power that always knows a functional limit given by the reason for which legal system acknowledge that right.

[52] The theme is also examined with similar criticism as in this analysis P. Piras, *Comunicazione e innovazione nell'amministrazione gattopardo. I social media per un nuovo rapporto cittadino-pa: nulla di fatto?*, cit. at 16, 241-263 (2020); M. Bombardelli, *La comunicazione nell'organizzazione amministrativa*, in G. Arena (ed.), *La funzione di comunicazione delle pubbliche amministrazioni* (2004) 89-101.

of services may be made by the provider[53].

Hypothetically, digitalization could turn out to be a factor contributing to equality between users, who would be reduced to IP addresses, thus insusceptible to disruption and equal treatment[54], during provision of the service.

Long-standing issue of digital divide, in some ways, is not relevant in the service execution phase but in the preceding phase of access to the service.

The question must therefore be put in another perspective, namely whether there might be a risk of unequal treatment in providing online services. The answer seems to be, at least at first sight, negative, since any violation of the principle of equality would not be inherent in *ratio legis* referred to above, i.e. the prohibitions placed on provider to discriminate on the basis of sex, race, language, religion and political opinions would not take place because the user is depersonalized behind a code.

Inequality is perceived in accessing the service, but there do not seem to be particular criticalities in delivery, because there are no grounds for different regimes and different choices by the provider, based on violations commonly deduced in enforcement phase.

It seems to be with a sense of favour towards digital public services, but on closer inspection it is not a question of lack of discrimination and infringements but of unconscious respect for a principle that must necessarily inform all relations in a democratic state, far beyond the issue of public services analyzed here.

It is important that citizens (i.e. users) expectations are taken into account in organizing and operating online services.

The relevance of expectations of citizen-user within organization and functioning of online services is intertwined with liability of the provider of online services with respect to users, in line with principle of equality between different service users, the ob-

[53] Cf. G. Amato, *Cittadinanza e pubblici servizi*, in Vv. Aa. (eds.), *Le istituzioni della democrazia* (2014), 235, 244; cf., in a similar perspective. C. Franchini, *Le principali questioni della disciplina dei servizi pubblici locali,* in Vv. Aa. (eds.), *Studi in onore di Leopoldo Mazzarolli* (vol. 2, 2007) 367-370

[54] On wider issue of relation between Internet and right to equality, see S. Rodotà, *Il diritto di avere diritti* (2015) 23, 77-81; G. De Minico, *Internet. Regole e anarchia* (2012), 35, 88-90; F. Giglioni, *Le garanzie degli utenti nei servizi pubblici locali*, cit. at 45, 365.

jective is long term and indiscriminate as it falls on responsibility of the provider who has a specific interest, therefore, to respect this assumption.

If, on one hand, the cited datum seems, fortunately, not to be surmountable, the question of digital divide risks severing this link with equality already upstream[55], since lack of access to digital services by users who do not own devices or access to networks appears to be an inadmissible violation and brings back the theme with respect to flawed Italian public policies, which have constantly advocated the unrealistic prospect of 'digital at zero cost'.

2.2 Impartiality in delivery and service continuity principle: undoubted advantages of digitalization

The Service Charter provides for impartiality and continuity of service as further criteria for service provision.

Impartiality is to be understood as an obligation imposed on the service provider, and individual clauses of general and specific service conditions and rules governing service provision are to be interpreted accordingly[56].

In relation to impartiality, even aforementioned conclusions on equality are confirmed, albeit with different paths and approaches, since system of public services provided in digital form does not have access to methods that could easily violate impartiality understood as operational equidistance with respect to all users[57].

[55] See G. Saraceni, *Digital divide e povertà*, 2 Dir. fond. 1-19 (2019).

[56] On this subject, the following interpretations should be noted L.R. Perfetti, *Miti e realtà nalla disciplina dei servizi pubblici locali*, 2 Dir. amm. 387-393, 396 (2006), on criticalities and an overly articulated system, which expands its problems, which are all too evident in the tendering phase, even into delivery phase; on specific aspects, but fully compliant, B. Giliberti, *L'amministrare in senso oggettivo tra libertà e funzione. Riflessioni a margine di un recente caso in materie di libere università*, 1 PA Persona e Amministrazione 71-80, 82 (2019); G. Piperata, *Tipicità e autonomia nei servizi pubblici locali* (2005) 112-122, 134; see, G. Montedoro, *Economia e società circolare: quali trasformazioni dello Stato e del diritto amministrativo?,* 1 Dir. soc. 175-181 (2020), how principles in general hold up in view of inevitable changes to which the State and public administrations are subjected.

[57] Similar to the general reflections made by A. Morrone, *Verso un'amministrazione democratica. Sui principi di imparzialità, buon andamento e pareggio di bilancio*, 2 Dir. amm. 381-390, 397-399 (2019); M. Avvisati, *Neutralità, imparzialità e azione amministrativa*, 12 Federalismi 15-20 (2020), impartiality

Moreover, Art. no. 1 of CAD itself provides that public administrations, in autonomously organizing their activities, shall use information and communication technology for achieving objectives, among others, of impartiality[58].

It is true that, in interpreting legislation, a conceptual solution has been sought by distinguishing between activities directed internally and externally to public administrations: internal impartiality would concern structure of public offices and resource management, whereas external impartiality[59] would concern relations between the public administration and private individuals, as well as between various public bodies.

The latter assumption obviously lends itself to application also within public service delivery and there is no reason to doubt that digitalization will not alter these balances. In line with the political and economic culture of New Public Management, providers are entities invested with certain public resources, the use of which they must account for to users of the services they offer.

Continuity of public service is guaranteed by digital technology, which obviously does not provide for schedules or limited

represents public administration's ability to operate objectively and equitably, thereby countering pressure from interests other than those institutionally entrusted with the exercise of function; S. Spuntarelli, *Il principio di legalità e il criterio di imparzialità nell'amministrare*, 1 Dir amm. 223-231 (2008); on the subject, in general terms, please refer to the unsurpassed work by U. Allegretti, *L'imparzialità amministrativa* (1965) 44-51.

[58] Cf. L. Casini, *Lo Stato nell'era di Google*, 4 Riv trim. dir. pubbl. 1111-1148 (2019); G.M. Racca, *La modellazione digitale per l'integrità, l'efficienza e l'innovazione nei contratti pubblici*, cit. at 11, 741 digitilazation and, conversely, delivery of public services allows for more analytical and effective assessments in pursuit of better quality design, with reduced costs and lead times; I.M. Delgado, *La riforma dell'amministrazione digitale: un'opportunità per ripensare la pubblica amministrazione*, in L. Torchia, S. Civitarese Matteucci (eds.), *La tecnificazione della publica amministrazione*, in L. Ferrara, D. Sorace (eds.), *A 150 anni dall'unificazione amministrativa italiana. Studi* (vol. 4, 2016) 133, 151-157.

[59] Although from a very sectoral perspective, the approach taken by S. Cognetti, *Parteneriato istituzionale e servizi alla persona. A proposito di "le fondazioni di diritto amministrativo: un nuovo modello" di Antonio Romano Tassone*, in Vv. Aa. (eds.), *Scritti in memoria di Antonio Romano Tassone* (vol. 1, 2018) 705-725; A. Moliterni, *Solidarietà e concorrenza nella disciplina dei servizi sociali*, 1 Riv. trim. dir. pubbl. 89-101, 103 (2015); C. Colosimo, *L'oggetto del contratto, tra tutela della concorrenza e pubblico interesse*, in G.D. Comporti (ed.), *Le gare pubbliche: il futuro di un modello* (2011) 65-83, 95-97; F. Di Porto, *Note sul regime giuridico delle privatizzazioni in Italia. In particolare nei servizi pubblici essenziali*, 6 Giur. comm. 738-750 (1999).

time windows but allows uninterrupted and substantially unlimited activity on the part of the provider, since telematic platform allows access to services, with direct contact between user and provider guaranteed by means of a more immediate platform, which undoubtedly brings users closer to services and makes them more easily accessible to all.

Expectations of users with regard to the public service pour into the operational continuity of the latter perhaps the most easily appreciated and perceived canon of service improvement, since digital space reduces time and guarantees an uninterrupted use, to which the public service is naturally entitled[60].

However, duty to guarantee a continuous and uninterrupted service is incumbent on providers, who may use digital system as a support for different phases (e.g. user assistance service), and it is generally considered that digital systems provide a formidable support for continuity of service.

In fact, delivery times would be guaranteed by digital perspective, which overcomes typical criticalities that lead to delays in public service delivery. This issue, of course, involves the extensive subject of the administration's compliance with time limits[61] and related expectations of private users in terms of legitimate expectations.

2.3 Broadening choice and deterritorialization of providers: favouring competition and risks for users

Dematerialization of services, wherever this is possible, opens the way to an unlimited number of subjects that can play a role as service providers, provided, however, that this favour has its effects more in antecedent phase, i.e. awarding phase, than in

[60] On this subject of service maintenance and digitalization, see T.A.R. Aosta, Sec. I, 3 August 2020, no. 34, 7-8 Foro amm. 1455 (2020); in general terms, on this subject, cf. M.L. Maddalena, *La digitalizzazione della vita dell'amministrazione e del processo*, 10 Foro amm. 2535-2556 (2016), institutional activity sees in digitalization a natural continuity of action imposed on it by law; more diffident, and one agrees with this approach, is the position taken by P. Piras, *Il tortuoso cammino verso un'amministrazione nativa digitale*, 1 Dir. inf. 43-55 (2020).

[61] In relation to healthcare, see S. Buoso, *Conciliazione dei tempi e continuità del servizio nella sanità*, 1 Lav. Dir. 51-69 (2020); F. Aperio Bella, *Tecnologie innovative nel settore salute tra scarsità delle risorse e differenziazione: alla ricerca di un equilibrio difficile*, 2 Federalismi 246-260 (2020); C. Bottari, *Profili innovativi del sistema sanitario* (2018) 34-45.

execution one.

However, as will be seen in section two of the survey, while dematerialization, on the one hand, promotes competition and thus facilitates users and administrations, on the other hand, there is a risk of systematic circumvention of competitive procedures, precisely because of the digital, immaterial and therefore 'unregulated' nature of such procedures.

Structural deconcentration may, however, lead to several risk areas, especially for users, who, in exchange for savings, may find a reduction in quality of services offered, obviously not in relation to essential public services. The tendency towards unrestricted accessibility (and therefore without controls) to public service markets entails inevitable risks, including in terms of judicial protection, which would seem to be thwarted by deregulation, but there are differing opinions on the subject.

Platforms conceal pitfalls for users, who may not find corresponding protection for a range of reasons, since competition, which tends to be unrestricted and therefore at risk of being unregulated, appears to be very much present in public services provided in digital form.

SECTION TWO: Health and transport services, possible scenarios of a digitally delivered service. Discontinuities and theoretical links with the ordinary legal regime

3. The national and regional health service: a permanently changing laboratory

In this second section of work, potential ways of systematically restructuring and rethinking public services due to digitalization are investigated, with reference to two strategic sectors, health and public transport, with some reference also to the pandemic and how it has or has not affected a path that seems to have been mapped out[62], but where there are still too many weak-

[62] A. Pioggia, *La lezione dell'epidemia di Covid-19 sul sistema sanitario e il suo ruolo*, Sp. Iss. Ist. fed. 17-22 (2020); with reference to tensions between pandemic and digitalization, cf. E. Sorrentino, *La sanità digitale in emergenza Covid-19. Uno sguardo al fascicolo sanitario elettronico*, 30 Federalismi 242-254 (2020); A. Pioggia, *Il decreto 'Rilancio'. Sanità e sicurezza [Speciale Covid-19]*, 5 Giorn. dir. amm. 561-567 (2020); on risk profiles and transposition into the digital space, see M.

nesses.

Application of new technologies, the use of constantly interconnected databases seems to acquire, in relation to the health service, peculiarities that allow to draw some important points of reflection and can bring improvements to a sector that in Italy has gone through several financial crises[63] - and whose consequences have been clearly visible precisely in the constant hustle and bustle of the administrative management of the pandemic - and that is in constant search of reforms and reference models to be inspired[64].

A digital rethink of the healthcare system implies investing in more efficient and transparent services, in new models of patient-oriented care, in long-term cost-savings for the healthcare system[65], and an adequate health system explained its importance during pandemic management, because a more efficient system imposed restrictive measures with less impact on the economy and the country system; at the same time, it means investing in a market that can act as a driving force for the nation's economic development[66].

D'Arienzo, *Problemi e prospettive del risk management nella sanità digitale: notazioni a margine della recente riforma della responsabilità medica*, in Vv. Aa. (eds.), *Scritti per Franco Gaetano Scoca* (vol. 1, 2020) 1415-1443.

[63] F. Saitta, *La nuova direzione delle Aziende sanitarie: piccoli passi verso un'autentica meritocrazia?*, 2 Dir. soc. 191-219 (2019); in a welfare perspective, cf. L. Torchia, *Sistemi di welfare e federalismo*, 4 Quad. cost. 713-740 (2002); the issue of the crisis in the Italian health sector is not recent, as demonstrated by the analysis carried out by F. Liguori, *Impresa privata e servizio sociale nella sanità riformata* (1996) 52-54, each health reform in Italian legal history has had to deal with inadequate organization and problems of financial achievement.

[64] In a cross-check perspective, see M. Arlotti, *Dati di sfondo. Il sistema sanitario italiano in prospettiva comparata*, 4 Pol. soc. 453 (2013).

[65] See M. D'Arienzo, *La salute ai tempi della "spending review": come conciliare il controllo della spesa sanitaria con l'effettività del diritto alla salute e della relativa tutela giurisdizionale*, 3 Dir. econ. 1083-1124 (2018), difficult balance between guaranteeing the service to be provided and spending limits.

[66] As noted during a meeting held in Rome in February 2016 (*Smart Health. L'innovazione digitale al servizio della salute*) on the topic of smart health in Italy, digital healthcare in Italy suffers from same critical issues that are faced by traditional healthcare, with a system fragmented from region to region and a constant battle with states of debt and economic crisis in the sector; on the issue, see L. Pinto, *Scenari eHealth: dalla dematerializzazione sanitaria all'approccio di cura "patient-centered"*, 1 San. pubbl. pri. 42 (2017), traditional e-healthcare system utilized by healthcare institutions all over the world is transitioning into a new

It should be noted that, already in 2014, Italy adopted the 'Pact for Digital Health' aimed at improving efficiency of national health service and implementation of a fair and sustainable health infrastructure system. These promises were punctually broken, and the vaccination campaign against Covid-19 shows once again that there is an administration that still thinks in paper form, records data on paper and then (eventually) transfers them to digital format.

In this survey there will be no mention of centralist or federalist tendencies, not because there would be no reason for it, there has already been mention of the need for centralism in order not to betray a digital uniformity[67] that already seems an unattainable objective.

Intuitively, health service plays a central role within reforms of a State, and for this reason a interconnected healthcare model can generate interesting considerations[68].

The implementation of a digital health model intercepts different issues that need to be addressed from two different perspectives.

The first is the perspective of the user, i.e. the patient, who relates to a completely interconnected and digital new healthcare system; from this point of view, the issue of privacy protection in consideration of the sensitive data involved when dealing with healthcare data is prevalent[69].

The second perspective is the one of firms that provide health services, in which values of competition[70] are involved,

interconnected and extended smart-healthcare system capable to solve undeniably complicated current situation of the healthcare sector.

[67] Cf. G. Pesce, *Digital first. Amministrazione digitale: genesi, sviluppi, prospettive* (2018) 10-12.

[68] See H. Dermikan, *A smart helathcare framework system*, 15 IT Prof. 38-41 (2018), a cost-effective and sustainable healthcare information system relies on the ability to collect, process, and transform healthcare data into information, knowledge, and action. However, in implementing such systems, healthcare providers face many complex and unique challenges.

[69] See R. Miccù, M. Ferrara, C. Ingenito, *La digitalizzazione dei servizi sanitari, il diritto alla salute e la tutela dei dati personali. Una introduzione*, 2 Federalismi 1-4 (2021) (Focus, La digitalizzazione dei servizi sanitari. Il diritto alla salute e la tutela dei dati personali); cf., also, M. Gola, *Brevi considerazioni sulla tutela della salute, tra etica e intelligenza artificiale: presente o futuro?*, in C. Bottari (ed.), *La salute del futuro. Prospettive e nuove sfide del diritto sanitario* (2020) 271-278.

[70] Cf. F. Liguori, *La concorrenza amministrata tra innovazioni legislative e resistenze*

with some specific features compared to other public services. Different ways in which public services are currently provided in Italy have to face the specificities of the health sector, where services provided are functional to right to health, constitutionally protected by Art. no. 32 Cost.

3.1 Digital perspective of health services, including sensitive data: the highest level of privacy protection

The perspective that requires a particular care on theme of a digital and interconnected management of health system is the one held by patients, whose health data, that are by their very nature sensitive, must be adequately protected in terms of privacy[71], an issue that is in antithesis with the one of continuous data management between public administrations (especially in the health sector).

It is opportune to operate a shared premise, according to which balance of interests (and in this part of the analysis, between efficiency of health system through interconnected databases and protection of patients privacy) cannot be solved by domestic law alone, because by its very nature the smart management of public services is a-territorial, and benefits and risks of this development have been previously analyzed (see *supra* par. § 2.3)[72].

In this respect, Regulation 2014/536/EU stated that the protection of citizens rights, safety, dignity and well-being takes precedence over other values, such as economic ones, in the field of clinical trials. This measure, if coordinated with the subsequent regulation designed to protect privacy, provides a general indica-

burocratiche, 7 San. Pubbl. 511 (1997).

[71] For a comprehensive analysis of data protection from a European perspective, see O. Lynskey, *The foundations of EU Data protection law* (2015) 43-47; from the perspective of Italian law, see, in the field of health and use of data, M. Falcone, *Le potenzialità conoscitive dei dati amministrativi nell'era della "rivoluzione dei dati": il caso delle politiche di eradicazione dell'epatite C*, 2 Ist. fed. 421-446 (2017).

[72] Cf. A. Barletta, *La tutela effettiva della privacy nello spazio giudiziario europeo e nel tempo della aterritorialità di internet*, 6 Eur. dir. priv. 1179 (2017); M.F. De Santis, *Ragionando su chi governa il mondo. Sabino Cassese e la global polity*, 6 Riv. it. dir. pubbl. com. 1463-1470 (2015); in a broader perspective, see S. Cassese, *Global standards for national democracies?*, 3-4 Riv. trim. dir. pubbl. 701 (2011); cf., in critical terms, M.R. Ferrarese, *Diritto sconfinato. Inventiva giuridica e spazi nel mondo globale* (2006) 66.

tion of the position of the European Union with regard to the protection of privacy with respect to other values, especially in the health sector[73].

It is undeniable that data and information circulation can be useful for treatment of diseases or for improvement of certain aspects of whole health service, as showed up by the Art. no. 47-*bis* of Decree Law 9 February 2012, no. 9 (converted, with amendments, into Law 4 April 2012, no. 35) according to which preservation of the medical report of the patient in digital form[74] can allow advantages in terms of accessibility; however, risks of an uncontrolled application of these technologies through which the use of health data could be used for profit or marketing purposes are also undisputed.

Another specific risk linked to an improper use of health data managed by interconnected databases are ones linked to a state of discrimination to which patients may be subject, related to the disease[75].

[73] S. Rodotà, *Il diritto di avere*, cit. at 54, 396, use of new technologies in the field of health experimentation requires the use of user data, which highlights the need to balance individual rights with the remarkable economic interests involved; L. Chieffi, *La tutela della riservatezza dei dati sensibili: le nuove frontiere europee*, 1 Federalismi 6 (2018), national and European law have a duty to guide the use of these new technologies to bring their use more closely into line with the rights of individuals; in general terms, see A. Paltrinieri, *Sanità e internet*, 6 Ragiusan 590-596 (2003); S. Battini, G. Vesperini, *Profili di tutela dell'utente nel settore sanitario*, 6 San. Pubbl. 637 (1997), on the subject of profiles of tusers protection within health service provision;.

[74] Please refer to L. Califano, *Fascicolo sanitario elettronico (FSE) e dossier sanitario. Il contributo del Garante privacy al bilanciamento tra diritto alla salute e diritto alla protezione dei dati personali*, 1 San. pubbl. pri. 12 (2015), Electronic Health File (*FSE* in Italian) is the tool through which citizens can trace, consult and share their health history. The *ESF* manages all the data and digital documents of a health and social-health nature generated by present and past clinical events of the patient. It has a time horizon that covers the entire life of the patient and is constituted, with prior consent, by the Regions and Autonomous Provinces for the purposes of prevention, diagnosis, treatment and rehabilitation pursued by the subjects of the National Health Service and the regional health and social services that take care of the patient; R. Acciai, *La tutela della privacy ed il S.s.n.*, 1 Ragisan 20 (2003); P. Guarda, *Ok Google, am I sick?: Artificial Intelligence, E-Health and Data Protection Regulation*, 1 Riv. Biodir. 359-378 (2019).

[75] Cf. A.L. Hoffman, *Where fairness fails: data, algorithms, and the limits of antidiscrimination discourse*, 22 Inf. Com. tech. 900-915 (2019); D.T. Young, *How do*

The increasing use of IT tools by all healthcare professionals to support all (or almost all) electronic treatment pathways and greater interoperability of data raises sensitive issues, such as the need to protect such records from misuse by a variety of actors.

In 2016, National Bioethics Committee drew a document in which it stated, in view of appropriate use of data, that it is necessary to define responsibility of provider and verify the quality of the data and transparency of algorithms used, because use of data, from the perspective of the patient, can bring about significant innovations in the medical field[76].

The whole issue related to patients privacy in terms of digital and interconnected health care, must take into account that the concept of e-health which contains many different tools, the use of which endangers the right to privacy at different intensities[77].

Difficulty in identifying individually the e-health devices that could undermine value of privacy, European legislator has chosen to operate from another perspective, namely from the widening of the notion of health data.

In this sense, recital no. 35 of Regulation 2016/679/EU states that personal data concerning health "should include all data pertaining to the health status of a data subject which reveal

youmeasure a Constitutional moment? Using algorithmic topic modeling to evaluate Bruce Ackerman's theory of Consititutional change, 122 Yal. L. Jour. 122-131 (2013).

[76] Comitato Nazionale per la Bioetica, *Tecnologie dell'informazione e della comunicazione e Big Data: profili bioetici*, avaiable at www.bioetica.governo.it (2016) 7-10, in particular, relevant development paths in the field of health are outlined with the so-called 'Data-driven precision medicine', i.e. the possibility – which is still the subject of study and research and at the moment cannot be extended to all aspects of biology and medicine – to build on the basis of the amount of data collected predictions and simulations of diagnosis and treatment for individual patients in specific contexts or for stratified groups of patients, but also possibly extended to the definition of health policies for public health, in particular preventive type of preventive medicine or precision medicine, but also possibly extended to the definition of public health policies; in the opposite direction, on the possible failures of this system, see P. Savona, *Administrative Decision-Making after the Big Data Revolution*, 19 Federalismi 19-21 (2018), "In data mining and data matching decisions (also named data-driven decisions) the inputs may be a relevant source of errors as well, since such decision result from the processing of large amounts of unverified data, which may easily be incorrect".

[77] For a survey of these tools, see L. Chieffi, *La tutela della riservatezza dei dati sensibili: le nuove frontiere europee,* cit. at 73, 8-11.

information relating to past, current or future physical or mental health status of data subject. This includes information about natural person collected in the course of the registration for, or the provision of, health care services[78]".

The position of European legislator appears evident, since it extends concept of health data to any element capable of revealing the state of health of individuals in order to protect the subject from external interference.

However, on the other hand, use of health data can lead to clear improvements in treatment of diseases, in definition of appropriate strategies by state health government bodies, to implement a whole digitalized management of the health system, both at European, national and local level. Obviously, and again management of Covid-19 revealed this criticality, data input was sometimes incorrect, sometimes there was a suspicion that the data was not reliable because it had been altered, resulting in an obvious continuous rush[79].

[78] Moreover, recital no. 35 includes among the health data, and consequently particularly sensitive, "a number, symbol or particular assigned to a natural person to uniquely identify the natural person for health purposes; information derived from the testing or examination of a body part or bodily substance, including from genetic data and biological samples; and any information on, for example, a disease, disability, disease risk, medical history, clinical treatment or the physiological or biomedical state of the data subject independent of its source, for example from a physician or other health professional, a hospital, a medical device or an in vitro diagnostic test". The Regulation also refers to the genetic data defined in recital no. 34 as follows, "Genetic data should be defined as personal data relating to the inherited or acquired genetic characteristics of a natural person which result from the analysis of a biological sample from the natural person in question, in particular chromosomal, deoxyribonucleic acid (*DNA*) or ribonucleic acid (*RNA*) analysis, or from the analysis of another element enabling equivalent information to be obtained"; genetic data are ultra-sensitive and require enhanced protection and the balance in terms of access to such information can only be achieved with a imminent public health or safety concern; please refer to C. Fanuele, *Il regolamento attuativo della banca dati nazionale del DNA: nuove garanzie e persistenti vuoti di tutela*, 1 Proc. pen. Giust. 11 (2017); E. Stefanini, *La circolazione dei dati genetici tra vecchi diritti e nuove sfide*, in C. Casonato, C. Piciocchi, P. Veronesi (eds.), *I dati genetici nel biodiritto* (2009) 112-115; P. Fattorini, C. Previderè, *La complessità in genetica-forense: l'analisi di DNA in limitata quantità ("Low Copy Number DNA") e l'interpretazione di tracce commiste*, 1 Riv. it. Med. Leg. 179-182 (2016).

[79] On critical aspects during Covid, also in relation to privacy issues, see F. Vari, F. Piergentili, *"To no other end, but the..safety, and public good of the people": le limi-*

The balance between values involved is not easy and it would be necessary to make an analysis by categories of data, because even the expression 'health data' is too vague and generic. However, it is possible to try to identify some cardinal points in a field that is constantly evolving and for this reason unstable in terms of achieved balances.

In this respect, Italian Privacy Guarantor has provided interesting and useful guidelines for the analysis carried out.

First of all, already in 2016, Privacy Guarantor established that the use of health data through ICTs must be carried out reducing to a minimum the invasive effects on personal sphere, in compliance with the principles of purpose, necessity, proportionality and not excess[80].

In this measure, the privacy protection authority states that health data can be managed through computer systems in accordance with the four parameters mentioned. A cross-reference of these parameters makes it possible to state that it is necessary to demonstrate that the re-use of health data can lead to results (in any field) that would not be achievable without them[81].

tazioni alla protezione dei dati personali per contenere la pandemia di Covid-19, 1 Rivista AIC 328-334 (2021); A. Lucarelli, *Costituzione, fonti del diritto ed emergenza sanitaria*, 2 Rivista AIC 558-569, 571 (2020); C. Bergonzini, *Non solo privacy. Pandemia, contact tracing e diritti fondamentali*, 2 Dir. fond. 704-714 (2020); F. Filosa, *Il diritto alla privacy nello stato di emergenza. Riflessioni sull'applicazione della telemedicina quale possibile tecnologia per contrastare la diffusione del Covid-19*, 2 Dir. fond. 847-869 (2020); E. Calò, *Perché l'emergenza sanitaria dell'epidemia Covid-19 è anche un'emergenza giuridica*, 3 Notar. 258-260 (2020); S. Whitelaw et al., *Applications of digital technology in Covid-19 pandemic planning and response*, 4 Lancet 435-440 (2020).

[80] Garante Privacy, aut. 15 December 2016, no. 8, register of provisions no. 530/2016, avaiable at www.garanteprivacy.it (2016), with regard to genetic data, there is a ban on dissemination for research purposes, which is only allowed in aggregate form or in a manner that does not make the data holder recognizable; see L. Califano, *Il trattamento dei dati genetici: finalità di ricerca, esigenza di sicurezza e diritto alla protezione dei dati personali*, in Vv. Aa. (eds.), *Cultura giuridica e diritto vivente* (2017) 4-8; S. Rodotà, *Dati genetici: un piano per rafforzare la tutela*, avaiable at www.garanteprivacy.it (2004), genetic data, apart from requiring reinforced protection because of their very delicacy, pose very particular management and collection problems. Behind the increase of genetic tests and the exponential growth of this type of analysis there is the strong pressure of commercial interests from market and it is necessary to develop a strong social awareness in order not to risk serious consequences for privacy.

[81] Please refer to the authoratative position held by S. Rodotà, *Privacy e costru-*

More recently, the Privacy Guarantor has provided essential guidance on the discipline for the treatment of health data under Regulation 2016/679/EU.

In particular, it is stated that the treatment of health data is allowed for reasons of relevant public interest on the basis of Union or Member State law, for reasons of public interest in the field of public health[82] and for the purpose of preventive medicine, diagnosis, health or social care or therapy or the management of health or social systems and services (i.e. treatment purposes).

In these hypotheses, balance is operated in direction of allowing data to be processed, since need to ensure re-use is prevalent compared to the protection of privacy, even if in such a delicate field as health data.

Apart from the three hypotheses described above, in which processing of data can be carried out without the consent of the individual, there are other cases in which processing is permitted but is subordinate to the consent of the private individual[83].

Specifically, for the issue of smart management of health care, this category includes treatments connected to the use of medical Apps, through which independent owners collect data, including health care data of the person concerned, for purposes different from the so-called 'telemedicine'.

From this point of view, it seems that both the European legislator and the National Privacy Guarantor have preferred to protect privacy with respect to the development of digital (i.e.

zione della sfera privata. Ipotesi e prospettive, 3-4 Pol. dir. 534-541, 544 (1991); insights are also provided by *Data Protection Commissioner vs. Facebook Ireland Ltd*, 134 Harv. L. Rev. 1567 (2021).

[82] This means protection against serious cross-border threats to health or ensuring high standards of quality and safety of healthcare and of medicinal products and medical devices, on the basis of Union or Member State law providing for appropriate and specific measures to protect the rights and freedoms of the person concerned, in particular professional secrecy.

[83] L. Aulino, *Consenso al trattamento dei dati e carenza di consapevolezza: il legal design come un rimedio ex ante*, 2 Dir. inf. 303-312 (2020), patient consent is necessary for treatments aimed at customer loyalty in order to benefit from services or ancillary services, related to the pharmaceutical and health sector, additional to the activities of pharmaceutical assistance traditionally carried out by public and private territorial pharmacies within the National Health Service, for treatments carried out in the health field by private legal entities for promotional or commercial purposes, for treatments carried out by health professionals for commercial or electoral purposes.

smart) management models of health data.

The question is clearly wide-ranging and difficult to define in a theoretical way, since it would be necessary to carry out a case-by-case analysis. However, it is appropriate to try to set some minimum features, the cardinal points within which to confine the reflections.

Using of data (and, in the case analysed, of health data) to be used as the basis for the improvement of health system in its various aspects (research, provision of health services, efficiency of the system) has found in the development of technologies a formidable support; these continuous evolutions have induced the legislator (both European and Italian) to pass from a static protection of the right to privacy, to a dynamic protection[84], which must change quickly to be able to adapt itself to social and technological changes that can undermine the right to confidentiality of citizens.

Authoritative scholars of Italian public law, in support of the protection of privacy have attempted to amplify the notion of informational self-determination of the individual through the use of the notion of human dignity[85]. Moreover, these dating but shareable interpretations have been incorporated into various legislative texts, as evidenced by Art. no. 1 of the EU Charter of Fundamental Rights, which was later incorporated into the Treaty of Lisbon.

Application of the principle of human dignity highlights the interpretative impulse to protect the rights of the person (specifically privacy) against sources of discrimination and danger from which a violation of the principle of equality could derive, presided over by Art. no. 3 of Constitution.

Argumentative paths just outlined does not open the door to interpretations or balances other than the one that emphasize the protection of the value of privacy, especially by virtue of the reference to Art. no. 3 and the principle of equality.

On the basis of this analysis, there is no balance to be made, because the right to self-determination of the individual in order

[84] Please refer to T.E. Frosini, *Liberté, Egalité, Internet* (2015) 12-22.

[85] See the resarch made by G.M. Flick, *Elogio della dignità (se non ora, quando?*), 4 Pol. dir. 530 (2014); A. Ruggieri, A. Spadaro, *Dignità dell'uomo dell'uomo e giurisprudenza costituzionale (prime annotazioni)*, 3-4 Pol. dir. 344-351 (1991); L. Chieffi, *La tutela della riservatezza dei dati sensibili: le nuove frontiere europee,* cit. at 73, 23-26.

to protect him from states of subjection and degradation due to the diffusion of data that reveal the most intimate characteristics must be fully protected.

The relationship that is identified between the protection of privacy and human dignity as a constitutionally guaranteed value cannot be compromised by any other requirement, since maintenance of control of data flow is linked to primary constitutional values, such as the principle of equality, inviolable and not susceptible to be compressed.

However, it should be noted that this interpretative approach is a principled one and may be subject to derogations in individual cases where the right to confidentiality has been sacrificed in balancing other values[86].

Currently, and this speech seems to be valid both for European and Italian context, there are no legislative and organizational conditions (regarding tools of public administration) to implement a smart management of health, which can manage health data for an overall improvement of the health service.

Right to confidentiality of data as sensitive as health ones does not allow balances with other values, such as the improvement of the health service or research for treatments of unidentified diseases. The right to privacy of health data is guaranteed by Art. no. 3 of the Constitution, which guarantees individuals sovereignty and self-determination over the use of their own sensitive data, as authoritatively defined as electronic self-determination[87].

Attempts aimed at restricting access to sensitive data only

[86] Please refer to T.A.R. Emilia-Romagna, Bologna, Sec. I, 20 November 2017, no. 760, 11 Foro amm. 2300 (2017), right to access prevails over right to confidentiality, even if requests for disclosure concern documents relating to so-called ultra-sensitive data, such as, for example, those to disclose the state of health of the subject to whom the request for access is addressed, in the event that the interest that moves the applicant for access is at least equal in rank to that of the subject who intends to keep his own data confidential.

[87] S. Rodotà, *Il mondo nella rete. Quali diritti, quali vincoli* (2014) 33-37; in the opposite direction, please refer to S. Baker et al., *Internet of things for smart healthcare: technologies, challanges and opportunities*, 99 IEEE Access 3 (2017), "there are relatively few disadvantages of remote health monitoring. The most significant disadvantages include the security risk that comes with having large amounts of sensitive data stored in a single database", but "as progress continues to be made to reduce the disadvantages, IoT-based systems for remote health monitoring are becoming an increasingly viable solution for the provision of healthcare in the near future".

for medical and therapeutic needs or in a state of need related to public health reasons, through encrypted forms or authentications that separate health data from personal data, should be accompanied by a specific discipline.

In conclusion, it seems appropriate to try to draw some critical input, with the necessary warning that the continuous and sudden mutability of the theme makes it difficult to establish unchangeable criteria.

It may be unnecessary to try to outline possible solutions in a abstract way, as it is appropriate to assess the possibility of managing health data according to the objectives to be achieved, which may differ one from another, such as medical research requirements, the management of the public health service or even requirements for judicial protection.

Recital no. 52 of Regulation 2016/679/EU states that "derogating from the prohibition on processing special categories of personal data should also be allowed when provided for in Union or Member State law and subject to suitable safeguards, so as to protect personal data and other fundamental rights, where it is in the public interest to do so, in particular processing personal data in the field of employment law, social protection law including pensions and for health security, monitoring and alert purposes, the prevention or control of communicable diseases and other serious threats to health. Such a derogation may be made for health purposes, including public health and the management of health-care services, especially in order to ensure the quality and cost-effectiveness of the procedures used for settling claims for benefits and services in the health insurance system, or for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes".

The part of recital which provides for the management of health data for "health purposes, including public health and the management of health-care services, especially in order to ensure the quality and cost-effectiveness of the procedures" seems to make an indirect reference to a smart management of the health service based on personal data.

It is necessary to be prudent on this issue, since, on the one hand, the European regulation aimed to standardise European legislation on the processing of sensitive data (and specifically health data), and, on the other hand, the Italian legislator, assisted

by the guarantor of privacy, had already arrived at an advanced model of protection.

An hypothesis of a totally smart and wired healthcare system management model, which can bring improvements both in the management of healthcare treatments and in the governance of the public healthcare service itself, seems still far from being outlined, since to date the protection of such data from abuse and interference by private individuals (e.g. from profit-making companies) must be a priority.

3.2 Digital health services, role of administrations and business attitude: free competition and benefits for the entire system

Conclusions just drawn regarding the re-use of health data (and therefore sensitive) of users in order to hypothesize a model of smart management of health service cannot be used in the construction of an interconnected health care network, from the perspective of the administrations and companies that provide health services[88].

However, conclusions reached in the first part of this analysis regarding quality of services to be provided to citizens, find in essential services, such as the health service, a particular declination with precise obligations and precise declination of users' rights.

Main research trace for lawyers moves from the relationship between the user and health data, ultra-sensitive by nature, and moves into the perspective of the provision of health service, in the perspective of the relationship between administration, business and patient, which remains the final receiver, involving issues such as free competition, equal treatment between economic operators, but always in relation to a particular public service, which has undergone numerous reforms over years, but which here must be analyzed from a renewed perspective, to try to identify a legislative path for the provision in smart form of certain health services, analyzing the critical issues raised by this

[88] Cf. C. Acocella, *Modelli organizzativi e gestionali dei servizi sociali e sanitari e logiche di mercato*, in F. Liguori, C. Acocella (eds.), *Liberalizzazioni. Isituzioni, dinamiche economiche e lavoro nel diritto nazionale ed europeo* (2015) 63-69; C. Miglioli, *La dimensione europea della sanità, fra integrazione e confini nazionali*, 2 Riv. it. pol. pubbl. 147-155 (2009).

landing, so far still only hypothetical.

Management of an interconnected public service, based on data released by companies that provide same services, raises completely different issues, which must be addressed in accordance with the rules on the award and disbursement of public services (health, in this case) and necessary protection of free competition.

In this sense, Big Data analytics is also used in market regulation; the so-called cognitive regulation is a particular type of regulation based on the processing, with methods of Big Data analytics, of the opinions and behaviours of market operators and that, improving the knowledge of independent authorities, allows them to choose soft regulatory options, which do not impose behaviour, but try to induce market operators to assume certain on the basis of the evaluation of such data[89].

In addition, to making general or timely decisions, Big Data analytics is also used in public administrations to improve the efficiency and effectiveness of the services they provide, both from an organizational point of view and from a performance point of view, particularly within health services[90].

In this analysis, not all issues related to the management and provision of health services can be investigated, but specific references will be made to circumstances that must be analyzed according to the main line of research. In this sense, it seems appropriate to try to delineate the theme and analyze current forms that can be considered models of digital health care and verify their compatibility with some key aspects of Italian administrative law.

Before investigating central issue of digital management of the health service as a whole, it is necessary to make two necessary preliminary remarks.

First of all (and this also applies to what will be said in rela-

[89] Please refer to M. Ramajoli, *"Regulation by information": diffusione della conoscenza del rischio e incertezza scientifica*, 2 Giorn. dir. amm. 201-211 (2020); B. Guy, *Governance without government? Rethinking public administration*, 8 Journ. Pub. Ad. Theo. 223-243 (1998).

[90] B. Bekermeier, *Challengers and lessons learned in promoting adption of standardized local public health service delivery data through the application ofthe Publc Health Activities and Services tracking model*, 26 Journ. Amer. Med. Inf. Ass. 1660-1663 (2019).

tion to the public transport sector), public services sector in Italian legal system is, as noted in an authoritative manner, unstable[91], since it is characterised by continuous legislative changes that do not allow permanent solutions to be found. In this report, it is not possible to account for such a complex and articulated issue, which requires targeted and articulated analyses. The current situation has been made even more unstable by pandemic disease Covid-19, for which there are temporary derogations, *ad hoc* rules, which have also had a major impact on public services.

The choice linked to the survey of Italian health system is explained by several reasons[92].

Before all else, because the health service plays an intuitive central role in the development of any legal system, for the primary needs to which it responds and for the high cost of the organization[93]. An essential service, in the Italian context continually subjected to economic pressures and changes in management on the basis of political choices. Pandemic, perhaps in the excesses of management, has shown this to be the case.

Secondly, because health sector has been the testing ground for many reforms adopted in field of Italian public administration, even though these choices have often been characterised by a

[91] The adjective unstable was used by F. Merusi, *I servizi pubblici*, cit. at 36, 34-41.

[92] See A. Pioggia, *Di cosa parliamo quando parliamo di diritto alla salute*, 1 Ist. fed. 293-299 (2013), right to health in Italian system, since its constitutional sanction, has been placed as a site of intersection between different pressures, involving the person and his relationship with the medical professional, with the administration, with society, which affect the relationship between business and workers rights, concerning the choices of allocation of public resources, decisions on the organization of the administration, individual freedom and responsibility. For this reason it is a right that is more affected than others by social, cultural and legal changes and that stimulates a continuous confrontation on its nature and its content, which evolves not only with the science that deals with it, but also and especially with the society in which it settles.

[93] In this respect, the following considerations are current G.M. Racca, *La professionalità nei contratti pubblici della sanità: centrali di committenza e accordi quadro*, 9-10 Foro amm. CDS 1727-1735 (2010), there is a widespread belief that the costs of the national health service must be reduced and to ensure high levels of health protection and address new expenditures a profound rationalization of health spending as a whole is necessary; cf. F. Merusi, *I servizi pubblici negli anni '80*, in *Il diritto amministrativo degli anni '80. Atti del XXX Convegno di Studi di scienza dell'amministrazione, Varenna - Villa Monastero 20-22 settembre 1984* (1987) 151-155, the right to provision of a health service is not absolute, but is financially conditioned.

good deal of improvisation[94]. Public services have been the workshop for federalist, centralist, public spending and differentiated management experiments, which have not always been successful, with all the criticalities that emerged clearly during the management of the Covid-19 pandemic emergency.

Demand and supply of health services historically reveal in the Italian experience an inefficient market model that requires the intervention of public authorities[95].

Dealing with innovation in relation to health purchasing policy means balancing a number of principles that are difficult to combine[96]. The whole analysis carried out must take into account the expenditure limits imposed at both national and European

[94] Cf., in relation to a very specific circumstance from which fundamental elements and interpretations can be derived, F. Bosetti, *Stato, carità solidarietà nella storia della protezione dalle malattie contagiose*, 10 Giur. it. 2302-2309 (2020); G. Pagliari, *Libertà, autonomia privata e utilità sociale. Una riflessione problematica*, in G. Leone (ed.), *Scritti in memoria di Giuseppe Abbamonte* (vol. 2, 2019) 1123-1131; G. Greco, *Servizi sociali e disciplina della concorrenza: dalla esclusione alla (possibile) eccezione*, 5-6 Riv. Dir. comm. Int. 822-825 (2015); S. Civitarese Matteucci, *Servizi sanitari, mercato e modello sociale europeo*, 1 Merc. Conc. reg. 179-185, 189-194 (2009); G.F. Cartei, *Servizi sociali e regole di concorrenza*, in Vv. Aa. (eds.), *Studi in onore di Leopoldo Mazzarolli* (vol. 2, 2007) 253-261, the social term of the service can serve as a parameter for controlling and reviewing the value of competition, both from the perspective of the administration and of the company; A. Romano Tassone, *L'azienda sanitaria tra democrazia e tecnocrazia*, 4 San. pubbl. 389 (1997); F. Liguori, *Impresa privata e servizio sociale nella sanità riformata*, cit. at 63, 246; G. Cazzola, *Lo stato sociale tra crisi e riforme: il caso Italia* (1994) 150-159; G. Rossi, *Enti pubblici associativi. Aspetti del rapporto tra gruppi sociali e pubblico potere* (1979) 53-58.

[95] For a dated but current analysis on the subject, please refer to I. Ciolli, *La salute come diritto in movimento. Eguaglianza, universalismo ed equità nel sistema sanitario nazionale, oggi,* 2 Biol. Journ. 13 -33 (2019), one of the major failures, not yet resolved, concerns fragmented financing of the health service. The results achieved with the various reforms are partial and unsatisfactory, as they were achieved with short-sighted health policies that were not aimed at long-term analysis; T. Frittelli, *Spunti di riflessione sul sistema di finanziamento del Servizio Sanitario Nazionale*, 21 Federalismi 1-16 (2018); M. D'Angelosante, *Strumenti di controllo della spesa e concorrenza nll'organizzazione del servizio sanitario in Italia* (2013) 81-167.

[96] L. Giani, *Spunti per la costruzione di una cultura dell'innovazione negli appalti in sanità*, 2 Nuove Aut. 205-221 (2018), reforms in the healthcare sector in Italy have been drafted in the prism of rationalization, constantly seeking a balance between healthcare provision in compliance with Art. no. 32 of the Constitution and budget stability.

level.

As clearly reported, "e-healthcare may be defined as the health care practice supported by electronic devices and communication, including a broad range of health care systems such as electronic medical records (*EMR*), electronic prescriptions (*EPS*), healthcare knowledge management (*HKM*), and remote monitoring. Its implementation in medical care is essential for high quality and cost-effective healthcare services, prevention of medical errors, improving healthcare staff performance and physician efficiency, and a better physician-patient relationship[97]".

Before dealing with the problematic issues related to the subject under investigation, it is appropriate to give an account of different tools that can be used in smart healthcare. The analysis will be limited to digital healthcare tools that can bring improvements to entire service governance, without taking into account technologies that start from the patient's data and are aimed at more properly therapeutic purposes.

The topic concerns different models of *PSS* (Product System Service), that refer to an integrated product and service offering that delivers value in use, where both the product and the service are considered as one single offering. *PSS* models are based on a service offered on the basis of results-oriented and patient-oriented principles, a service provided from bottom up, starting from users needs[98].

[97] D. Miorandi, S. Sicari, F. De Pellegrini, I. Chlamtac, *Internet of things: vision, application and research challanges*, (conference paper) (2012) 4-8, "the real-time data acquisition from the physical world will lead to the introduction of various novel business services and may deliver substantial economic and social benefits. In healthcare IoT technology makes possible to collect data from smart items anywhere and anytime facilitating better decision-making capabilities focused on empowering patients in prevention and treatment of disease. IoT may bring a wide range of opportunities and benefits to healthcare system improving quality of care tracking patient's daily activities, food intake, and physiological parameters helpful for medical diagnoses, treatment regimens and medical care. Thus, improves efficiency while reduces cost".

[98] D. Opresnik, *Information. The hidden value of servitization* (2013) 49-55, an important feature of smart items lie in their capability to enhance informatization i.e. information which can be exploited and transmitted through servitization, or what is the same information as a service; T.S. Baines et al., *State of the art in product-service systems. Proceedings of the institution of mechanical engineers*, 10 Jour Mech. Eng. 1543-1564 (2013) this term refers to a major business transformation where companies 'shift' from selling products to selling an integrated

The first e-health tool, also in terms of impact, is *WSN* (Wireless Sensor Network), an intelligent network application system that autonomously collect, integrate and transmit data by incorporating latest technological achievements in micro-electronics, network and communications.

Beyond the execution modalities of this model, its implementation may bring important benefits for healthcare staff such as timely information, information accuracy, system usability (i.e. confident in performing), reduced costs, and high user satisfaction followed by a higher quality of service perceived by patients[99].

Another model that can be traced back to the pattern of *PSS* is *RFID* (Radio Frequency IDentification), which utilizes radio waves for collecting and transferring data, with the capability of sending and receiving information without human involvement. This technology has been widely adopted on the Supply Chain Management (*SCM*) domains mostly for logistic services[100].

Apart from *PSS* models, one template to analyze is cloud computing, "a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources that can be rapidly provisioned and released with minimal management effort or service provider interaction[101]". This new paradigm is transforming rapidly the way IT infrastructure is being delivered and consumed offering users and businesses computing resources designed and governed in form of services, reclassifying IT from an expensive capital expenditure to a pay-as-you-go operating expenditure, where the Cloud Service Provider (*CSP*) is the one who maintain and manage all comput-

combination of products and services that deliver value in use.

[99] For an economic analysis of health services (specifically on the Grossman model), cf. M. Grossman, *On the concept of health capital and the demand for health*, 80 Jour. Pol. Ec. 223-227 (1972).

[100] It was primarily adopted by healthcare institutions for the elimination of paper-based mechanisms, reduction of medical errors, and patient waiting time. Over time, its usage spread vastly towards new services such as inpatient drug delivery, blood identification, and equipment tracking. Its adoption have also extended the scope of healthcare services, nowadays is possible to use smartphones with *RFID*-sensor capabilities as a platform for monitoring of medical parameters, a new technological branch of e-Health now commonly referred to as m-Health.

[101] P. Mell, T. Grance, *Effectively and securely using the cloud computing paradigm* (2nd ed., 2009) 44-56.

ing resources that are offered to the end user under form of services, relieving end-users from acquiring and hosting hardware and software resources.

In other words, "by adopting cloud computing healthcare institutions may focus more on increasing quality of delivered healthcare instead of managing their own IT, reducing or even eliminating the high-cost of technical departments to support and operate the in-house infrastructures".

The new e-healthcare landscape empowered by integration of *WSN-RFID* items and cloud computing allows to collect, process, and store high volume of sensitive patient information on a timely basis. Once collected, healthcare institutions may use informations provided in form of health parameters to enhance existing services and offer new ones. This type of services is called embedded or these services, and are successful at creating a competitive advantage, and accelerating service innovation[102].

Beyond the differences between two patterns outlined (*PSS* and cloud computing), the new e-healthcare landscape empowered by the integration of *WSN-RFID* items and cloud computing allows to collect, process, and store high volume of sensitive patient information on a timely basis. Once collected, healthcare institutions may use the information provided in form of health parameters to enhance existing services and offer new ones. This type of services is called embedded or smart services, and are successful at creating a competitive advantage, and accelerating service innovation.

After having outlined these institutions as digital health care models, not in an exhaustive manner, it is necessary to assess the profile of compatibility with general principles of Italian administrative law in terms of entrustment and management of the health service. Obviously, in this study it is not possible to carry out a complete review of such a vast subject from a legal literature point of view as the entrustment of health services, but it is outlined a key to provide some food for thought based on determined specific aspects.

It should be noted that the term health service includes a

[102] On this subject, in general terms, including on public service parameters and related quality of service offered to users, cf. G. Sgueo, *Punteggi, classifiche, premi: è possibile giocare con le politiche pubbliche?*, 2 Riv. trim. dir. pubbl. 591-611 (2019).

very high number of services, including for example medical transport, cleaning and security service, the canteen service. Following remarks do not take into account the differences between the different services to be entrusted, but look at health system as an essential service as a whole, to be provided to the user.

The public interests that arise in a potential model of renewed idea of healthcare system are several, but are not dissimilar from those that emerge in the management of the public service provided in the traditional way but perhaps need to be balanced in a different way.

Firstly, the health service must be provided in accordance with the provisions of Art. No. 32 of the Constitution, which protects health not only as a fundamental right of the individual, but as an interest of the community[103].

Secondly, and closely linked to the issue of health protection referred to in referred Art. no. 32, there are the essential levels of care (namely *LEA*), i.e. the minimum standards of assistance that the health service must guarantee[104]; compliance with these levels must be respected regardless of the mode of delivery of the public service chosen.

Of course, the value of the optimal performance of service

[103] In a classical meaning on the subject see C. Mortati, *La tutela della salute nella Costituzione Italiana*, 1 Riv. mal. Inf. Prof. 2 (1961) 2, now in *Scritti. Problemi di diritto pubblico nell'attuale esperienza costituzionale repubblicana* (vol. 3, 1972); F. Bocchini, *Salute e sanità tra solidarietà e responsabilità*, 1 Contr. impr. 126-132 (2018); C. Bottari, *Il diritto alla tutela della salute*, in P. Ridola, R. Nania (eds.), *I diritti costituzionali* (vol. 2, 2006) 1100-1121; B. Pezzini, *Il diritto alla salute: profili costituzionali*, 1 Dir. soc. 21-24 (1983); M. Luciani, *Il diritto costituzionale alla salute*, 4 Dir. soc. 769 (1980); M. Bessone, E. Roppo, *Diritto soggettivo alla salute, applicabilità dell'art. 32 Cost. ed evoluzione della giurisprudenza*, 4 Pol. dir. 766-771 (1974).

[104] See www.salute.gov.it/portale/lea (2017), Decree of the President of the Council of Ministers issued on 12 January 2017 established the minimum levels of medical care to be guaranteed, defined the activities, services and performances guaranteed to citizens with the public resources made available to the National Health Service and above all divided three main levels to be respected. The first level corresponds to collective prevention and public health, the second level corresponds to district assistance, i.e. healthcare and social services spread throughout the territory and the third to hospital activity. In order to ensure the continuous, systematic updating, on clear rules and scientifically valid criteria, of the essential levels of care, the National Commission for the updating of the *LEAs* and the promotion of appropriateness in the National Health Service has been established.

and respect for the value of free competition are in evidence. These values, of course, refer to the complex relationship between administration and market[105] - because interposition of data collection and processing tools operated by private parties requires a redefinition of standards - which could be interpreted differently, since a digital handling of the health service would involve a less invasive role of the administration[106].

In conclusion, it emerges interests of private subject to protect data held by private companies, a sort of right to privacy of corporate companies that can be declined in different rights, such as, for example, the right to the protection of the industrial secret[107].

In this sense, it is possible to share the leading reflection according to which there are certain social values that must induce the administration to adopt certain corrective measures for the market[108], that must follow its own rules.

[105] The subject has been addressed by many authoritative scholars of public law, without pretending to be exhaustive, it is mentioned the contributions that have had a decisive impact on the investigation, F. Trimarchi Banfi, *Il principio di concorrenza: proprietà e fondamento*, 1 Dir. amm. 15-28 (2013), the achievement of competitive conditions increases efficiency, public interventions can distort the functioning of markets in a negative sense. The contrast between economic growth and equity expresses the relationship between the way in which the public powers act and effects in terms of growth; M. D'Alberti, *Poteri pubblici mercato e globalizzazione* (2008) 69-74; A. Police, *Tutela della concorrenza e pubblici poteri: profili di diritto amministrativo nella disciplina antitrust* (2007) 2-11; U. Pototschnig, *Poteri pubblici e attività produttive*, 1 Dir. econ. 40-44 (1990); M. D'Alberti, *Libera concorrenza e diritto amministrativo*, cit. at 28, 350; G. Corso, *Riflessioni su amministrazione e mercato*, cit. at 35, 4; S. Cassese, *Stato e mercato, dopo privatizzazione e deregulation*, 2 Riv. trim. dir. pubbl. 378-390 (1991).

[106] Please refer to R. Chieppa, *Tutela della salute e concorrenza*, 1 San. pubbl. pri. 5-7 (2017); again with reference to vaccination status, see R. Danelli, *In attesa di un vaccino per il Covid-19: una valutazione del peculiare rapporto tra vaccini e diritto della concorrenza*, 3 Eurojus 202-217 (2020).

[107] The very definition of industrial secret is a difficult task for the jurist, for a detailed analysis please refer to A. Andolina, *Tutela delle liste clienti tra concorrenza sleale, segreto industriale e banche dati*, 5 Giur. it. 1146-1151 (2018); E. Arezzo, *Protezione del segreto e tutela del software: convergenze, sovrapposizioni, conflitti*, 1 Dir. indust. 145-151 (2018); M. Libertini, *Le informazioni commerciali riservate (segreti commerciali) come oggetto di diritti di proprietà industriale*, 3-4 Dir. indust. 566-570 (2017); L.C. Ubertazzi, *Riservatezza informatica ed industria culturale*, in Vv. Aa. (eds.), *I diritti d'autore e connessi. Scritti* (2003) 136-141.

[108] G. Amato, *Il mercato nella Costituzione*, cit. at 35, 9.

The theme, in these terms, is placed in a perspective only potential and abstract even if in other systems have successfully tested the possibility for medical devices to use big data to make more efficient the use of ambulances during emergencies within a given territory. Through historical data on the profiles that most often require ambulance intervention, meteorological data or demographic data it is possible to make projections on the demand for ambulances in the long run.

Health service as a whole is made up of many different public services which together are aimed at the functioning of public health; here there is no reference to any particular service but there is an attempt to carry out general reflections.

The opportunity to provide the health service in a new and networked form must necessarily come to terms with the subject (public or private, and the distinction is of considerable importance for the issue) who must manage data of companies.

Obviously, the considerations made must take into account the need to compress public health expenditure through internal and *EU* instruments, a consideration that may seem trivial but which stands at a fundamental crossroads of prospects for e-health, and a strategic role will be played by the Recovery Plan and the NRPs[109] in guiding a truly innovative development of health services.

4. A potential new concept of public transport service: reflections from and beyond the Uber case

[109] F. Merloni, *Il PNRR e le riforme della pubblica amministrazione. Dieci idee per progetti operativi*, 3 Or. Dir. pubb. 1-5 (2021); F. Manganaro, *Editoriale*, 1 Dir. econ. 1-8 (2021); F. Bassanini, *Le riforme, il 'vincolo esterno europeo' e la governance del PNRR: lezioni da un'esperienza del passato*, 1 Astrid 1-6 (2021); is critical the position held by R. Cavallo Perin, *Dalle riforme astratte dell'amministrazione pubblica alla necessità di amministrare le riforme*, 1 Dir pubbl. 73-81 (2021), who notes the inefficient subsistence of the tension between reforms and the very need to administer these public policies, for an analysis of the obstacles to the preparation and implementation of useful reforms in public administration, see M. Clarich, *Perché è difficile fare riforme della pubblica amministrazione utili all'economia*, 1 An. Giur. econ. 169-182 (2020); M. Clarich, *Riforme amministrative e sviluppo economico*, 2 Riv. trim. dir. pubbl. 159-188 (2020), according to which the halt in development is due to the well-known 20-year problems exacerbated by external economic conditions; L. Iannotta, *Amministrazione dello sviluppo ed economia e finanza di impatto sociale*, 6 GiustAmm 1-22 (2017).

The issue of local public transport represents a point of attraction for many classic aspects of administrative law, since the presence of an efficient local transport service is undoubtedly one of the thermometer of a nation's growth, being able to have a significant impact on the quality of life of its citizens, social cohesion, employment, economic growth, the performance of a significant number of businesses, public administration services and investments.

A cutting edge and interconnected form of transport does not pose problems in terms of privacy protection different from those already analyzed, but also raises different issues, such as protection of competition (in relation to possible episodes of unfair competition) linked to the relationship between data used by administrations or private entities that provide the public service, users and operators of the platforms that operate the technological platform that is responsible for the direction of the service.

The transport sector is a heterogeneous category, which can be classified according to different benchmarks, and can cover (by way of example) air, rail, road, scheduled or non-scheduled transport; in any case, the issue is linked to the right to mobility of citizens, if the point of view is that of the task of the public administration. In addition, this renewed concept of public transport also includes hybrid situations such as bike-sharing services, which can act as a link between the various existing public transport services, performing a fundamental function that can only be defined as a public service[110].

The common feature of the heterogeneous range of the transport sector is the presence in the competition sector, as a value to be protected both from the point of view of opening up to the market and from the point of view of the way in which relations are managed.

Transport policy is an essential part of European economy[111] and general governance policies must be coordinated with

[110] See T.A.R. Emilia-Romagna, Bologna, Sec. II, 20 March 2018, no. 260, concerning a dispute related to a public tender for the award of a bike sharing service based on the use of smart bicycles, and on a technology that makes it possible not to always have to guarantee bike-to-stall coupling, with the possibility of setting up virtual stations as well.

[111] L. Senn, *La politica dei trasporti in Europa*, in L. Ammanati, A. Canepa (eds.), *La politica dei trasporti in Europa: verso uno spazio unico?* (2015) 3-8, 11, it is noted

sectoral policies on the protection of transport-related values, such as the environment.

In addition to these aspects, after the budget item concerning health, the budget item concerning transport is the most significant in the financial statements of the Italian regions.

In addition, if the environmental aspect is also taken into account, the public transport sector plays an essential strategic role for economic development and, at the same time, represents one of the economic sectors that exercises the greatest pressure on environmental and natural resources.

In the public transport sector, more than in other sectors, legislative action is needed to ensure certainty of investment, technological adaptation of infrastructure, continuity of service and connections, proportionate tariffs[112].

The analysis carried out in relation to public transport must be subdivided into two autonomous sections: a first section dedicated to the current state of the service in Italy and a second section in which, starting from the so-called Uber case, possible points of development for the theme are traced in a perspective in which the service is no longer lowered from above (or not only) but responds to the needs immediately expressed by the citizen.

At the end, a part of the discussion is devoted to a possible declination of the local service, aimed at facilitating access for disabled people, in a social perspective of the use of technologies.

4.1 Local and national public transport in Italy: a perpetually unresolved issue

In this part of the analysis, the wide range of issues concerning the public transport sector, the various modes of entrustment and the strategic role that this sector plays from many points of view that are crucial for the administrative action of a State cannot be taken into consideration, in their entirety. However, it is necessary to analyse the main criticalities that afflict a sector in which the efficiency and economy of management must never be

that the definition of a common policy is hampered by the fear of Member States to lose their identity and to have a direct impact on businesses and the economic factors involved.

[112] In general terms on the subject, the approach offered by S. Vaccari, *Le tariffe dei servizi pubblici tra teoria economica e regolazione amministrativa*, 2 Riv. reg. merc. 367-394 (2020), is shared.

at the expense of the quality of the service provided; moreover, as has been authoritatively noted, the operating result (understood as the quality of the service provided) represents the characteristic and distinctive feature of the public service[113].

Public transport is an excellent example of a public service to be designed in a innovative way, since transport is a network industry, the subject of competition policy, as a privileged area for the creation of a single European area, based on the removal of administrative and technical barriers, in which ICT can play a strategic role[114].

The constant process of digitization in the access and functioning of transport makes mobility a service, according to the increasing use of ICT, changes the way in which consumers meet their mobility needs, a process that intercepts that of the creation of so-called 'mobility platforms'.

Moreover, the traditional public transport sector has not responded to the needs of citizens for a long time and, moreover, new needs have emerged in relation to auxiliary services that can only be provided through a more flexible system (and already takes on value in relation to the mobility of people with disabilities, as will be seen *infra* § 4.3).

[113] F.A. Roversi Monaco, *L'attività economica pubblica*, in F. Galgano (ed.), *Trattato di diritto commerciale e di diritto pubblico dell'economia* (vol. 1, 1977) 429-431; from the perspective of user protection in the field of public services, the analysis carried out by M. Ramajoli, *La tutela degli utenti nei servizi pubblici a carattere imprenditoriale*, cit. at 48, 383; F. Giglioni, *Le garanzie degli utenti dei servizi pubblici locali*, cit. at 45, 370-372.

[114] Cf. M. Gola, *Periferie, viabilità e trasporto*, in M. Immordino, G. De Giorgi Cezzi (eds.), *Periferie e diritti fondamentali* (2020) 373-380; F. Gaspari, *La regolazione della mobilità urbana sostenibile e i limiti del 'Green Deal' dell'Unione Europea. Ovvero, il ruolo dello Stato all'alba della post-globalizzazione*, 1 Munus 67-109 (2020); T. Bonetti, *Il trasporto pubblico locale nel prisma della mobilità sostenibile*, 3 Dir. amm. 563-580 (2020), a substantial change is taking place in which, even if it is not always straightforward and in any case marked by many delays and resistance, local public transport should be able to acquire a renewed centrality in terms of sustainable mobility, to a point where sustainable mobility seems to be able to assert itself as the relative paradigm of reference; see the analysis carried out by L. Ammanati, *Diritto alla mobilità e trasporto sostenibile. Intermodalità e digitalizzazione nel quadro di una politica comune dei trasporti*, 3-4 Federalismi 6 (2018), intelligent mobility systems include ERMTS, SESAR, SafeSeaNet, RIS, ITS, as the emphasis on innovation is evident in all areas of public transport and takes a look in different directions; S. R. Foster, *The limits of mobility and the persistance of urban inequality*, 127 Yal. L. Journ. 11 (2017).

In the concept of mobility as a service in itself, the change of perspective is evident (and the Uber case is an example) because the role of users is increasingly placed at the centre, reversing perspective with service provider.

Some issues, such as the management of personal data and the tension with right to privacy, the management of sensitive data belonging to companies by public or hybrid subjects present the same critical points already found so far in the course of this analysis.

However, account should be taken of the many factors that lead to inefficiency in the public transport sector (both legislative and managerial) which could be resolved by a different understanding of the same concept of transport and by rethinking the same modes of delivery.

Public transport framework represents public service *par excellence*, also at European level, while other services are considered "of general interest[115]".

Classification of a specific service activity as a public service may allow for some derogation from general rules on economic activities and such derogations may concern the greater discretion accorded to public administrations representing local authorities in their choices of organization and management of public transport services[116].

[115] The transport sector is essential to ensure the development of the economy and the well-being of civilian population in the European context, as it facilitates the functioning of the internal market, fosters employment growth in the European Union and contributes to the evolution of the European integration process.

[116] Please refer to G. Caia, *Il trasporto pubblico locale come paradigma del servizio pubblico (diciplina attuale ed esigenze di riordino)*, 3-4 Rivista AIC 334-338 (2018); for a complete overview of the legislation and critical points in perspective, see F.A. Roversi Monaco, G. Caia, *Situazione ordinamentale e prospettive del traporto pubblico regionale e locale*, in F.A. Roversi Monaco, G. Caia (eds.), *Il trasporto pubblico locale* (vol. 1, 2018) 7-11; M.I. Triolo, *Il trasporto pubblico locale: la qualificazione dell'attività in termini di servizio pubblico e il contratto di servizio*, 1 Rass. Avv. St. 247-261 (2016); on the modalities of entrustment of the service, *inter alia*, see L.R. Perfetti, *Le procedure di affidamento dei trasporti pubblici locali*, 1 Munus 129-145 (2015); S. Vasta, *Diritti e obblighi dei passeggeri nel trasporto pubblico locale*, 4 Diritto e processo amministrativo 1123-1145 (2015), challenges of local public transport concern both the way local public transport services are allocated and the question of financing local public transport, as well as the relationship between local and national legislative; D.U. Galetta, M. Giavazzi, *Trasporti terrestri*, in G.

One of the first real issues in the field of public transport, which concerns, but is not limited to, modes of entrustment, concerns regulatory fragmentation, a myriad of European, primary and regulatory provisions, in addition to the opinions of national authorities and other acts of soft law or flexible regulation.

In other terms, legislative fragmentation occurs both at domestic level (also in relation to multi-level competences between different local authorities) and at European level. In this regard, it is advisable to note the possible frictions and overlap between Regulation 2007/1370/EU on public transport services (as partly reformed by Regulation 2016/2338/EU) and Directive 2014/23/EU on the award of concessions. The issue is extremely complex and concerns several sensitive areas of possible overlap, although it is necessary to underline the provision contained in Art. no. 10 of Directive 23/2014/EU which expressly sets out a preference clause for the application of Regulation 2007/1370/EU, through a legislative choice that prefers the specialty of the public transport sector[117].

The transport sector represents a public service which, as such, must be governed by the principle of economy, which in turn must, however, be guaranteed in the same way as the principle of continuity of service. In other words, the concrete guarantee of the aforesaid operational continuity can only be provided by

Greco, M.P. Chiti (eds.), *Trattato di diritto amministrativo europeo* (vol. 4, 2007) 2294-2299.

[117] In general terms, on shared mobility and needs to reform this sector, see E. Caruso, *Trasporto pubblico locale non di linea e mobilità condivisa tra continuità e discontinuità regolativa*, 10 Dir. quest. Pubbl. 1-37 (2020); on the subject, in another perspective, but relevant to the explored topic, see M.E. Bucalo, *I servizi delle piattaforme online tra giurisprudenza sovranazionale e interna e necessità di regolazione dell'economia collaborativa. Riflessioni a partire dal Caso Airbnb*, 22 Federalismi 66-93 (2020); on the subject of collaborative practices, in relation to established premises, there are several aporias concerning the role of local authorities in this development, cf. S. Profeti, V. Tardini, *Le pratiche collaborative per la coproduzione di beni e servizi: quale ruolo per gli enti locali*, 4 Ist. fed. 861-877 (2019); P. Tullio, *Da Uber ai robotaxi: spunti comparatistici per una riforma degli autoservizi non di linea*, 2 Dir. trasp. 403-423 (2019); see, also, for a view about possible antinomies and overlaps between Directive and Regulation, the exhaustive analysis carried out by N. Aicardi, *L'affidamento delle concessioni di servizi pubblici nella Direttiva 2014/23/UE ed il rapporto con il Regolamento (CE) n. 1370/2007 sui servizi pubblici di trasporto di passeggeri su strada o ferrovia*, 3-4 Riv. it. Dir. pubbl. com. 533-553 (2018).

the management efficiency, as a suitable balance factor to avoid or in any case to prevent interruptions or quality downgrades.

Public transport, regardless of the mode chosen by the administration to provide the service, is a real black hole for public finance with a very low quality of service and disproportionate costs incurred by public entities[118]. The legislation requires that operation of regional and local public transport services, in any manner and in any form entrusted, must comply within principles of economy and efficiency (in accordance with Art. no. 18, Legislative Decree 19 November 1997, no. 422), but in Italy there are numerous failures of management in this sector.

However, it should be noted that the fragmentary legislative framework on local transport services does not help the pursuit of good overall performance of service as a whole, but similarly it should be noted that many of the critical issues and problems that affect the management of public transport services could be overcome if the administrative authorities simply strive to give a proper application to legal tools that are already present in the legislation and that are designed and suitable to provide a significant input to the expected cost-effectiveness and management efficiency.

Widespread inefficiency of public transport at various levels is an established fact and concerns various components, in terms of delays, lack of maintenance of infrastructure, obvious territorial disparities, not only between North and South of the nation but also within the same region.

[118] Cf., in relation to subject of competences, L. Lorenzoni, *Accentramento o frammentazione delle competenze in materia di regolazione del trasporto ferroviario: modelli istituzioanli a confronto*, 1 Munus 4-11 (2018), in area of rail transport, European law pursues the objective of protecting and promoting free competition between undertakings, and derogations from this system may be granted only for overriding public interests; on the specific subject of rail transport, which will not be examined in this work, see the contribution to the subject under investigation provided by A. Police, *Il servizio pubblico di trasporto in Italia, regolazione e mercato nel trasporto ferroviario*, 3 Nuove Aut. 321-334 (2015); M. Ponti, *I trasporti pubblici locali: cronaca di una morte annunciata*, 1 Il Mulino 38-42 (2014), local public transport costs the public administration a great deal, compared with a quality level of services provided that does not correspond to this public expenditure; although analysed from a specific perspective, see the unsurpassed analysis of problems in the transport sector carried out by T. Treu, *Il patto dei trasporti*, 1 Lav. P.a. 11-21 (1999).

4.2. Notes for a rethink of public transport from a smart perspective: the Uber case and beyond

The general mismanagement of local public transport also calls for a rethink on the basis of the opportunity to exploit existing technologies, the search for a subtle balance between rules, protection of rights, good delivery of public service, respect for EU rules, not compromising free competition.

Transport regulation, especially at European level, has experienced numerous changes in recent years between liberalization and re-regulation processes.

In addition to this swing of settings, there are also numerous technologies, based on algorithms and data, which have had a significant impact on the regulation of public transport, but to which the Italian law has not yet provided an organic response.

In any case, two main aspects that emerge from regulatory policies of this theme revolve around concept of a policy that must be competitive and sustainable[119].

[119] M.G. Della Scala, *Lo sviluppo urbano sostenibile e gli strumenti del governo territoriale tra prospettive di coesione e tutela dei diritti fondamentali*, 4 Dir. amm. 787-790 (2018); N. Michele, *La politica dei trasporti dell'Unione Europea e le problematiche riuardanti la tutela ambientale e lo sviluppo sostenibile*, 2-3 Dir. comm. Internaz. 227-234 (2013), over years, national and European transport policies have had to deal with the identification of new basic needs, namely the need to ensure the efficiency and competitiveness of the sector by seeking compatibility with another emerging need of equal importance, such as the protection of natural and environmental resources. Since most of the journeys in the European Union are carried out by road and a large part of the environmental pollution comes from road transport vehicles, which cause high greenhouse gas emissions and frequent congestion in road traffic, the European Union has adopted a series of legislative measures to reduce the negative impact of these types of transport on the environment and the excessive encumbrance of connecting routes in order to rationalize the entire set of legal instruments; see European Strategies, White Book (2011), Roadmap to a Single European Transport Area - Towards a competitive and resource efficient transport system, COM (2011) 144, avaiable on www.eur-lex.europa.eu (2011), "mobility is vital for the internal market and for the quality of life of citizens as they enjoy their freedom to travel. Transport enables economic growth and job creation: it must be sustainable in the light of the new challenges we face. Transport is global, so effective action requires strong international cooperation", "New technologies for vehicles and traffic management will be key to lower transport emissions in the EU as in the rest of the world. The race for sustainable mobility is a global one. Delayed action and timid introduction of new technologies could condemn the EU transport indus-

Undoubtedly, one of the issues that should be resolved in order to achieve these objectives concerns coordination between different levels of governance on the topic, aiming at a common policy and a single European area, issues that seem to overlap, but that often follow divergent paths.

As part of the search for such a delicate balance, technological innovation can undoubtedly lead to an overall rethinking of the transport system, which can become a means of achieving the objectives of sustainable and efficient mobility.

From this point of view, Uber affair can provide interesting food for thought[120], in terms of the system's capacity to maintain public services and compatibility of current provisions with a service requested by the user and not decided by the provider (regardless of its legal nature, public or private).

try to irreversible decline. The EU's transport sector faces growing competition in fast developing world transport markets"; M. Foti, *L'economia collaborativa davanti alla Corte di Giustizia dell'Unione Europea: alcune riflessioni a margine della sentenza Uber Spain*, 3-4 Riv. it. dir. pubbl. com. 507-535 (2019); B.G. Edelman, *Efficiencies and regulatory shortcuts: how should we regulate companies like Airbnb and Uber*, 19 Stan. L. Rev. 293-310 (2016); in relation to the subject under analysis, see K.C. Strong, *When apps pollute: regulating transportation network companies to maximize environmental benefits*, 86 Univ. Col. L. Rev. 1049-1053 (2015), "ridesharing has long been touted as a means to reduce the pollution and congestion caused by personal vehicles, but in practice has been relatively unpopular among Americans. That outlook may be changing, however, thanks to new 'Transportation Network Companies' (*TNCs*) that toe the line between ridesharing and for-hire passenger transportation services, such as taxis and limousines. UberX, Lyft, Sidecar, and other similar services have rapidly spread to cities throughout the United States, attracting the attention of investors and ire of incumbent transportation providers. Legal commentary has thus far focused on proposed regulations implications for liability, public safety, and fairness, but this Comment seeks to broaden the conversation to assess their potential environmental implications".

120 There are other cases in Europe related to the functional relationship between technologies and public transport, such as, for example, the 'FlixBus' case, a mode of transport by bus whose company, founded in 2011 in Munich, used software to exploit data through a logistics platform, using data from different private platforms or held by public entities. The particularity of this case was based on the separation of the legal entity responsible for the organisation from the companies providing bus transport services, which created considerable problems with regard to the tariffs applied and therefore with regard to free competition.

Uber is an instrument of sharing economy[121] that converges with the current connotation of the urban social context, characterized by a changing legislative landscape and a growing level of demand for mobility by users.

The change in the paradigm underlying potential of these platforms (in which users geolocate, exploit reduced fares) has to deal with the characteristics of the urban system, with the rules on public transport, with damage to the principle of free competition, with the need for the administration not to remain on the sidelines of the change induced from outside, which, to date, does not correspond to a body of rules (neither primary nor secondary).

The subject has been the subject-matter of numerous judgments (issued by ordinary and administrative courts and by the Constitutional Court) which can provide a broader reading of the case, in order to try to derive from this some reflections of a broader nature.

The starting point on this issue can be represented by a part of the Constitutional Court ruling 15 December 2016, no. 265, according to which technological evolution and resulting economic and social changes raise questions that are not only jurisdictional but much broader[122], due to plurality of interests involved and relative intersections and balances[123].

Specifically, Constitutional Court is aware that the whole debate cannot be resolved at a domestic level but must be dealt with at a European level, and specifically brings the whole issue into the category of issues relating to competition.

[121] See, in a business perspective, S. Valaguzza, *Nuovi scenari per l'impresa pubblica nella 'sharing economy'*, 27 Federalismi 363-391 (2020); cf. C. Iaione, '*Sharing economy*' *e diritto dell'innovazione. Il caso della mobilità urbana*, 1 Munus 187-232 (2019); F. Pellegrino, *Il diritto dei trasporti quale motore di sviluppo delle 'gig economy'*, 2 Dir. trasp. 693-711 (2019).

[122] Cf. M.E. Bartoloni, *The EU Social integration clause in a legal perspective*, 1 It. J. Pub. L. 98-104 (2018).

[123] R. Ducato, *Scritto nelle stelle. Un'analisi giuridica dei sistemi di "rating" nella piattaforma Uber alla luce della normativa sulla protezione dei dati personali*, 10 Dir. quest. Pubbl. 1-35 (2020); O. Pollicino, V. Lubello, *Un monito complesso e una apertura al dibattito europeo rilevante: Uber tra giudici e legislatori*, 6 Giur. Cost. 2479-2485 (2016), the ruling under examination declares the unconstitutionality of Regional Law of Piemonte 6 July 2015, no. 14, which limited to taxi services and rental with driver the possibility of using computer support for the supply, excluding from this system the Uber bracket.

Arguments set by Constitutional Court, from which it is possible to draw important points of investigation, refers to regulation of non-scheduled public transport, i.e. licence for transport by taxi and authorization for the rental service with driver[124].

In a regulatory framework linked to the provisions of Law 15 January 1992, no. 15, new services were introduced that provide a non-scheduled public transport service through the use of modern technologies of geolocation and interconnection between the end user and means of transport.

Obviously, there were differences and regulatory shortcomings, since, as noted by Council of State[125], new models of public transport are not related to the regulated cases, since payment is deferred on the basis of a price set by an algorithm and not by the administration, and geolocation is an aspect on which the regulation of the sector is silent[126].

[124] Taxi service is marked by wide stretches of public service, including the pricing predetermined by the administration and the indeterminate users. Car rental with driver differs in many aspects, but the discipline of the matter is also entrusted to the Law 15 January 1992, no. 21; for a review of several European court rulings on the Uber legal qualification see R. Lobianco, *Servizi di mobilità a contenuto tecnologico nel settore del trasporto di persone con conducente: brevi riflessioni sulla natura giuridica del fenomeno Uber*, 3 Resp. Civ. prev. 1046-1058 (2018), which states that, under Italian law, the qualifications of Uber, from a civil point of view, may fall into different categories, a feature which will be analysed only if it raises questions relating to the protection of competition or administrative powers. From the point of view of private law, the brokerage system set up by Uber could fall within one of the types of mandate contract with or without representation (Art. no. 1703-1704 of the Italian Civil Code) so that the latter concludes, in the name of the user, a contract of carriage with a carrier chosen by the algorithm; among the possible subtypes, the shipping contract is excluded and this, in addition to the fact that the shipment has as its object the conclusion of contracts for the carriage of goods and not persons, also because there is no real obligation management by Uber, an obligation that characterizes the mandate contract, and in particular that of shipment, as a replacement tool in acting;; E. Corapi, *Regulatory sandbox in FinTech?*, 4 Dir. comm. Int. 785-799 (2019); N. Rampazzo, *Rifkin e Uber. Dall'età dell'accesso all'economia dell'eccesso,* 5-6 Dir. inf. 957-959 (2015), in which the widespread dissemination of communication tools has also had an impact on the issue of mobility.

[125] Cons. St., 25 November 2015, advice no. 757, the public transport system shows signs of the time that has passed and it is advisable for the legislator to intervene with a discipline that is able to include all the sectors affected by transport, without leaving room for action without discipline.

[126] European Court of Justice (ECJ), Judgment of the Court (Grand Chamber) of 20 December 2017, Case C-434/15, avaiable on www.eur-lex.europe.eu (2017),

The competitive advantages of Uber service consist in carrying out the activity in an open space (not subject to the administrative burden) but the differences also concern other aspects including the possibility for drivers to refuse the request, which is not the case for non-scheduled public services.

The scope of the delimitation of the issue of the legal position of Uber is therefore necessarily that of competition, although it is appropriate to clarify some aspects that, however, as noted by the Constitutional Court, must be resolved at EU level[127].

In conclusion on this aspect, it is worth mentioning, albeit briefly, of debate that has developed in a sprawling way in Spain and France, with obvious repercussions on social balances that were already unstable due to external situations.

In Spain, the issue needs a social, economic and political interpretation[128].

The so-called 'Abalos' Decree attempted to systematise a very complex matter, with restrictions based on a regional scale, which did not have the desired effects. The problem was not just one of licensing and frictional aspects with taxis, but the need to render organic subject, which had been the subject of intense po-

"the intermediation service provided by Uber is based on the selection of non-professional drivers using their own vehicle, to whom the company provides an application without which those drivers would not be led to provide transport services and persons who wish to make an urban journey would not use the services provided by those drivers. In addition, Uber exercises decisive influence over the conditions under which that service is provided by those drivers. On the latter point, it appears, *inter alia*, that Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion".

127 O. Pini, *Le nuove frontiere del servizio pubblico locale: la vicenda 'Uber' tra regolazione, giurisprudenza e ruolo delle autonomie*, 2 Nuove Aut. 401-411 (2015), the Uber affair has raised a number of issues that are intertwined between internal and EU legislation, regional competences and cases related to the protection of competition.

128 Cf. M. Noa, *Uber en Espana, Factores sociales, económicos y políticos para considerar*, 6 Comillas 8-9 (2019); J.J. Montero, *La regulación de la economia colaborativa: Airbnb, BlaBlaCar, Uber y otras plataformas* (2017) 11-24; cf. in a broader perspective, C. Chapla, *Regulating the sharing economy at the legal frontier: the case of Uber in the European Union*, 1 Stan. L. W.P. 4-7, 18-22 (2017); G. Doménech, *La regulación de la economía colaborativa*, 175 CEFLegal 65-68 (2015).

litical debate.

The matter has also had turbulent developments in the French context, with rulings by France's Constitutional Court and countless reform projects, because in France, too, debate around digital platforms has become increasingly lively in recent years, with an increase in the number of people working thanks to the IT applications provided by large platforms operating in various market sectors.

To appreciate tense state of the issue, one can observe how, in 2017, "Paris created a special law enforcement department, called the Boers, to stop Uber drivers and issue tickets. Once Uber drivers were ticketed, they were told to stop driving for the company. However, Uber paid for these tickets, and the drivers kept driving[129]".

Although this issue has been shifted to the protection of workers and their contractual framework, it still suffers from a particularly invasive role of Courts but not from an adequate regulatory framework, as is the case in rest of Europe.

4.3. Smart transport in terms of welfare state: potential and developments for people with disabilities

Some final study notes on public transport and the use of technologies should be dedicated to the possibility of dedicating auxiliary aspects of the transport service to the requests of users with difficulties (disabled or elderly)[130], starting from specific requests that can be forwarded by the subject who requests it in real time to the subject providing the service. This subject, of course, deserves an autonomous and detailed study, but in this context, the approach of the lawyer to subject may be in sense of finding legislative paths to facilitate the use of technologies on this

[129] Cf. J.C. Martini, *International regulatory enterpreneurship: Uber's battle with regulators in France*, 2 San Diego L. Rev. 145-153 (2018); the problem also arose from the perspective of the legal position of drivers, as noted by M. Männis, *Uber drivers considered as employees in France, court rules*, 3 Labour Law 1-3 (2020), the ruling held by the *Cour de Cassation* [n° 374, 4 March 2020] could severely impact the American company's business model, given the added costs and responsibilities that come with an employment relationship, in contrast to the contractor model that the company has been claiming since its inception.

[130] On the general relevance of the issue, the following views are shared by A. Albanese, *Il servizio di trasporto dei malati tra regole della concorrenza e valore sociale*, 1 Munus 115-155 (2012).

graft[131].

Among public services, transport is undoubtedly one of sectors in which the ability of the public administration to ensure an adequate quality of supply, whether produced by public (companies) or by private (companies), is most called into question, and obviously, the whole is accentuated if they are physically disabled. In transport, in fact, the use of the service itself presupposes a strong, physically tangible interaction between the service provided and the user. It is precisely in this direction that a major development in recent years has had the issue of passenger rights, both at European and at national level, a general issue in which the rights of disabled people are given specific attention.

This issue is dealt with sporadically by legislation, including it is necessary to mention Art. no. 16 of Legislative Decree 17 April 2014, no. 70 which provides for penalties for violations of obligations relating to persons with reduced mobility and Artt. 8 et seq. of Legislative Decree 4 November 2014, no. 169.

In this sense, there is a negative opinion for legislation that only penalises shortcomings in the administration, without identifying incentives or subsidies for administrations that use ICT to facilitate and reduce difficulties in accessing public transport services for the disabled and the elderly.

All the legislation set up by in last twenty years concerning traditional public transport has had key objective of ensuring that persons whose mobility is reduced when using transport because of a physical disability (sensory or locomotor, permanent or temporary), mental disability or impairment, or any other cause of disability, or because of age, have a transport service under conditions comparable to those enjoyed by other users. The two key interpretations of Italian legislation in this area are the improvement of the quality of service with a strong commitment to eliminate or reduce the causes of inconvenience to users and guarantees for the application of sanctions against transport companies under EU and national rules on passenger rights.

For all transport systems, there are many simple improve-

[131] In terms of the interconnection between administration, digital and mobility, please refer to C. Inguglia, M. Di Marco, *Mobilità urbana ed inclusione sociale dei migranti: il ruolo della sharing mobility. Una ricerca qualitativa*, 10 Dir. quest. Pubbl. 1-21 (2020); G. Camarda, *Per una collocazione sistematica del diritto dei trasporti*, 3 Dir. trasp. 609-655, 661 (2015).

ments to vehicles, infrastructure and operational practices that can increase accessibility at little cost. These improvements are well known and the problem is one of implementation. Once these improvements have been made, there will remain barriers to accessibility that could be overcome by the use of ICTs. These include, for all modes, the provision of better trip-planning information and information during a journey.

From a legal point of view (understood as legislation in force, but also in terms of case-law or scholars' approach) the subject is in a field that is almost completely unexplored by law.

This topic actually raises problems that would be more solvable by the administration (and at the same time also by the legislation) because the consent of the subject would overshadow the issues related to privacy and the social component of the choice to make available to people with ICT limitations able to direct some aspects of public transport in order to avoid that the limitations prevent the use of the public service itself. The possibility of using databases and ICT by people with physical limitations in the field of public transport, in order to allow full use of the service, could be a laboratory for the administration to experience any problems and potential, precisely because of the final social vision.

The balance with the primary value of privacy in this case seems to recede, since the consent of the subject himself and the need to respect the principle of equality (in this case the use of technology would serve to reduce the difficulties of the subject) enshrined in Art. no. 3 of the Constitution do not raise doubts in that regard.

One of the most interesting aspects underlying a rethink of transport in smart form, with a view to improving the service, is to direct this service from a social point of view, to facilitate access to and use of transport for the elderly or people with disabilities.

The possibility of orienting the service on the basis of the users and their relative preferences assumes a particular importance in relation to people with disabilities, since it would be a matter of orienting the service (or welfare or auxiliary aspects) of the service, from a social point of view, of substantial equality, since it would be a matter of the possibility of removing obstacles to the same fraction of the service, exploiting the technological apparatus, the databases and the requests of the person with a

disability or elderly person[132].

From a legal point of view for Italian law, the ideal approach proposed in this analysis is the possibility to make organic rules regulating public transport for people with disabilities (also with regard to so-called auxiliary services to public transport) so as to have a clear set of rules on which to reason in relation to implementation of technological supports that guide public action in this regard.

In conclusion, an active role can be identified for the public administration or for provider of service or for another autonomous subject that manages the ICT in support of this objective of making access to public transport less difficult for people with disabilities[133], in a context that summarizes the social value of public power and the use of technologies aimed at improving or supporting the exercise of public function, not to be understood as the exercise of power but as a direct public action to needs of citizens.

5. Towards a new model of public service, a requirement rather than a choice

Attempts to identify some common traits and shared con-

[132] On the subject, see the study conducted by R. Battarra et al., *Smart Mobility and Elderly People. Can ICT Make the City More Accessible for Everybody?,* Sp. Iss. TeMA Jour. of Land Use Mob. and Env. 53-61 (2018) the first essential component that characterizes Smart Mobility for the elderly is accessibility, which can be defined as the "ability of places to be reached, in order to make elderly able to participate to city daily life, by preventing inequality in terms of spatial access". The adoption of a smart approach cannot be limited to a market-induced uncritical introduction of devices or sensors, instead, it will be necessary to refine the tools for understanding the needs of specific categories of users, such as the elderly, to define integrated strategies able to operate on many aspects simultaneously. The subject is obviously broader, since it is necessary that Smart Mobility for the elderly and people with disabilities cannot fail to take into account the need for interventions in cities, which might help them move around safely (such as the construction of pedestrian paths, equipped public transport stops, maintenance of sidewalks, pedestrian crossings with traffic light systems, urban furniture), but also the need for public transport management policies aimed at facilitating this mode of movement; N. Colette, P. Bjorn, *Elderly and disabled travellers: intelligent transport systems designed for the 3rd millenium*, in 1 Transp. Hu. Fac. 121-134 (1999).

[133] C. Favretto, *Il costo dei diritti come limite alla discrezionalità economica del legislatore: il caso degli studenti disabili*, 3 RSDD 603-608 (2019).

clusions collide with the variety of topics and aspects covered, which have involved several key aspects of the issue of smart management of public services.

Many of the issues raised, citizens' rights, a critical rethink of public services, legal certainty: these are all topics that must be addressed in the context of digitalization of society, of action, of development, through public choices that cannot ignore how central topics for a country's development are taking direction.

This is not meant to offer miraculous solutions or formulas for implementing a drift that is imposed on the administration, or rather imposed by market, well beyond those liberalizing and simplifying policies having a liberalizing effect proposed from time to time in a constant state of complexity, without solving problems. Neither, from time to time, can the administrative courts authorize or neutralize economic systems and operators to enter into market, a role to which administrative judges should not be assigned, even in the variety of tasks that have been assigned to them over these years.

It is all too obvious how important for economic development the introduction of technology in public services is, without prejudice to any need to regulate the subject, without being able to achieve pathological deviations from regulations, precisely because of protection, among others, of values such as privacy and competition, which are indicated in this survey as benchmarks for any limits that may be opposed.

Various profiles concerned must, however, be brought back into line within a system, since it is unthinkable to envisage a fragmentary regulation or to envisage that, from time to time, infringement of privacy or competition should lead to legal consequences that render the whole field less attractive.

The action of public administrations to be oriented on the basis of varied needs of users with some peculiar aspects that leave limited balancing space to the administration (as in the case of the constitutionally protected rights investigated during the chapter) raises doubts and potential, in a legislative landscape still unaware mostly of these aspects, which however cannot and should not be ignored, especially if we think in terms of the low quality of services provided in Italy, especially at the local level.

Evidences identified in this paper, although limited to two specific but strategic areas, allows some brief conclusions to be

drawn against a fragmentary or sometimes non-existent legislative framework.

While it is impossible to overturn the existing complex system of management and entrustment of public services, it is impossible not to recognise the impact of these new forms of service or the issues raised by the use of new platforms, beyond the legal qualification provided (as for example in the Uber case).

As noted, many issues are raised, including the renewed relationship between administration and the market in light of the use of ICT or digital platforms, the protection of privacy or secrecy in terms of industrial know-how, the re-use of data by administrations or the entity that manages the service.

The legislator, especially with regard to public services in relation to the impact in terms of public savings and possible areas relating to infringements of competition that cannot remain unregulated with the risk of sanctions by the EU, cannot fail to take into account the needs of a changing market as users needs, i.e. citizens, change.

From this point of view, for sectors investigated, considerations of European Commission are particularly relevant. The Commission hopes for a creation of an inclusive electronic society in which businesses and citizens have the skills and knowledge necessary to use the interconnected electronic services, at least in relation to the strategic areas of administration of justice, health, energy and transport[134].

However, in view of the need, rather than a choice of legislative policy (both for Italy and for the EU), to be able to exploit new technologies and new advice to direct public services towards a smart, interconnected and more effective dimension, the obstacles are considerable and cannot be easily overcome.

Although lawmakers and administrations are facing chal-

[134] European Commission, *A Digital Single Market Strategy for Europe*, COM (2015) 192 final, available at www.ec.europa.eu/digital-single-market (2015); A. Pajno, *Crisi dell'amministrazione e riforme amministrative*, 3-4 Riv. it. dir. pubbl. com. 549-560 (2017), which, in general terms, points out that reforms, which must flank rather than hinder innovation, should be brought to the attention of public opinion and rulers themselves from a different angle; L. Torchia, *Stati e mercati alle soglie del terzo millennio,* in *Il cittadino e l'amministrazione* (2016), 45-51; G. Ubertis, *Interdisciplinarità, diritti fondamentali, informatica: una cornice generale*, 1 Jus 109-113 (2013).

lenges from which they have so far been unsuccessful, technology is now making it necessary, at least at European level, to introduce uniform regulations in order to balance various and extremely heterogeneous values at stake, which vary from one public service to another, but which must be brought back into a single key of macro-principles inspiring different administrative regimes[135].

The risk that digitalization, also in relation to public services, might go the way of simplification, a goal always announced and never achieved, and reach the point of continuously issuing 'Digitization Decrees' is unfortunately not remote. Simplification Decrees, *bis*, *ter*, *quater*, *ad infinitum*, the usual way to reform an administration at zero cost, whose static nature, in view of extraordinary recovery plan, becomes an obstacle that Italy cannot afford not to overcome.

[135] See A. Pajno, *Giustizia amministrativa ed economia*, 3 Dir. proc. amm. 952-978 (2015), faced with such a complex situation, the ambition can only be to moderate expectations, to isolate extreme positions which, on the one hand, envisage an unprotected economy and, on the other, a non-economic system, and to try to achieve a balance that is fair and always perfectible.

THE EXCLUSIVE JURISDICTION OF THE ADMINISTRATIVE COURTS ON THE SPORTING LEGAL SYSTEM: RATIONALE, FEATURES AND LIMITS

*Enrico Lubrano**

Abstract

The main purpose of this paper is to analyze the exclusive jurisdiction that the administrative courts have over the sporting legal system, under Law No. 280/2003 – a jurisdiction that is regarded as unusual in multiple respects.

Firstly, it is a jurisdiction over acts issued by persons of a variety of different natures, such as the Italian National Olympic Committee (CONI), a public authority; and the national federations of individual sports, which are private associations that, while they operate in the public interest to promote and organize the respective sports, are not formally recognized as public-law bodies.

Secondly, it is a jurisdiction that may be brought to bear only where the matters at issue in the case are of (legal and economic) relevance, and only where all three instances of sporting justice have been exhausted.

Thirdly, it is a jurisdiction that is subject to significant limitations in some of the key areas in which the sporting legal system reaches determinations, such as with respect to sporting disciplinary matters, where the administrative courts' jurisdiction is restricted entirely to the award of compensation, as the Constitutional Court ruled in its Judgments, Nos. 49/2011 and 160/2019.

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1. Introduction

Any analysis of the exclusive jurisdiction of the administrative courts over the sporting legal system presupposes an understanding of the relationship between sporting organizations and the state system, and the way on which Italy's legal system approaches the system of sporting justice. That demands a schematic outline of how the relationship currently operates within the general system (set out in Para. I, below).

Placing the operation of the state system in its proper context reveals how the sport justice system is best understood as a sectoral system, operating with autonomy, and requires one to understand the relationship between the system of sport justice and the state legal system throughout their historical development, before and after the enactment of Law No. 280/2003, which provided for the administrative courts to have exclusive jurisdiction over the system of sports justice (Para. II, below).

2. The state system in its current configuration

In order to properly frame the state system in its current configuration it is necessary to trace the historical evolution of the concept of legal system in general (para. 1), to recognize the corresponding existence of a plurality of legal systems within the state system (para. 2) and to identify the relationship between autonomy in sectoral arrangements, and the supremacy of state power (para. 3).

2.1 The concept of legal systems as it developed historically

To understand fully just how sporting organizations may assert an autonomous legal order, and the relationship to the State as one among a number of legal orders, there must first be an examination of how that legal order is configured, and its proper collocation within the State's legal system.

In the historical evolution of the general theory of law, the concept of the legal system is originally identified, under Kelsen's normativistic doctrine, exclusively in the system of norms put in

place by the State. This approach holds that a legal system may be identified as a regulatory system composed entirely of norms [1].

Subsequently, this approach was superseded by the institutional doctrine of Santi Romano (*L'ordinamento giuridico*, 1918), which held that the element of standardization was not sufficient to express the concept of a legal system, as it is the product of a social conscience put in place by the representatives of the people. It therefore recognized that the elements of "multi-subjectivity" and of pre-existing "organization" reproduce the element of "standardization", with the consequence that the concept of legal system coincides with the concept of society (*ubi societas ibi ius*) [2].

The book[3] was organized into two Chapters. In the first, Romano critically discussed the dominant conception of norma-

1 On this argument, see: F. Modugno, *Normativismo,* Enc. Dir. Vol. XXVIII 543 (1978).

2 On this argument, see: F. Modugno, "*Istituzione*" Enc. Dir. Vol. XXIII, 69-96 (1973) "*Ordinamento giuridico (dottrine generali)*", Enc. Dir. Vol. XXX, 678 (1980). On the influence of the doctrine of Santi Romano on public law, see A. Sandulli, *Santi Romano and the Perception of the Public Law Complexity*, 1 Italian Journal of Public Law 1-38 (2009): "*Santi Romano, the major Italian scholar of Public Law, was protagonist of the «most extraordinary intellectual adventure that any twentieth- century Italian jurist ever lived»: he was the architecture of the complexity of Public Law*"; A. Sandulli, *Santi Romano e l'epurazione antifascista*, 2-2 Dir. Amm. 287-309 (2018). See also: L. Arata, "*L'ordinamento giuridico" di Santi Romano,* 1 Riv. Corte conti, 253 (1998); F. Carnelutti, *Appunti sull'ordinamento giuridico*, Riv. Dir. Proc. 361 (1964); W. Cesarini Sforza, *Il diritto dei privati, Il corporativismo come esperienza giuridica* (1963); G. Cicala, *Pluralità e unitarietà degli ordinamenti giuridici*, *Scritti giuridici per il notaio Baratta*, 62.; V. Frosini, *Santi Romano e l'interpretazione giuridica della realtà sociale*, Riv. Internaz. Filosofia diritto 706 (1989); M. Fuchsas, *La "genossenchafttheorie" di Otto von Gierke come fonte primaria della teoria generale del diritto di Santi Romano,* Materiali storia cultura giur. 65 (1979); M.S. Giannini, *Gli elementi degli ordinamenti giuridici*; *Sulla pluralità degli ordinamenti giuridici, Atti del XIV Congresso internazionale di sociologia*, 455.

3 *L'ordinamento giuridico* was first published in 1917 (Part I) and 1918 (Part II). The second edition, which appeared in 1946, was translated into Spanish (1963), French (1975), German (1975) and Portuguese (2008). It was translated into English only in 2017, by Mariano Croce (*The Legal Order*).

tive legal positivism[4]. In the second, Romano dealt with a series of issues that arose out of his theory mainly related to the question of pluralism[5].

His doctrine of the plurality of legal orders was very influential in Italy (where the pluralism of institutions was subsequently recognized not least in the Italian Constitution). Its international influence has also been considerable (following the vari-

[4] Santi Romano's introduction to his discussion about the dominant conceptions of normative legal positivism early in Chapter I is particularly stimulating: "*All the definitions of law that have been advanced so far have, without exception, a common element, that is to say, the genus proximum to which that concept is reduced. Specifically, they agree that the law is a rule of conduct, although they to a greater or lesser extent disagree when it comes to defining the differentia specifica by which the legal norm should be distinguished from the others. The first and most important goal of the present work is to demonstrate that this way of defining law, if not mistaken in a certain sense and for certain purposes, is inadequate and insufficient if considered in itself and for itself. Consequently, it is to be integrated with other elements that are usually overlooked and that, instead, appear more essential and characterizing*" (S. Romano, *The Legal Order* (2017), Chap. I, par. 1 translated by Mariano Croce).

[5] The conclusion reached in the Chapter II, about the pluralism of institutions, is very important, particularly in the section in which Santi Romano discusses the "*effectiveness*" of the order posed by the institutions and about their characteristics, which could be also *criminal or immoral*: "*As long as these institutions live, it means that they are constituted, have an internal organization and an order, which, considered in itself and for itself, certainly qualifies as legal. The effectiveness of this order is what it is, and will depend on its constitution, its ends, its means, its norms and the sanctions of which it can avail itself. (…) They have legislative and executive authorities, courts that settle disputes and punish, statutes as elaborate and precise as state laws. In this way they develop an order of their own, like the state and the institutions recognized as lawful by the state. Denying the legal character of this order cannot be but the outcome of an ethical appraisal, in that entities of this type are often criminal or immoral*" (S. Romano, *The Legal Order* (2017), Chap. II, par. 30). The institution, in Santi Romano's conception, is "*an organization, a structure, a position of the very society in which it develops and that this very law constitutes as a unity, as an entity in its own right*." (S. Romano, *The Legal Order*, Chap. I, page 12).

ous translations made of *L'Ordinamento giuridico* over the decades, and especially the 2017 English translation by Mariano Croce)[6].

The recognition of a plurality of legal orders requires the acknowledgement of a plurality of rules imposed by different institutions and of a plurality of judicial systems. Other organizations, not just the State, impose laws and have a judicial system.

Once you acknowledge the plurality of legal orders, the issue then is to coordinate and avoid conflicts between State-laws and other systems' laws and between the State jurisdiction and the other legal orders' judicial systems. This is particularly the case in the relationship between State and Sport.

The issues posed by the recognition of the plurality of legal orders have been resolved by the application of the principle of a hierarchy of institutions (whereby the State is recognized as occupying a higher level than all the other legal systems) and of a hierarchy of regulations (whereby only the State may promulgate laws of primary level, and other institutions may promulgate only regulations of a secondary level).

The application of the principle of a hierarchy among legal systems regulations will also govern the relationship between State jurisdiction and the jurisdictions of the other legal systems.

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[6] On the importance of the concept of pluralism among legal orders see also: R. Cotterrell, *Still Afraid of Legal Pluralism? Encountering Santi Romano*, 45:2 Law & Social Inquiry, 539-558; M. Croce, *Romano Santi*, Encyclopedia of the Philosophy of Law and Social Philosophy 1-3 (2020); M. Croce, *Whither the state? On Santi Romano's The legal order,* 11 Ethics & Global Politics 1-11 (2018); M. Croce – A. Salvatore, *Ethical Substance and the Coexistence of Normative Orders*, 39 The Journal of Legal Pluralism and Unofficial Law 1-32 (2007); M. De Wilde, *The dark side of Institutionalism: Carl Schmitt reading Santi Romano*, 11 Ethics & Global Politics 2-24 (2018); F. Fontanelli, *Santi Romano and l'ordinamento giuridico: The Relevance of a Forgotten Masterpiece for Contemporary International, Transnational and Global Legal Relations*, 2 Transnational Legal Theory 67-117 (2011); V. Kondurov, *The Court and the Order: Classic Institutionalism by M. Hauriou and S. Romano*, 4 Vestnik of the St. Petersburg University of the Ministry of Internal Affairs of Russia 39 (2020); G. Itzcovich, *"Something More Lively and Animated Than the Law": Institutionalism and Formalism in Santi Romano's Jurisprudence*, 33:2 Ratio Juris 241-257; C. Mac Amhlaigh, *Constitutional pluralism Avant la Lettre?: on Santi Romano's l'ordinamento Giuridico,* 11 Jurisprudence: An International Journal of Legal and Political Thought 101-113 (2020); A. Salvatore, *A counter-mine that explodes silently: Romano and Schmitt on the unity of the legal order,* 11 Ethics & Global Politics 50-59 (2018); L. Vinx, *Santi Romano against the state?*, Ethics & Global Politics 25-36 (2018).

Sport is an important example of the application of these principles of hierarchy among legal orders and their jurisdictions. In Italy, Law 280/2003 lays down an important principle describing "sporting preliminary rulings" (requiring all instances of sport justice to be completed before the matter may be brought to the national courts). Thus, athletes and sports associations gain access to the State's court only once they have completed all grades of Sport Justice and the final decision of Sport Justice on a single case may be challenged by the national courts.

2.2 The plurality of legal systems in the Italian constitutional system

The consequence of this approach is that every association with elements of "multi-subjectivity", "organization" and "standardization" is recognized as a legal system; and that the existence of a plurality of legal systems must be recognized.

Therefore, also from the standpoint of the general theory of law, the state system includes a series of subsystems, constituting sectoral orders, each of which pursues the interests of a particular sector.

The existence of social legal pluralism is also expressed in the Constitution with the recognition of the positive value of social formations as an expression of the personality of the individual (Article 2), of the principles of autonomy and decentralization (Article 5), of the right of association in general (Article 18) and within the family (Article 29), of trade unions (Article 39) and political parties (Article 49) [7].

After the Second World War, the state model as a centralizing apparatus was replaced by a polycentric state model whose functions were decentralized both, at a local level, to local authorities and, at institutional level, to organizations pursuing collective and public interests.

This model recognizes, within the State, a series of institutions for the pursuit of collective interests in various sectors. These social formations are recognized as sectoral systems (the military order, the orders of the various professions, the ecclesiastical order, the university system, sports organizations, and so forth).

[7] G. Ambrosini, *La pluralità degli ordinamenti giuridici nella Costituzione italiana*, 1 Studi in onore di Giuseppe Chiarelli (1973-1974).

These sectoral systems carry out their activities with a certain degree of autonomy. This autonomy has practical consequences in terms of the organizations' ability to establish self-regulation and standardization.

2.3 The relationship between the autonomy of the sectoral systems and the supremacy of the State

These sectoral systems are created, and develop, within the state system, of which they form part.

This derivation is the consequence of two essential and objective factors:

1) in most cases, given the recognized worth of the public or collective purposes those systems pursue, the State finances them by means of public contributions; and

2) the persons within the various sectoral orders are also present within the state system, carrying on their professional activities within the relevant sectoral order.

It follows that instruments issued within individual sectoral systems can assume legal relevance outside the sectoral framework within which a member of the sector carries on its activities, to the extent that those instruments are detrimental to the legal sphere of the person to whom they are addressed also as a citizen of the State system, and to their fundamental rights (the right of expression of the personality, the right to work, and the right to carry out economic initiatives, under Articles 1, 4 and 41 of the Constitution).

Accordingly, the relationship between the individual sectoral systems of the State should not be expressed in terms of separation, but in terms of autonomy. The sectoral regulations, as an institution existing within the state System, are in any case subject to the control of the administrative and jurisdictional authorities of the State.

The unity of this polycentric state organization is guaranteed by the existence of a hierarchy of institutions determined by the existence of the hierarchy of sources of law. In fact, only the State has regulatory power as its primary source, while all the other sectoral systems have a normative power of a secondary source. It follows that the internal regulations of the sectoral systems must always comply with the principles established by the higher regulations established by the State and the European Union.

The concept of autonomy of sectoral systems, therefore, expresses the recognition of the free sphere of action that such institutions have, though it contains an intrinsic limitation upon this freedom that is a result of having to operate subject to the supremacy of the state system and European system, thus in compliance with the regulations that they establish. In fact, where the legislation of the sectoral order is in conflict with the national or European legislation, which by nature is of a higher order, it may be found to be illegitimate and annulled by the State or European institutions (administrative or jurisdictional).

3. The sports system as a sectoral system

In light of the above regarding the recognition of the existence of a plurality of sectoral orders and the relationships between the autonomy of sectoral systems and the supremacy of state power, the sports system may be recognized as a sectoral order.

3.1 The international and national sports organizations

The current sports system is structured on an international basis. At the apex of the pyramid is the International Olympic Committee (the IOC), which aims to organize and promote sport worldwide.

All the national Olympic committees of the various countries, each pursuing the aim of organizing and promoting sport within their territories, are affiliated to the International Olympic Committee. In Italy, the National Olympic Committee is CONI (*Comitato Olimpico Nazionale Italiano*).

The overall sports system is divided into a series of subsystems that are federations that govern the organization of individual sports. There are also a number of sports regulations, related to the regulation of the individual federations. In particular:

1) at an international level, international sports federations are also affiliated to the International Olympic Committee, and they are tasked with organizing international competitions for individual sports; and

2) at the level of the individual nations, the various national sports federations are affiliated to the national Olympic committees; the national sports federations are tasked with organizing

competitions related to the various sports within their territories and are also affiliated with the relevant international sports federations.

At an intermediate level of the overall sports system are the continent-wide Olympic committees (in Europe, the European Olympic Committee), which have the task of organizing sports competitions at a continental level.

Also at an intermediate level between the international and national federations are the continental confederations, responsible for organizing continental competitions of the various sports disciplines (such as UEFA for soccer in Europe).

This vision of the system acknowledges the system of sports justice as a legal system[8]. It also distinguishes between:

1) a general international sports system, which brings together all of the components within the system ultimately headed up by the IOC; and

2) a general national sports system, which brings together all of the components of the system ultimately headed up by the National Olympic Committee.

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[8] The existence of a legal system within the organization of sports was first recognized in Italy by Massimo Severo Giannini, in 1949 (M.S. Giannini, *Prime osservazioni sugli ordinamenti sportivi*, 1 Riv. Dir. Sportivo 10 (1949); the author returned to the same subject, 50 years on, in *Ancora sugli ordinamenti giuridici sportivi*, Riv. Trim. Dir. Pubbl. 671 1996).
See also A. Albanesi, *Natura e finalità del diritto sportivo*, 2 Nuova giur. Civ. Comm. 321 (1986); A. De Silvestri, *Il diritto sportivo oggi*, Riv. Dir. Sport., 189 (1988); A. De Silvestri, *Il discorso sul metodo: osservazioni minime sul concetto di ordinamento sportivo*, www.giustiziasportiva.it (2009); R. Frascaroli, Sport, Enc. Dir. Vol. XLIII, 513; G. Gentile, *Ordinamento giuridico sportivo: nuove prospettive*, 1 Riv. Dir. Econ. Sport X (2014); S. Grasselli, *Profili di diritto sportivo* (1990); S. Landolfi, *L'emersione dell'ordinamento sportivo*, Riv. Dir. Sport. 36 (1982); P. Mirto, *Autonomia e specialità del diritto sportivo,* 1 Riv. Dir. Sport. 8 (1959); R. Nuovo, *L'ordinamento giuridico sportivo in rapporto al suo assetto economico–sociale,* Riv. Dir. Sport. 3 (1958); V. Renis, *Diritto e sport*, Riv. Dir. Sport. 119 (1962); R. Simonetta, *Etica e diritto nello sport*, Riv. Dir. Sport. 25 (1956); M. Sferrazza, *Spunti per una riconsiderazione dei rapporti tra ordinamento sportivo e ordinamento statale,* 2 www.giustiziasportiva.it (2009); B. Zauli, *Essenza del diritto sportivo*, Riv. Dir. Sport. 239 (1962).

3.2 The claim of autonomy by the sports organizations

Because of its undeniable peculiarities, the sports system has placed emphasis upon its specificity and accordingly asserted its autonomy from the various legal systems of the State.

To that end and in an effort to provide itself with the means to resolve all disputes arising out of sporting activities, the sports system has established a system of internal justice.

Furthermore, in accordance with the provisions of the international sports regulations, the various national sporting organizations have drawn up regulations that prevents affiliated organizations from applying to the courts when seeking to protect their sporting interests, with disciplinary sanctions that apply in the event of their breach.

Thereby, the sporting organizations sought to assert their autonomy from the various state systems by denying both affiliated companies and associations, and individual members (both athletes and trainers) the ability to protect their own interests through the courts.

For this reason, actions that persons within the sports organizations have brought in the national courts with a view to protecting their interests deriving from sports, have been the basis for the imposition of disciplinary sanctions by sports institutions.

This restriction (provided from sport regulations, which is of a lower standing as far as the Italian legal system is concerned) was potentially in violation of constitutional principles, such as the right to protect interests through the courts (Article 24) and the jurisdiction of the administrative courts over acts of public administration (Articles 103 and 113).

4. The historical development of the relationship between sports organizations and the state

Prior to the enactment of Law No. 280 of 17 October 2003, the relationship between sports organizations and the national legal system had not been explicitly addressed anywhere, with legal uncertainty resulting. The bringing of actions by members of the sport system lacked any systematic regulation by the State, with the result that there was sometimes conflict between the sports system and the national legal system.

4.1 Historical uncertainty of the law on judicial protection in sport

Given this historical backdrop, a situation of great legal uncertainty has resulted, one that has been resolved only in part through the contributions of the academic authorities and the often uneven pronouncements of the caselaw.

In particular, prior to the enactment of Law 280/2003, a series of areas of legal uncertainty had arisen with respect to key aspects of the ability of affiliated organizations to bring actions in the national courts.

As a result of the unresolved conflict between the autonomy of the sports system and the supremacy of the state system, there was no unequivocal answer to issues relating to:

1) how the national courts might establish jurisdiction over sports matters;

2) which jurisdiction (the ordinary or the administrative courts) should hear sports issues;

3) how the court should establish geographical jurisdiction; and

4) the extent to which the decisions taken by the state courts in sports matters would be binding.

4.2 The general principles established by the caselaw

The courts endeavored to find a way to provide justice while also delivering certainty.

1. With respect to identifying those situations in which state jurisdiction over sports matters would be considered to arise, the courts had applied what was referred to as the "relevance test", as the Court of Justice of the European Union had established in 1974[9]. Under this test, where the interests involved acquire not

[9] Court of Justice of the European Union, judgments in *Walrave* (12 December 1974, *Walrave* v *UCI*), *Donà* (14 July 1976, *Donà* v *Mantero*) and *Bosman* (15 December 1995).

About Bosman sentence, see: L. Barani, *Journal of contemporary European research* (2005); T. Erikson, *The Bosman case: effects of the abolition of the transfer fee*, Journal of Sports economics (2000); B. Frick, *Globalizations and factor mobility: the impact of the Bosman-Ruling on player migration in professional soccer*, Journal of Sports Economics (2009); S. Kesenne, *Youth development and training after the Bosman verdict (1995) and the Bernard case (2010) of the European Court of Justice*, European Sport Management Quarterly (2011); S. Kesenne, *The Bosman case and European football* (2006); A. Geeraert, *The Legacy of Bosman* (2016); D. Schmidt, *The effects of*

only a sporting but also economic and legal importance, with the ability to adversely affect the legal sphere of the person addressed by the decision, the jurisdiction of the national, and also of the European, courts was recognized. This principle of (legal and economic) relevance was ordinarily applied to all issues that could arise in the context of sports regulation and disciplinary, administrative, and financial matters.

2. With respect to determining the courts with jurisdiction over sporting matters, the caselaw's answer was to rely upon the ordinary rules for allocating jurisdiction. The jurisprudence had considered ordinary courts to have jurisdiction where the matter at issue concerned the protection of "subjective rights", and the administrative courts to have jurisdiction where it concerned the protection of "legitimate interests".

3. In terms of identifying the court with jurisdiction in geographical terms, the caselaw had applied the normal tests under civil and administrative procedural law for establishing geographical jurisdiction.

4. In terms of the binding nature of the courts' decisions, the state judges had tried to ensure that their decisions would be enforceable by deploying such means as they had at their disposal (such as imposing acting commissioners upon organizations), but often this would have negative results, and historically the failure on the part of sports institutions to enforce the decisions taken by the national courts was a very serious issue.

4.3 The inadequacy and inconsistency of the solutions adopted by the caselaw

1. Although the caselaw had tried to establish consistent criteria for resolving the various issues related to sports disputes in the national courts, there remained considerable uncertainty around the rules governing the four major areas identified in the previous paragraph.

Specifically:

1) establishing the jurisdiction of the national courts;

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the Bosman-case on the professional football leagues with special regards to the top-five leagues, www.essay.utwente.nl (2007).

2) assigning jurisdiction among the administrative and the ordinary courts;

3) identifying geographical jurisdiction; and

4) the extent to which decisions by the national courts were binding and enforceable.

1. With respect to the issue of the jurisdiction of the national courts, applying the relevance test to subjective legal situations brought before the courts was perhaps the only one that guaranteed a certain uniformity, although its application to particular situations resulted in:

a) a general principle that an issue failed the relevance test where it entirely regarded technical matters[10];

b) a general principle that an issue would be relevant where it concerned disciplinary issues, whether the consequences were[11]:

b1) definitive (removal from a register, or revocation of affiliation);

b2) temporary (suspension or disqualification); or

b3) financial (in the form of fines);

c) a general principle that an issue would be relevant where it concerned matters of a financial nature[12];

d) a general principle that an issue would be relevant where it concerned administrative matters that were[13]:

d1) absolute, involving a definitive loss of status as a person within the sports system, as where affiliation was forfeited; or

d2) limited, where an entity would remain an associate, but would see its level reduced, as where a club was relegated several divisions.

2. With respect to the allocation of jurisdiction between the administrative and the ordinary courts, the test based upon the

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10 Supreme Court of Cassation, *en banc*, No. 4399/1989; Civil Court of Rome, Judgment of 20 September 1996; Regional Administrative Court of Lazio, No. 1613/1985; and among the academic authorities, G. Naccarato, *Sulla carenza di giurisdizione del giudice statale in ordine alla organizzazione di competizioni sportive*, Rivista Dir. Sport. 548 (1997).

11 Regional Administrative Court of Lazio Sez. III, Nos. 962/1999 781/1999. See also, in Germany, *Krabbe* case, District Court of Munich, 17 May 1995. See also, in the United States of America, the *Reynolds* case, District Court of Ohio, 3 December 1992.

12 Pretura di Roma, 9 July 1994; Pretura di Prato 2 November 1994.

13 Council of State, No. 1050/1995.

subjective legal situation being pleaded was by contrast extremely vague, given the difficulty in identifying the exact nature of the interests that were alleged to have been harmed (distinguishing between "subjective rights" and "legitimate interests"). This difficulty was also a consequence of the issues around the legal nature of sports federations (whether they represented forms of public administration, or private associations) and their activities, and consequently the nature of the acts they carried out (that is, whether they constituted public or private acts).

3. In relation to the issue of geographical jurisdiction, the ordinary principles of civil and administrative procedural law for resolving such issues had been almost systematically bypassed by litigants, who almost always turned to the most local courts, which would often result in favorable rulings, at least on interim matters.

4. As for the binding nature of the decisions made by national courts on sports matters, the failure to define the role of sports organizations within the state system meant that, in some cases, sports institutions that were unsuccessful in the national courts would fail to give effect to the courts' decisions.

The fact that the relationship between the autonomy of the sports system and the supremacy of the state system remained unresolved had, in the field of judicial protection of the interests of sports subjects, resulted in serious legal uncertainty on key issues: in particular, on preliminary questions such as establishing jurisdiction, identifying the appropriate venue also in geographical terms, and also with respect to matters that arose after the fact (such as the enforceability of the decisions of the national courts).

The need to establish certain rules in this area that would provide legal practitioners, sportspersons and organizations alike with legal certainty became increasingly obvious. Above all, the early 1990s saw increasing demand for justice at the state level from individuals and entities within the sports system, partly as a result of the increasing size of the economic interests present within the sector.

The legislature's long-anticipated response was first delivered in urgent circumstances, with the enactment of Decree Law 19 August 2003, No. 220, subsequently converted with amendments into Law No. 280 of 17 October 2003.

5. The jurisdiction of the administrative courts over matters of sports law, under law no. 280/2003

Law No. 280/2003 may have merely codified the principles upon which the academic authorities and the caselaw had settled with regard to the relationship between sports organizations and the state system, but it nonetheless provided an effective response, at least with regard to aspects over which there had been much legal uncertainty.

5.1 The general principle enshrined in Law No. 280/2003: the autonomy of sports system and its limits

Law No. 280/2003 definitively resolved a number of key issues that had remained controversial. In particular, it:

1) endorsed the principle that a national sports system had autonomy as a division of the international sporting order and it established the principle of relevance testing, thereby effectively recognizing that the national courts would have jurisdiction over sports matters where the interests involved where of legal relevance (article 1(1));

2) established that, where the interests did have legal relevance, the administrative courts had exclusive jurisdiction to hear disputes relating to actions by the Italian National Olympic Committee (CONI) or by the national sporting federations, except in cases of financial disputes between peers, over which the ordinary courts would have jurisdiction (article 3(1); this provision is now reflected in the code of administrative procedure, Legislative Decree No. 104 of 2 July 2010, article 133(z));

3) identified, for those matters over which the administrative courts have jurisdiction, the Regional Administrative Court of Lazio, in Rome, as having functional and binding competence (article 3(2), this provision also reflected in the code of administrative procedure, article 135(g)); and

4) effectively ended all attempts by organizations within the sports system to avoid the enforceability of decisions by the national courts.

The Law also contains specific provisions relating to the methods of bringing actions in the national courts, by bringing in "sporting preliminary rulings" (requiring all instances of sport justice to be completed before submitting the matter to the national courts), and regarding specific procedural features of decisions on

sports matters in the administrative courts (including an accelerated trial procedure, reflected in the code of administrative procedure, at article 119(g)).

Under Law No. 280/2003, the principle of the hierarchy of legal systems is implicitly codified. Consequently, the principle of hierarchy of the legal systems and the principle of hierarchy of the sources of regulations applies to the relations between sports organizations and the state system.

It follows that the sporting order, because of its autonomy, has an ability to regulate matters that is of secondary standing and can, therefore, enact rules of a regulatory nature whose terms and principles do not conflict with the higher regulations originating from primary legislation and constitutional law within the state system and within the European legal system.

In the event that a rule of the sport system conflicts with the higher principles of the state system or indeed of the European legal system, it may be challenged directly in the administrative and ordinary courts of the national legal system and also of the European legal system, which will be able to assess the legitimacy and, if necessary, annul the rule directly or impose such changes as may be required to bring it into line with the superior principles.

5.2 The basis under which the administrative courts hold jurisdiction

Law No. 280/2003 provided an important resolution to the issue of the allocation of jurisdiction between the administrative courts and the ordinary courts, specifying that every relevant act of the sport legal system would be within the exclusive jurisdiction of the administrative courts and only financial disputes between peers would be matters for the ordinary courts.

The legal rationale for conferring exclusive jurisdiction over sports subjects to the administrative courts has its legal basis in the recognition of the public nature of the activities carried out by sports federations, as offshoots of the Italian National Olympic Committee, which is defined a public authority under article 1 of Legislative Decree No. 242/1999.

5.2.a The public nature of the activities carried out by CONI and the national federations

In administrative law what matters, for the purposes of identifying the substantive and procedural principles to be applied, is the nature of the activity carried out, and not the nature of the agent, which means the nature of the national federations as private associations is not material, as is recognized by article 15 of Legislative Decree No. 242/1999.

The legislature's decision to assign jurisdiction over all sports matters exclusively to the administrative courts (rather than the ordinary courts) must be considered a positive development, as almost all the activity carried out by the sports federations are public by nature, as is also confirmed by article 23 of the Statute of the Italian National Olympic Committee.

The entire national sports organization that is headed up by CONI, with a view to achieving autonomy and decentralization in administrative action (as required by article 5 of the Constitution), has a task that is of a public nature, to organize and promote sports generally.

In particular, within CONI all of the affiliate sports federations are charged with organizing the particular sporting discipline, in relation to which they are responsible for assuring that the competitions are properly conducted.

The organization of the sport sector is decentralized from the State to CONI, and from CONI to the individual sports federations.

For this reason, the acts by sports federations that are of relevance (in legal and economic terms) beyond the sports system, given their public status, assume the nature of administrative measures. These acts are assumed by the federations in a top-level authoritative public position in the interest of the best pursuit of their institutional activity toward their members[14].

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[14] On the nature of instruments issued by national federations, see S. Cassese, *Sulla natura giuridica delle federazioni sportive e sull'applicazione ad esse della disciplina del parastato*, Riv. Dir. Sport. 117 (1981); A. Clarizia, *La natura giuridica delle federazioni sportive anche alla luce della legge del 23 marzo 1981 No. 91,* Riv. Dir. Sport. 208 (1981); L. Di Nella, *Le federazioni sportive nazionali dopo la riforma,* Riv. Dir. Sport 53 (2000); F. Fracchia, *Sport*, XIV Dig. Disc. Pubbl. 470-471 (1999); F. Luiso, *La giustizia sportiva* 90, 125, 198 (1975); G. Napolitano, *Sport* in S. Cassese (ed.), Dig. Dir. Pubbl. vol. VI 5678-5685 (2006); G. Napolitano, *La riforma del*

5.2.b The application of the principles of administrative law and European law to sports institutions

In Italy, it is understood that the national federations are private entities, with legal rights and duties under the private law, as recognized by article 15 of Legislative Decree No. 242/1999. However, most of the academic authorities and of the caselaw identifies the national federations as having principal, institutional objectives as well as a public interest[15] which is to promote, organize and guarantee the administration of the championship of the particular sport.

Consequently, the activity of the national federations is subject to administrative law, like any other private person who participates in public functions, pursuant to Law No. 241 of 1990.

Article 1(1-*ter*) of Law No. 241 of 1990 establishes that private persons responsible for the exercise of administrative activities must ensure compliance with the principles of administrative law. This provision codified the principle according to which even private parties, such as federations, can perform public functions, through the exercise of authoritative powers ("Private parties responsible for carrying out administrative activities shall ensure that the criteria and principles referred to under this subsection are observed").

Furthermore, this sub-article provides that these persons must operate in accordance with the normal principles that regulate the performance of administrative activities, particularly principles of good administration and impartiality referred to in Article 97 of the Constitution, as well as the principles of economic efficiency, effectiveness, openness and transparency and of all the principles of the European legal system, referred to by article 1 of

CONI e delle federazioni sportive (commento al D. Lgs. 23 luglio 1999, n. 242), 6 Giornale di Dir. Amm. 113 (2000); G. Napolitano, *L'adeguamento del regime giuridico del CONI e delle federazioni sportive (commento al D. Lgs. 8 gennaio 2004, n. 15)*, 10-4 Giornale di Dir. Amm. 353 (2004); M. Sanino, F. Verde, *Il diritto sportivo*; L. Trivellato, *Considerazioni sulla natura giuridica delle federazioni sportive*, Dir. e Soc. 141 (1991).

[15] On the notion of public interest, see A. Benedetti, *Seeking "certainty" between public power and private systems*, 2 Italian Journal of Public Law, 337-358 (2012); G.F. Ferrari, *The concept of "public interest" in the case law of the Italian Court of Auditors,* 2 Italian Journal of Public Law 859-866 (2019); G. Rossi, *Administrative power and necessary satisfied interests. Crisis and new perspectives of administrative law,* 2 Italian Journal of Public Law 280-334 (2012).

Law No. 241/1990 ("Administrative action shall pursue the objectives established by law and shall be founded on criteria of economy of action, effectiveness, impartiality, publicity and transparency, in accordance with the modes of action provided for both by the present Law and by the other provisions governing individual procedures, as well as by the principles underpinning the Community's legal order").

The application of the principles of Law No. 241 of 1990 and of the European law also compels sports institutions to comply with obligations related to the right of access (article 22 of Law No. 241 of 1990)[16] and the regulation of its activity in compliance with the principles of competition (Law No. 287 of 1990) [17].

Law No. 280/2003 requires that sports institutions in their administrative actions operate within the usual schemes for such decision-making, and that activities within the sports system are subject to review and supervision by the administrative and jurisdictional authorities of the State.

5.2.c The issue concerning the application of the Public Contracts Code to national federations

There are numerous issues concerning the application of the Public Contracts Code (Legislative Decree No. 50 of 19 April

16 Regional Administrative Court of Calabria, No. 984 of 18 September 2006; Regional Administrative Court of Lazio, Section III Ter, No. 3996 of 21 April 2009.

17 M. Colucci, *L'autonomia e la specificità dello sport nell'unione Europea; alla ricerca di norme sportive, necessarie, proporzionali e di buon senso*, II-2 Riv. Dir. e Econ. dello Sport (2006); G. Greco, *La dimensione economica dello sport nell'UE: diritto antitrust e diritti televisivi*, www.giustiziasportiva.it (2015); M. Colucci, D. Rapacciuolo, *Lo scontro tra FIBA, FIBA Europa e Euroleague: la vexata questio sulla autonomia delle associazioni sportive e la specificità dello sport*, I Riv. Dir. e Econ. dello Sport 9-24 (2016); A. De Silvestri, *Lo sport nelle costituzioni italiana ed europea*, pubblicato, www.giustiziasportiva.it (2006); D. Gullo, *L'impatto del diritto della concorrenza sul mondo dello sport*, Riv. Dir. e Econ. Dello Sport (2007); A. Piscini, *L'evoluzione della disciplina sulla diffusione dei diritti di immagine relativi agli eventi sportivi – in Italia e in Europa – tra affari, concorrenza e specificità*, Riv. Dir. e Econ. Dello Sport (2008); L. Smacchia, *Il Lodo Mutu: come il Diritto Europeo limita la specificità dello Sport*, in Riv. Dir. e Econ. Dello Sport (2015); M. Vigna, *Il vento antitrust soffia dalla Germania: nubi per il Regolamento Procuratori FIGC*, II www.giustiziasportiva.it (2015); J. Tognon, *L'Unione Europea e lo Sport*, III www.giustiziasportiva.it (2006)

2016) to national federations. The Code expressly applies only to "public administrations" and "public-law bodies", and not private individuals and private-law organizations (article 3(1)(a)).

Thus, the issue is one of whether national federations should be identified as public-law bodies.

Public-law entities are a concept laid down in European Union law on public contracts, originally stated in article 1(b) of Directive 89/440/EEC and then Directive 92/50/EEC (article 1), Directive 2004/18/EU (article 9), Directive 2014/23/EU (article 6.4), Directive 2014/24/EU (article 2.1) and Directive 2014/25/EU (article 3.4) [18].

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[18] On the influence of European law on Italian administrative law, see D. De Pretis, *Italian administrative law under the influence of European law,* 1 Italian Journal of Public Law 7-85 (2010); T. Groppi, A. Celotto, *Diritto UE e diritto nazionale: primauté vs controlimiti*, 14-6 Rivista italiana di diritto pubblico comunitario, 1309-1384 (2004).

About public-law bodies, see: AA.VV. *Organismo di diritto pubblico: nozione e presupposti*, 12 Ventiquattrore avvocato 83-92 (2008); M. Antonucci, *La definizione ampliata di organismo di diritto pubblico nell'unione europea*, 54/5-6 Il Consiglio di Stato 1073-1080 (2003); E. Botta, *Assoggettabilità al Codice dei contratti pubblici dei Fondi paritetici interprofessionali e nozione estensiva di organismo di diritto pubblico e di personalità giuridica*, 2 I contratti dello stato e degli enti pubblici 43-52 (2017); F. Brunetti, *La c.d. "teoria della contaminazione" dell'attività commerciale o industriale svolta dall'organismo di diritto pubblico*, 10-3 Rivista amministrativa degli appalti 231-247 (2005); V. Caputi Iambrenghi, *L'organismo di diritto pubblico*, 8-1 Dir. amm. 13-39 (2000); M.P. Chiti, *L'organismo di diritto pubblico e la nozione comunitaria di pubblica amministrazione* (2000); M.P. Chiti, *Impresa pubblica e organismo di diritto pubblico: nuove forme di soggettività giuridica o nozioni funzionali?* 4s Servizi pubblici e appalti 67-76 (2004); F. Cintioli, *Di interesse generale e non avente carattere industriale o commerciale: il bisogno o l'attività? (brevi note sull'organismo di diritto pubblico)*, 4s Servizi pubblici e appalti 79-89 (2004); R. Garofoli, *L'organismo di diritto pubblico: orientamenti interpretativi del giudice comunitario e dei giudici italiani a confronto*, 4 Foro. It. (1998); R. Garofoli, *Organismo di diritto pubblico, Atti del Convegno 'L'organismo di diritto pubblico e l'atto amministrativo in contrasto con le norme CEE'* (2004); G. Greco, *Organismo di diritto pubblico: atto primo*, Riv. It. Dir. Pubb. Comm. 733 (1999); G. Greco, *Organismo di diritto pubblico, atto secondo: le attese deluse*, Riv. It. Dir. Pubbl. Comm. (1999); B. Mameli, *Gli organismi di diritto pubblico*, Urb. e App. (2000); B. Mameli, *L'organismo di diritto pubblico - profili sostanziali e processuali* (2003); G. Marchegiani, *La nozione di Stato in senso funzionale nelle direttive comunitarie in materia di appalti pubblici e sulla rilevanza nel contesto generale del diritto comunitario*, Riv. It. Dir. Pubbl. Comm. (2002); D. Marrama, *Contributo sull'interpretazione della nozione di 'organismo di diritto pubblico'*, 8/3-4 Dir. Amm. 585-615 (2000); A. Musenga, *Brevi cenni sulla questione dell'organismo di diritto pubblico titolare di diritti speciali ed esclusivi nei settori speciali*, 2 Giustizia amm. 41-46 (2009); V. Pedaci, *Considerazioni sull'organismo di diritto*

Under these Directives, a "body governed by public law" means any entity meeting all three of the following requirements:

1) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

2) having legal personality; and

3) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those authorities or bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional or local authorities, or by other bodies governed by public law[19].

Therefore, in order to understand whether national federations should be recognized as public-law bodies, one must examine whether they comply with these three characteristics.

The Anticorruption Italian Agency (ANAC, *Autorità Nazionale Anti Corruzione*) determined under its Resolution No. 372 of 23 March 2016 that national federations should be considered public-law bodies, recognizing that they:

1) had been established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character (promoting, organizing and ensuring the proper regulation of sport);

2) had legal duties (as set forth in article 15 of Legislative Decree No. 242/1999); and

3) were financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law or subject to management supervision by those bodies. In relation to this particular characteristic, ANAC acknowledged that not all of the national federations could be said to be mostly financed by CONI (at that time), because there were some federations (including the

pubblico nel processo di sostanzializzazione della funzione amministrativa, 156/2-3 Rivista amministrativa della Repubblica Italiana 261–269 (2005); S. Pelino, *Soggetti pubblici e privati nella nozione comunitaria di organismo di diritto pubblico*, 54-2 Rivista della Corte dei Conti 292–325 (2001); S. Vinti, *Note critiche in merito all'elevazione dell'organismo di diritto pubblico ad archetipo della personalità giuridica 'a regime amministrativo'*, Giustamm 1-8 (2013).

19 Court of Justice of the European Union, 10 November 1998 (Case C-360/96); 15 May 2003 (Case C-214/00); 22 May 2003 (Case C-18/01); Council of State, Section IV, No. 4711 of 17 November 2002; Council of State, Section V, No. 4959 of 23 August 2006.

most prominent) that received little funding; but that these national federations were nonetheless subject to management supervision by CONI, which held many powers over the federations, for instance to approve the accounts, and to name each federation's external auditors.

ANAC underlined that this interpretation had support in the academic authorities and the caselaw (specifically, TAR Lazio No. 5414/2010; and Council of State, Nos. 4743/2007, 5440/2002, and 1050/1995), which recognized national federations as a limb of CONI (the confederation of the national federations, as article 1 of its own statute states), and ultimately by the inclusion of the national federations in the list of public-administration institutions kept by the official Italian statistical organization (ISTAT, *Istituto Nazionale di Statistica*).

Nevertheless, ANAC's position was challenged by some subsequent caselaw, which held that not all the national federations could be said to be financed for the most part by CONI. There was also criticism of the interpretation given to "management supervision," which, it was felt, required not just a power of oversight but a specific ability to determine the general policy or program of the federations.

After the decision by ANAC, the caselaw split into two camps:

1) one camp recognizing national federations as public-law bodies, on the basis that the powers CONI held over them qualified as management supervision, meaning the national federations were obliged to respect the Public Contracts Code (TAR Lazio Nos. 713/2020, 8092/2017, 6212/2011 *et seq*.); and

2) another camp refusing to recognize national federations as public-law bodies, on the basis that the powers CONI held did not so qualify, and accordingly the national federations had no such obligation (see TAR Lazio No. 3372/2017).

In this situation, two different courts, the Court of Auditors (*Corte dei Conti*) and the Council of State (*Consiglio di Stato*, Italy's highest administrative court), brought the issue before the Court of Justice of the European Union, querying the proper interpretation of "management supervision," and directly whether CONI had effective management supervision over the national federations.

In the first case, the Court of Auditors (under two Judgments, Nos. 31/2017 and 32/2017, made in connection with two lawsuits brought by federations contesting their inclusion on the ISTAT list) sought a preliminary ruling from the Court of Justice regarding the notion of management supervision under European law, particularly whether the position of CONI should be recognized as one of management supervision over national federations.

In the second case, the Council of State (under two Judgments, Nos. 1006/2019 and 1007/2019) applied to the Court of Justice for a similar preliminary ruling. That was in connection with lawsuits that had been brought against two federations, alleging that they had failed to comply with the Public Contracts Code. This second application also sought a ruling on the notion of management supervision and whether CONI was exercising management supervision over national federations.

The Court of Justice, Second Chamber, gave its decision on 11 September 2019 (Joined Cases C-612/17 and C-613/17) on the first application, that made by the Court of Auditors (the application from the Council of State has yet to be decided). It defined management supervision as "the ability of a public administration to exercise a real and substantial influence, on a lasting and permanent basis, on the very definition and achievement of the [non-profit institution]'s objectives, activities and operational aspects, as well as the strategic orientations and guidelines that the [non-profit institution] intends to pursue in the exercise of those activities".

The Court of Justice did not address the specific issue raised, which was "to verify whether a public administration, such as the National Olympic Committee at issue in the main proceedings, exercises public control over national sports federations". This it referred back to the Court of Auditors, for it to resolve in accordance with the general principle it had indicated.

The Court of Auditors has yet to decide the case.

It appears that while the Court of Justice has stated an important general principle regarding the notion of management supervision, it remains unclear whether national federations should properly be considered public-law bodies, and whether or not they are bound to the procedures laid down in the Public Contracts Code.

We may assume that, in the near future (when the two cases have been decided by the Court of Auditors, and when the Court of Justice has ruled on the application from the administrative court), the judgment will not be of universal application to all of the national federations, and in all likelihood the courts will confirm that the national federations are not under management supervision by CONI (given the limitations imposed upon this notion in the interpretation of the Court of Justice).

However, we can suppose that realistically the courts will in deciding upon individual federations, apply the second part of the third requirement ("financed, mostly by the state, or by other bodies governed by public law"). That would mean each court applying the "market/non-market test" and examine whether the particular federation receives more than 50% of its budget from the State, meaning directly from the publicly-owned company Sport e Salute Spa, established by Law No. 145 of 30 December 2018, article 1(629), and consequently:

1) where the federation has generated in revenues more than 50% of its budget, and thus received less than 50% from the State (taking into consideration the last five years), it will not be recognized as a public-law body; and

2) where the federation has generated in revenues less than 50% of its budget and received more than 50% from the State (again considering the last five years), it will be recognized as a public-law body and obliged to observe the Public Contracts Code.

5.3 Features and limits of the jurisdiction of the administrative courts on the sport legal system

The jurisdiction that the administrative court holds over the sport legal system is unusual, in that it is exclusive jurisdiction that nonetheless may only be exercised where the subjective legal situations submitted for consideration are considered relevant, and only once there is a "sporting preliminary ruling" in place, and subject also to further limits when dealing with sports disciplinary matters (meaning the purely compensatory jurisdiction).

5.3.a The exclusive jurisdiction of the admin. Court

On the basis of the considerations set out above regarding the public nature of the activities carried out by CONI and by the

national federations, and the consequent application of the principles of administrative and European law to sports institutions, the legislature has in relation to sporting matters allocated exclusive jurisdiction to the administrative courts.

That jurisdiction extends to disputes relating to instruments issued by any of the sports institutions that make up the organization of sports. In particular, it extends not only to instruments issued by CONI or a national federation, but also by any of their offshoots, such as the national leagues (when organizing the professional championships) or the referees' association (in ruling on issues relating to referees' work) [20] or as sport justice (in deciding sports issues)[21].

Lastly, this jurisdiction also includes disputes relating to the implementation and enforcement of the instruments issued by such subjects.

In light of the general principles governing the relationship between sporting organizations and bodies of higher standing (Italian and European court systems), it may be observed that decisions reached by sports institutions in relation to specific persons and organizations may be challenged in the administrative courts, since they are by nature regulatory acts, with the consequence that they may be deemed illegitimate where their terms breach regulations of higher standing in the Italian and European systems[22].

Regulatory instruments issued by a sporting organization may be challenged in the administrative courts be that because the instrument is:

1) directly detrimental to the interests of the litigant; or

2) because represents an underlying instrument, and its *application* has been detrimental to the litigant's interests.

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[20] Council of State, Sixth Section, No. 6673 of 14 November 2006.

[21] Regional Administrative Court of Lazio, Section I *Ter*, No. 11146 of 10 November 2016; Regional Administrative Court of Lazio, Section I *Ter,* n. 1163 of 23 January 2017. On these decisions, see A. Petretto, *Risarcimento danni a seguito di sanzione disciplinare: nota a sentenza n. 1163/2017 del TAR Lazio*, 1 www.giustiziasportiva.it (2017).

[22] Regional Administrative Court of Lazio, Judgments Nos. 33423/2010 to no. 33428/2010 (finding some of the Italian regulations on players' agents unlawful). On this, see G. della Cananea, *Giudice amministrativo e giurisdizione sulle regole [Commento a Corte di cassazione, Sezioni unite civili - ordinanza 17 aprile 2003, n. 6220]*, 9-12 Giornale di diritto amministrativo, 1287-1290 (2003).

In relation to these appeals, the administrative courts have recognized that they have complete jurisdiction over the rules of sports regulations, even if they constitute an expression of "technical discretion".

5.3.b The purely compensatory jurisdiction in sports disciplinary matters (Constitutional Court Nos. 49/2011 and 160/2019)

A further issue of great discussion in the academic authorities and the caselaw was the reservation made in favor of sporting justice, in relation to sports disciplinary matters, by article 2(b) of Law No. 280/2003[23]:

1) the question of the rule's constitutional legitimacy was brought before the Constitutional Court by the Regional Administrative Court of Lazio (ruling No. 241/2010), on the basis of a potential violation of Articles 24, 103 and 113 of the Constitution, given that such a rule would prevent access to the administrative courts, in relation to a field (meaning, sports disciplinary issues) in which there are legally and economically important positions, and

[23] Specifically, the Regional Administrative Court of Lazio interpreted article 2(b) as a reservation that was by no means absolute, and it recognized the jurisdiction of the administrative courts over sporting disciplinary matters where the sanction imposed was relevant on the basis of the principle set forth in article 1. See Regional Administrative Court of Lazio, Section III *Ter*, Order No. 4332 of 28 July 2004; Order No. 2244 of 21 April 2005; Judgment No. 2801 of 28 April 2005; Judgment No. 13616 of 14 December 2005; Order No. 4666 of 22 August 2006; Order No. 4671 of 22 August 2006; Judgment No. 7331 of 22 August 2006; Order No. 1664 of 12 April 2007; Judgment No. 5280 of 8 June 2007; and Judgment No. 5645 of 21 June 2007.
On these decisions, see P. Amato, *Il vincolo di giustizia sportiva e la rilevanza delle sanzioni disciplinari per l'ordinamento statuale; brevi riflessioni alla luce delle recenti pronunce del TAR Lazio*, II-3 Riv. Dir. Econ. Sport (2006); A. Bazzichi, *Diritto sportivo: illecito disciplinare*, www.filodiritto.com; G. Manfredi, *Osservazioni sui rapporti tra ordinamento statale e ordinamento sportivo (nota a TAR Lazio, ordinanze nn. 4666/2006, 4671/2006 e 7331/2006*, 5-9 Il Foro Amm. TAR 2971-2986 (2006).
The interpretation of Regional Administrative Court of Lazio was not accepted by the Council of State, which observed that the reservation that article 2(b) made excluded the administrative courts from having any possibility of jurisdiction over sporting disciplinary matters (Judgment No. 5728/2008).

that was substantially prejudicial to the right to judicial protection; (24)

2) in relation to this question, the Constitutional Court, gave a discursive judgment, No. 49/2011, finding that the rule in question should be interpreted as precluding the administrative courts from annulling the penalty, and enabling those courts to provide remedies solely in the form of compensation; in light of this interpretation, the Court considered the rule in question to be reasonable and not unlawful, as an expression of a balance between the opposing interests involved (the autonomy of the sport system and the right to judicial protection)(25);

3) this system for the award of compensation for damages in the administrative courts on sporting disciplinary matters, has been criticized by the academic authorities(26), which suggested that such a solution:

c1) failed to provide effective and full jurisdictional protection to the interests of those who were the subject of disciplinary sanctions;

c2) denied the administrative courts effective and complete jurisdiction over disciplinary sanctions; and

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24 On this ruling by the Regional Administrative Court of Lazio, see V.A. Greco, *La Legge 280/2003 alla luce dell'ordinanza del TAR Lazio n. 241/2010*, 3 www.giustiziasportiva.it (2010).

25 On these judgments by the Constitutional Court, see F. Dugati, *La creazione giudiziale del diritto nelle decisioni dei giudici costituzionali*, 13-1 Diritto pubblico 155-178 (2007).

26 See, in particular, the first issue of Rivista di Diritto dello Sport (http://www.coni.it/rivista-di-diritto-sportivo.html): F. Blando, *Finale di partita. La Corte Costituzionale "salva" l'autonomia dell'ordinamento sportivo italiano*; S. Fantini, *La soluzione di compromesso della Sentenza n. 49/2011 della Corte Costituzionale*; T.E. Frosini, *La Giustizia sportiva davanti alla giustizia costituzionale*; A. Scala, *Autonomia dell'ordinamento sportivo, diritto d'azione ex article 24 Cost., effettività della tutela giurisdizionale: una convivenza impossibile?;* A. Palmieri, *Sanzioni disciplinari sportive, ricadute su interessi giuridicamente rilevanti e tutela giurisdizionale: la consulta crea un ibrido*; M.R. Spasiano, *La sentenza n. 49/2011 della Corte Costituzionale: un'analisi critica e un tentativo di "riconduzione a sistema"*.
See also A.E. Basilico, *l'autonomia dell'ordinamento sportivo ed il diritto di agire in giudizio: una tutela dimezzata? (comm. A Corte Cost., sent. 11 febbraio 2011, n. 49)*, 17-7 Giorn. Dir. Amm. 733-741 (2001); F. Greco, *Ordinamento sportivo e statale: dibattito aperto e riflessioni a distanza di qualche anno dalla storica sentenza della Corte costituzionale n. 49/2011*, 10 Giustamm 1-13 (2015); S. Placiduccio, *La Giustizia Sportiva dopo la sentenza n. 49/2011 della Corte costituzionale*, 3 Riv. Dir. Econ. Sport 41-56 (2016).

c3) exposed sports institutions to the risk that damages could be imposed that may be substantial, as compared to the more limited risk of disciplinary sanctions' cancellation;

4) in light of the controversy around this issue, the Regional Administrative Court of Lazio by its Ruling No. 10171/2017 again referred the question of this rule's constitutional legitimacy to the Constitutional Court, emphasizing its disagreement with the interpretation that the court provided in its Judgment No. 49/2011 and highlighting the potential violation, in addition to article 24, above all, of articles 103 and 113 of the Constitution;

5) the Constitutional Court, in its Judgment No. 160/2019, affirmed the interpretation it had set forth in its Judgment No. 49/2011, underlining those issues around Articles 103 and 113 of the Constitution had already been previously considered in that judgment [27].

6. Conclusions

In light of the above, it appears that the entire Italian national sports system operates as an autonomous, sectoral order, while nonetheless remaining subject to the exclusive jurisdiction of the administrative courts because of the fact it carries out functions of a public nature, which means that CONI and the national federations are required to apply the principles of administrative and European law. That aside, it remains unclear whether national

[27] On Judgment No. 160/2019 by the Constitutional Court, see G.P. Cirillo, *La Giustizia Sportiva in Italia*, www.giustizia-amministrativa.it; A. Gragnani, *I "punti di contatto" fra autonomia dell'ordinamento sportivo e diritti costituzionali come "rapporti multipolari di diritto costituzionale. (Sindacato "complessivo" di proporzionalità e "regola generale di preferenza" in funzione di monito preventivo al legislatore nella sentenza 160/2019 della Corte costituzionale)*, 1 www.giurcost.org (2020); L. La Rosa, *La tutela reale in caso di sanzioni disciplinari sportive: profili di giurisdizione (nota a Corte Costituzionale, sentenza 25 giugno 2019, n. 160)*, in www.ildirittoamministrativo.it; E. Lubrano, *La giurisdizione meramente risarcitoria del giudice amministrativo in materia disciplinare sportiva*, 23 Federalismi (2019); S. Papa, *L'effettività della tutela e autonomia dell'ordinamento sportivo: la Corte costituzionale conferma la legittimità della disciplina vigente*, 7 Giustamm (2019); F.G. Scoca, *Autonomia sportiva e pienezza di tutela giurisdizionale*, 3 Giur. Cost. 1687 (2019); A. Trentini, *Giustizia Sportiva: la Consulta scioglie i nodi*, www.studiocataldi.it; A. Trentini, *Giustizia sportiva e giurisdizione. La Consulta e la stabilità delle regole nella sentenza n. 160 del 25 giugno 2019*, 7 Giustamm (2019).

federations are truly public-law bodies and whether they are accordingly obliged to observe the Public Contracts Code.

Regarding more specifically the rules that currently govern the jurisdiction of the administrative courts over sporting matters, the conclusions are only partially positive.

On one hand, Law No. 280/2003 has had the great merit of at least providing certainty over fundamental aspects of the relationship between sports organizations and the state system. In particular, it is clear that the sports system is a sectoral order situated within the state system. In this way, the legislature has ultimately resolved issues regarding the extent to which the State has any jurisdiction over national sporting issues, how jurisdiction over such issues should be allocated (among the ordinary and the administrative courts) and how the court with the appropriate geographical jurisdiction should be identified.

On the other hand, with reference to sporting disciplinary matters, article 2(b) of Law 280/2003 explicitly attempted to leave such matters exclusively to the sporting organizations. The result has been the judgments of the Constitutional Court, Nos. 49/2011 and 160/2019, whereby the courts have as a halfway house assumed the ability, notwithstanding that legislative provision, to award compensation. There are clearly constitutional issues that remain unresolved, however. Neither the affiliated organizations (clubs, federations) nor the individual members (athletes, trainers) are being provided with the administrative courts' full and effective protection, which is their constitutional entitlement. The only remedy that those courts may offer is compensation, as they are unable to overturn the sanction imposed. It would in my view have been preferable for the Constitutional Court to have declared article 2(b) unconstitutional under Articles 24, 103 and 113, as the Regional Administrative Court of Lazio suggested in its referral, as this would have been provided a means by which the administrative courts could both overturn sanctions, in particular and, more broadly, exercise their jurisdiction to the fullest extent.

BOOKS AND JOURNALS REVIEW

MONOGRAPHS, COLLECTED BOOKS, HANDBOOKS

Vinicio Brigante[*]

Public law, market and competition

C. Franchini, *L'intervento pubblico di contrasto alla povertà* (2021), Naples, Editoriale Scientifica. The text aims to analyse the need to activate administrative power in terms of combating poverty even beyond the concept of welfare state.

E. D'Alterio, *Dietro le quinte di un potere. Pubblica amministrazione e governo dei mezzi finanziari* (2021), Bologna, Il Mulino. This book examines ways in which public administrations not only governs financial means but also affects programmes and policies of general interest.

C. Franchini, *La disciplina pubblica dell'economia tra diritto nazionale, diritto europeo e diritto globale* (2020), Naples, Editoriale Scientifica. The book traces the approach of legislative systems from the perspective of market and its mechanisms.

G. Colombini, M. D'Orsogna, L. Giani, A. Police (eds.), *Infrastrutture di trasporto e sistemi di regolazione e gestione. Coesione, sostenibilità e finanziamenti* (vol. 1-2, 2019), Naples, Editoriale Scientifica. These books, which collect results of a national research project on "Equality in fundamental rights in the crisis of the State and public finances: a proposal for a new model of social cohesion with specific regard to the liberalization and regulation of transport". Individual sectors are examined under various related profiles of competition protection, network governance, national and European funding sources, planning and programming procedures, protection of rights, environmental and financial sustainability.

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Public law and emergencies

S. Staiano (ed.), *Nel ventesimo anno del terzo millennio. Sistemi politici, istituzioni economiche e produzione del diritto al cospetto della pandemia da Covid-19* (2020), Naples, Editoriale Scientifica. The book examines the stability of institutional arrangements when faced with the Covid-19 pandemic, in relation to legal and constitutional contexts, European Union and international law, economic and political relations, with a multidisciplinary approach to the matter.

G. Palmieri, *Oltre la pandemia. Società, salute, economia e regole nell'era post-Covid 19* (vol. 1-2, 2020), Naples, Editoriale Scientifica. The book analyses the post-pandemic perspective from the critical viewpoint of a detailed analysis of the aporias encountered in dealing with the emergency.

L. Giani, M. D'Orsogna, A. Police (eds.), *Dal diritto dell'emergenza al diritto del rischio* (2018), Naples, Editoriale Scientifica. This book deals in a transversal way with different issues related to administrative management of emergencies, focusing on issues of prevention and precautionary principles, public function of risk assessment and several concrete experiences related to recent events.

Public law and technologies

R. Cavallo Perin, D.-U. Galetta, *Il diritto dell'amministrazione pubblica digitale* (2020), Turin, Giappichelli. The text intends to investigate wide range of challenges and issues raised by digitalization, with reference to algorithmic administration, privacy protection, good governance and European perspectives on the issue.

Administrative law

F. Liguori (ed.), *Il problema amministrativo. Aspetti di una trasformazione tentata* (2021), Naples, Editoriale Scientifica. The pandemic has intensified long-standing issues concerning public administration, which is increasingly perceived as an obstacle rather than an ally in decision-making and economic development processes.

A. Ferrari Zumbini, *Alle origini delle leggi sul procedimento amministrativo. Il modello austriaco* (2020), Naples, Editoriale Scientifica. The volume analyzes in detail the genesis and essential characteristics of the so-called "Austrian model" of administrative procedure as outlined in the 1925 law, suggesting the need for a rethinking of its historical-cultural matrix, its dogmatic antecedents and its theoretical-conceptual structure.

G. Iacovone, *Decisioni cautelare amministrative. Principi e regole* (2020), Naples, Editoriale Scientifica. The study aims to examine various aspects concerning the decisions and autonomous and general precautionary power in public administration from the perspective of jurisdiction, self-protection and typical administrative power.

F. Fracchia, M. Occhiena, *Le norme interne: potere, organizzazione e ordinamenti. Spunti per definire un modello teorico-concettuale generale applicabile anche alle reti, ai social e all'intelligenza artificiale* (2020), Naples, Editoriale Scientifica. This book examines how power and internal rules stand the test of imposition in the rule of law of networks, social media and artificial intelligence in order to define an organizational and institutional model that is coherent and respectful of legal principles.

M.A. Sandulli, *Principi e regole dell'azione amministrativa* (3rd ed., 2020), Milan, Giuffrè. The volume explores critical profiles of administrative action and organization, with detailed analysis of provisions and legislative amendments.

C. Cudia (ed.), *L'oggetto del giudizio amministrativo visto dal basso: gli istituti processuali in evoluzione. Atti del secondo colloquio fiorentino di diritto amministrativo* (2020), Turin, Giappichelli. The book analyses various conventional aspects of administrative law processes from a critical perspective, with an analysis aimed at identifying prospects for differentiated protection within administrative litigation.

M. Immordino, C. Celone (eds.), *La responsabilità dirigenziale tra diritto ed economia* (2020), Naples, Editoriale Scientifica. The issue of accountability covers whole of administrative law, from organization to division between politics and administration to judicial remedies.

A. Maltoni (ed.), *I contratti pubblici: la difficile stabilizzazione delle regole e la dinamica degli interessi* (2020), Naples, Editoriale Scientifica. The text addresses the issue of public contracts as a

possible instrument for balancing markets, balancing strict rules and public interests.

G. Rossi, M. Monteduro (eds.), *L'ambiente per lo sviluppo. Profili giuridici ed economici* (2020), Turin, Giappichelli. The environment and sustainability are the unifying features of the text from the perspective of a dynamic analysis between law and economics.

S. Perongini, *L'abuso d'ufficio. Contributo a una interpretazione conforme alla Costituzione* (2020), Turin, Giappichelli. Abuse of public function remains one of the unresolved knots of Italian law, a harbinger of countless critical issues, including defensive administration and interpretative aporias.

M. Calabrò, M.R. Spasiano, G. Mari, F. Gambardella, P. Tanda, A.G. Pietrosanti (eds.), *Fondamenti di diritto per l'architettura e l'ingegneria civile* (2020), Naples, Editoriale Scientifica. The book covers classic topics of public and administrative law, with an appendix of specific focuses on intersections with architecture and engineering.

D. Sorace, L. Ferrara, I. Piazza (eds.), *The Changing Administrative Law of an EU Member State* (2020), Turin, Giappichelli. The book investigates developments, dialectics and prospects of administrative law in a European perspective.

V. Berlingò, *Fatto e giudizio. Parità delle parti e obbligo di chiarificazione nel processo amministrativo* (2020), Naples, Editoriale Scientifica. The text aims to analyse, in specific context of administrative process, effective equality of parties between administrations and citizens, in carrying out single procedural steps.

A. Contieri, M. Immordino, F. Zammartino (eds.), *Le autorità amministrative indipendenti tra garanzia e regolazione* (2020), Naples, Editoriale Scientifica. The book covers Independent Administrative Authorities in their national and European dimensions and the systematic placement of the acts they produce.

F. Liguori, *Liberalizzazione, diritto comune, responsabilità. Tre saggi del cambiamento giuridico* (2nd ed., 2019), Naples, Editoriale Scientifica. The book analyses classic themes of the changing tasks of public administration, with reference to liberalization, private law and liability issues, with reference to recent regulatory changes.

R. Cavallo Perin, G. Colombini, F. Merusi, A. Police, A. Romano, *Attualità e necessità nel pensiero di Santi Romano* (2019), Naples, Editoriale Scientifica. The book traces Santi Romano's thought, in a key linked to the actualization of his thought and an analysis of his works.

L. Giani, M. Immordino, F. Manganaro (eds.), *Temi e questioni di diritto amministrativo* (2019), Naples, Editoriale Scientifica. This volume, which is in collective form, takes up and provides a critical and contemporary analysis of general theoretical themes in administrative law, in order to investigate how the role of administrations and law governing their relations with citizens are changing.

G. della Cananea, *Il nucleo comune dei diritti amministrativi in Europa. Un'introduzione* (2019), Naples, Editoriale Scientifica. The book offers a critical analysis of the theoretical and problematic core of administrative law in Europe, with comparative investigation in a diachronic and synchronic sense.

M. D'Alberti, *Diritto amministrativo comparato. Mutamenti dei sistemi nazionali e contesto globale* (2019), Bologna, Il Mulino. This volume contains a comparative analysis of different national administrative systems and their development over time, including in a supranational context, and reveals a progressive rapprochement between the various systems, fostered by increasing contact and dialogue between judges and scholars from the different countries.

F. Francario (ed.), *Garanzie degli interessi protetti e della legalità dell'azione amministrativa. Saggi sulla giustizia amministrativa* (2019), Naples, Editoriale Scientifica. The book deals with all the most delicate and controversial aspects of administrative justice in a critical and cross-cutting manner.

E. Chiti, *Il diritto di una comunità comunicativa. Un'indagine sul diritto amministrativo della chiesa* (2019), Milan, Giuffrè. The text investigates complex relations between administrative and canonical law, seeking points of synthesis between the two themes.

Public and Constitutional Law

M. Cartabia, N. Lupo, *The Constitution of Italy. A contextual Analysis* (2021), Oxford (UK), Hart Publishing. This book

introduces the reader to the Italian Constitution, which entered into force on 1 January 1948, and examines whether it has successfully managed the political and legal challenges that have occurred since its inception, and fulfilled the three main functions of a Constitution: maintaining a community, protecting the fundamental rights of citizens and ensuring the separation of powers.

G. Colombini (ed.), *La dimensione globale della finanza e della contabilità pubblica* (2020), Naples, Editoriale Scientifica. This book covers public finance, accounting, European rules and their effects, with reference to domestic and European law, the auditing system and role of Italian and European Courts of Auditors, including liability, and judicial remedies.

A. Ferrari Zumbini, *Il diritto pubblico tedesco della seconda metà del XX secolo: sfide e risposte* (2020), Naples, Editoriale Scientifica. The book is the Italian translation of the volume of Rainer Wahl *Herausforderungen und Antworten: Das Öffentliche Recht der letzten fünf Jahrzehnte* (2006), Berlin, De Gruyter.

A. Lucarelli, *Populismi e rappresentanza democratica* (2020), Naples, Editoriale Scientifica. This book investigated populism in relation to a crisis of representation and popular sovereignty, within founding elements of States. Populism, along with modern statehood, developed in absolutist regimes, with an unseen, disenfranchised people, expressing a bottom-up demand for decent human conditions.

G. De Maio, *Fiscalità energetica e cambiamento climatico. Il ruolo del diritto tributario nella società moderna* (2020), Naples, Editoriale Scientifica. This book deals with the theme of the role of tax law, in a renewed look at energy taxation, in view of environmental and climate challenges that require coordination and long-term strategic actions.

E. Carloni, F. Cortese (eds.), *Diritto delle autonomie territoriali* (2020), Padova, Wolters Kluwer. The volume explores a controversial issue of territorial autonomies, which give concrete form to the multi-centred articulation of Italian Republic. Their discipline is a result of underlying trends and constitutional and administrative reforms with sometimes different approaches, which reflect on the ability of territorial organizations to respond to their citizens' needs and interests.

M. Troisi, *Le pronunce che costano. Poteri istruttori della Corte Costituzionale e modulazione delle conseguenze finanziarie delle decisioni* (2020), Naples, Editoriale Scientifica. The topic offers an analysis of the impact of the public expenditure cost of Constitutional Court rulings with a specific focus on the powers of inquiry.

M. De Benedetto, N. Lupo, N. Rangone (eds.), *The crisis of confidence in legislation* (2020), Oxford (UK), Hart Publishing. The text analyses the factors behind the crisis in legislation and the progressive loss of public confidence.

Handbooks

G. Leone, *Elementi di diritto processuale amministrativo* (6th ed., 2021), Padova, Wolters Kluwer. This handbook examines and reviews all classic issues of administrative procedural law, with specific attention to technological innovation in the sphere of administrative jurisdiction. Administrative process does not yet seem to have found its final shape, the handbook takes into account modifications of special procedures.

A. Contieri (ed.) *Approfondimenti di diritto amministrativo* (2021), Naples, Editoriale Scientifica. The book addresses in a problematic and judgmental way the most debated issues in today's administrative law.

G. Clemente di San Luca (A. De Siano, A. De Chiara, G. Martini et al. eds.), *Lezioni di giustizia amministrativa* (5th ed., 2021), Naples, Editoriale Scientifica. The book takes up all the classic themes of the administrative process, as well as various possible rites and procedural consequences.

A. Travi, *Lezioni di giustizia amministrativa* (15th ed., 2021), Turin, Giappichelli. The handbook, in addition to an update imposed by legislative innovations, introduces references to more recent jurisprudential and doctrinal orientations and proposes a review of various institutions and principles, in the light of some important elements that are emerging in the current debate.

A. Simonati (ed.), *Diritto urbansitico e delle opere pubbliche* (4th ed., 2021), Turin, Giappichelli. The handbook covers urban planning and public works in connection with territorial government, construction activity, public works and urban

planning, with analysis of classic topics of administrative and urban law.

R. Dipace, *Manuale dei contratti pubblici* (2021), Turin, Giappichelli. The book addresses the many critical interpretative and dogmatic issues of public contracts in all their phases, with a detailed analysis of relevant and problematic issues.

L. Ferrara, *Lezioni di giustizia amministrativa. Il giudice speciale* (vol. 1, 2021), Turin, Giappichelli. The book examines how the administrative judge is specialized, investigating the historical reasons and organizational premises that led to the current system of administrative jurisdiction.

E. Casetta (F. Fracchia ed.), *Manuale di diritto amministrativo* (22nd ed., 2020), Milan, Giuffrè. The Handbook deals with administrative law, considering both the subjective and objective profile of administrations, and procedural law, with specific focus on general principles of the field, relevant in a complex and constantly evolving regulatory context. There are numerous in-depth studies of most important institutions, marked attention is paid to developments in case law, and there is a constant concern to provide a systematic overview of the subject matter.

F.G. Scoca (ed.), *Giustizia amministrativa* (8th ed., 2020), Turin, Giappichelli. This handbook analyses all topics of administrative court proceedings in a critical manner and with reference to various aspects of substantial administrative law.

A. Barbera, C. Fusaro, *Corso di diritto costituzionale* (5th ed., 2020) Bologna, Il Mulino. The handbook, updated with recent legislative and jurisprudential innovations, starting with the constitutional referendum on the reduction of parliamentarians, illustrates the Italian constitutional order in its entirety.

G. Napolitano, *Introduzione al diritto amministrativo comparato* (2020), Bologna, Il Mulino. The text proposes a study of comparative administrative law between the different legal systems of civil law and common law, defining traits of union and obvious differences.

F.G. Scoca (ed.), *Diritto amministrativo*, (6th ed., 2019), Turin, Giappichelli. The handbook deals with whole range of substantive administrative law issues, with critical analyses and doctrinal and argumentative paths.

G. Clemente di San Luca, R. Savoia, *Elementi di diritto dei beni culturali* (2019), Naples, Editoriale Scientifica. This book

focuses on different issues related to cultural and landscape heritage, analyzing various underlying problems, such as the nature of public power, conservation, protection and enhancement, within the different existing legal regimes.

Celebrative books

A. Carbone (ed.), *L'amministrazione nell'assetto costituzionale dei pubblici poteri. Scritti per Vincenzo Cerulli Irelli* (vol. 1-2, 2021), Turin, Giappichelli.

Vv. Aa. (eds.), *Scritti per Franco Gaetano Scoca* (vol. 1-2-3-4-5, 2020), Naples, Editoriale Scientifica.

Vv. Aa. (eds.), *Scritti in onore di Eugenio Picozza* (vol. 1-2-3, 2020), Naples, Editoriale Scientifica.

Aldo Sandulli, A.*M. Sandulli giurista liberal-democratico. Il giurista, le opere* (2020), Naples, Editoriale Scientifica.

S. Torricelli (ed.), *Ragionando di diritto delle pubbliche amministrazioni. In occasione dell'ottantesimo compleanno di Domenico Sorace* (2020), Naples, Edizioni Scientifiche Italiane.

C. Bertolino, T. Cerruti, M. Orofino, A. Poggi (eds.), *Scritti in onore di Franco Pizzetti* (vol. 1-2, 2020), Naples, Edizioni Scientifiche Italiane.

U.S. LAW REVIEWS: A FOCUS ON ADMINISTRATIVE LAW

Marco Lunardelli[*1]

L.B. Solum, C.R. Sunstein, *Chevron as Construction*, 105 *Cornell L. Rev.* 1465 (2020)

In this article, professors Solum and Sunstein draw a clear distinction between the Chevron doctrine used for interpretation and for construction. Such a distinction is grounded in the Supreme Court's language in *Chevron* itself [*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)], and thus in its so-called two steps. The first step is to verify "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." [*Chevron*, 467 U.S., at 842–43]. If the intent of Congress is not clear, step two occurs. In that case, "the question for the court is whether the agency's answer is based on a permissible construction of the statute" [*Chevron*, 467 U.S., at 843]. The article assumes that it is possible to identify "two quite distinct Chevron doctrines" (1467). By reading *Chevron* as construction, agencies should be recognized some deference, because of their technical expertise, and such deference does not undermine the separation of powers principle (1471).

Since *Chevron* mentions the "ambiguity" of statutory language, the doctrine is usually meant "as applicable to both interpretation and construction – to both the discovery of meaning and the creation of implementation rules or the effort to specify a vague or open-textured language" (1473-1474). *Chevron* as interpretation implies the recognition of deference to an agency "in a case in which the question concerns the meaning of statutory language." It goes beyond *Chevron* as construction, and thus to "deference to the agency's decision about how to implement a statute within the construction zone created by vague or open-textured language" (1475). The authors refer to Justice Brett

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Kavanaugh's criticism of *Chevron* [See B.M. Kavanaugh, *Fixing Statutory Interpretation*, 129 *Harv. L. Rev.* 2118 (2016)], especially of its application to cases, in which Congress has employed specific terms to define a rule. The point is explained as follows: "it is one thing to say that agencies should be allowed to adopt constructions that specify or implement the meaning of terms like 'source' and 'harm,' assuming these have not been defined in a way that resolves the question of construction. It is another thing to say that agencies should be allowed to decide what words are modified by the phrase 'to such extent as he finds necessary'" (1477). The authors acknowledge that the distinction they champion may be hard to detect in practice, or even in theory (1479-1482), and, nonetheless, they maintain it should be taken into account in case of a re-examination of the Chevron doctrine by the Supreme Court (1483). In their view, the doctrine may not be extended to interpretation of the law, thus to "resolving questions about the meaning of a statutory text", which is the courts' province (1487).

K.E. Hickman, A.L. Nielson, *Narrowing Chevron's Domain*, 70 Duke L.J. 931 (2020)

This article is aimed at pinpointing the proper scope of Chevron deference, in light of Supreme Court precedent. The authors recall that in *Mead*, the Court specified this scope, by limiting it to agency decision-making with the force and effect of law [See *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001)]. In the other cases, agency interpretations are subject to "the lesser *Skidmore* deference" (956) [*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), especially at 140]. As far as adjudication proceedings are concerned, even though the authors consider the exclusion of any deference to agencies as the best solution, they argue that courts may be deferential towards agency interpretation in formal adjudications but not also in informal ones (964). In this sense, since it has become rather common for courts to read statutes as granting agencies wide discretion to decide whether to conduct or not formal proceedings in adjudication, the application of Chevron deference depends on that agencies' choice (970-971). However, the scope of Chevron deference may become narrower: the authors also exclude from this scope formal adjudication proceedings, whenever the agency lacks a rulemaking power. In

those cases, indeed, "the argument that Congress has nonetheless implicitly authorized that agency to make policy, with deference, via adjudication is hard to see" (981). Supreme Court case law demonstrates that the Chevron doctrine has mainly been applied to proceedings concerning just notice-and-comment rulemaking (984-989).

D.D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 *Stan. L. Rev.* 175 (2021)

According to the unitary executive theory, Article II of the Constitution assigs the U.S. President the power to control and remove all executive branch officials. Such a power would be implicit in the concept of executive power, as observed by Chief Justice Taft in *Myers* on the basis of 17th and 18th century-Britain experience [*Myers v. United States*, 272 U.S. 52, 117-118 (1926)]. However, this article argues that, at the time, the British Crown did not enjoy such a wide prerogative. Many executive officers had tenured positions, and – above all – their appointment and removal were regulated by Parliament or however not entirely left to the King's will. Indeed, the legislative body "could, and did, grant tenure protections to executive officers without it being seen as an interference with the King's executive power" (228), except for some sectors, namely the military and foreign affairs (232). Therefore, the author relies on past British history of the executive branch to oppose the unitary executive theory, and thus to recognize Congress the power to "shield administrators, regulators, and law enforcement officials from removal without cause and other forms of presidential interference" (236).

R.E. Levy, R.L. Glicksman, *Restoring ALJ Independence*, 105 *Minn. L. Rev.* 39 (2020)

Administrative law judges (ALJs) are the agency officials charged with conducting formal adjudication proceedings, and this function requires them to be insulated from political pressures. The article intends to draw attention on the need for legislative intervention to ensure ALJs' independence. After illustrating the existing threats to this independence (53-68), the Authors analyze some recent Supreme Court decisions, which are concerned with the guarantee of good cause for removal of executive branch officials. Those decisions are deemed to "cast

doubt on the validity of good-cause requirements for ALJs and their superiors" (69). Pursuant to 5 U.S.C. § 7521(a), any action the agency decides to take against an ALJ requires the existence of good cause, determined by the Merit Systems Protection Board (MSPB) "on the record after opportunity for hearing before the Board".

The authors argue that it is important to establish whether the principal officer to the ALJ is the agency employing her or the MSPB. If the relevant principal is the former, then the double-level protection problem arises only if the agency head is also subject to good cause removal, like the SEC [(Securities and Exchange Commission)] or the SSA [(Social Security Administration)]. If, on the other hand, the relevant principal is the MSPB, whose members are removable only for good cause, then all ALJs are subject to dual good-cause removal provisions" (73). If a two-layer protection of ALJs from removal is considered an excessive restriction of the President's removal power, thus unconstitutional – the authors continue – "a court would have to determine whether to invalidate the good-cause removal provision for ALJs, or to sever good-cause removal requirements for the agency head" (74). In general, independence and good-cause removal provisions are both aimed at ensuring impartiality in ALJs' administrative action (84). The authors do not consider the creation of an administrative court to judge ALJs' removal a viable solution, as it raises a lot of problems (96-100). Another option would be to establish a central panel model, wherein the chief ALJ plays a pivotal role (100-102). In the authors' view, such a panel "could protect ALJ independence in a manner that is consistent with the constitutional requirements for appointment and removal of ALJs, while preserving agency expertise and policy authority and clarifying the appropriate scope and means of agency policy control over ALJ decisions" (103).

J.M. Cross, A.R. Gluck, *The Congressional Bureaucracy*, 168 *U. Pa. L. Rev.* 1541 (2020)

This article puts stress on a much-overlooked aspect of the legislative branch – its robust administrative apparatus. This internal bureaucracy is composed of thousands of nonpartisan highly qualified and usually tenured officials, who conduct most

of research and analyses in the drafting of statutes, thereby providing fundamental assistance to members of Congress. The authors underline that even though this bureaucracy, unlike the more traditional executive branch one, works not only for the majority but for the whole Congress, it is not required to be necessarily "position-neutral" (1621). In particular, the Joint Committee on Taxation, the Government Accountability Office, the Congressional Budget Office, and the Congressional Research Service usually draw their own conclusions from the analyses they have to conduct. In doing do, they follow a method, capable of safeguarding their objectivity. This "Weberian focus on rationalization" allows them to express views "that some members [of Congress] might not wish to receive" (1623).

Even though most of the congressional bureaucracy's work does not have direct legal effect, its intervention in the legislative process may be either mandatory or not mandatory, depending on the relevant office. For instance, the role of the Congressional Research Service and that of the Offices of the Legislative Counsel fall within the latter category. A Congressional Budget Office estimate is instead requisite for any bill or resolution approved by congressional committees, and similarly the Joint Committee on Taxation has to step in when legislative previsions on revenues are under discussion (1628-1629). Once a statute is passed by Congress and thus enacted, it has to be inserted into the U.S. Code, whose "custodian" (1567) is a component of congressional bureaucracy – the Office of the Law Revision Counsel. Its role is not just a formal but rather a substantial one. In order to identify the most suited title of the U.S. Code for a new statute, this office is permitted to modify statutory language. It also adds cross references, subtitle divisions, and headings, or even "new textual provisions, like definitions(!)" (1664). Each codified statute is subsequently approved of by Congress, which thus "blesses these edits and changes" (1665). In light of such a reconstruction of the drafting, enactment, and codification of statutes, the article concludes with a discussion about canons of statutory interpretation (1674-1682).

K. Barnett, *Regulating Impartiality in Agency Adjudication*, 69 *Duke L.J. 1695* (2020)

This article addresses the issue of at-will removal of adjudicators by agency heads as a possible threat to impartiality in adjudication proceedings. In general terms, decisions made by the competent officials in those proceedings may be reversed by agency heads, who in turn may be removed by the President at will. Therefore, except for independent administrative agencies, the principle of impartiality of adjudication should not be applied too rigorously (1705). However, it has long been acknowledged that the ability of at-will removal, along with the practice of financial incentives, is capable of affecting compliance with due process in decision-making adjudication. In such a sense, Congress seems to be allowed to regulate the removal power (1706-1707), thereby curbing the President's authority. At the same time, the removal power is coherent with the Take Care Clause of Article II of the Constitution, which implies the President's control over the executive branch for the faithful execution of laws (1707).

By referring to two quite recent Supreme Court decisions, namely *Free Enterprise Fund* [*Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010)] and *Lucia* [*Lucia v. SEC*, 138 S. Ct. 2044 (2018)], the author underlines that all ALJs hold continuous positions established by law and exercise trial-judge-like powers. Many non-ALJ adjudicators, too, have such powers, but it is not clear whether they enjoy a continuous office (1712-1713). Similarly, not only ALJs but also many non-ALJ adjudicators are assigned the power to issue final orders (1716). The issue of impartial adjudication and insulation from removal may be tackled within the executive branch, especially by establishing an internal separation of powers (or functions), in order to provide agency adjudicators sufficient protection from political pressures (1721-1728). On the basis of this argument, the author proposes leaving to individual agencies the adoption of impartiality regulations (1728-1733). He argues that such regulations may solve the issue just mentioned by « duplicat[ing] ALJs' current statutory protection from at-will adverse action for all agency adjudicators» (1733-1734). He specifies that the regulations also produce the beneficial effect of preventing a presidential administration from hindering the MSPB's functioning (1736). Furthermore, they may

establish merit-based rules and criteria for the hiring of ALJs and, more broadly, all agency adjudicators (1738-1739).

Other recent law review articles of significant interest to administrative law scholars are the following:

- D. A. Candeub, *Preference and Administrative Law*, 72 *Admin. L. Rev.* 607 (2020)

The article intends to offer a new perspective to a traditional issue – the nondelegation doctrine. In the author's opinion, the fact that Congress delegates lawmaking power to federal agencies, thus to the executive branch, may be analyzed as a matter of degrees, not by applying rigid categories. In this sense, the biggest decisions, those with a broad range, should be made by Congress, while more specific ones, thus decisions that clearly appear as implementing measures, may be delegated to agencies. A criterion the author suggests to identify to what category a given decision belongs is to verify its economic impact.

- P. Conti-Brown, David A. Wishnick, *Technocratic Pragmatism, Bureaucratic Expertise, and the Federal Reserve*, 130 *Yale L.J.* 636 (2021)

This article is aimed at analyzing how the Federal Reserve has been facing new challenges that fall within its statutory mandates. From the authors' perspective, the Federal Reserve is able to perform such tasks by employing its technocratic pragmatism. In particular, three challenges are considered. The first is the appearance of cyber risk, which led the Fed to develop specific expertise. The second is the phenomenon called emergency lending, which occurred before and during the 2008 economic and financial crisis, and presented itself once again recently, after the beginning of the COVID-19 pandemic. The third is the role the Fed may play with respect to the broad issue of global climate change.

- K. Schneider, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 *Stan. L. Rev.* 237 (2021)

This article deals with the good cause exception to public participation in agency rulemaking, provided for in the Administrative Procedure Act (APA). In particular, 5 U.S.C. § 553(b)(3)(B) allows an agency to avoid carrying out ordinary notice-and-comment procedures when it "for good cause finds" that "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest". While this exception was originally meant to apply rarely, it is invoked in a high percentage of cases nowadays. The author argues that the best way to face this issue is not to amend the statutory provisions but rather to allow courts to conduct de novo review of agency determinations on usage of the exception. Therefore, the key to solve the issue is identified in the standard of judicial review.

- Note, *Beyond "No Law to Apply": Uniting the Current Court in the Context of APA Reviewability*, 134 *Harv. L. Rev.* 1206 (2021)

This note is concerned with limits to agency reviewability before courts. Under the APA, 5 U.S.C. § 702 recognizes the right to turn to courts to those "adversely affected or aggrieved by agency action". However, § 701 exempts agency action from judicial review if the latter is precluded by statutes ((a)(1)) or if it is statutorily established that the former be "committed to agency discretion" ((a)(2)), and this second exception is the one on which the note focuses. Relying mainly on Justice Scalia's opinion, it argues that "APA reviewability bears directly on the law/policy distinction because 'hard look' review thrusts the courts into policy questions" (1217). Accordingly, the note opposes the "presumption of reviewability" the Supreme Court has followed for a long time (1218-1221) and cast doubt on the usage of the so-called "no law to apply" test (1222-1223). Finally, the note agrees with most of the reasoning of Justice Alito in the recent *Commerce* decision [*Department of Commerce v. New York*, 139 S. Ct. 2551 (2019)]. This partly-concurring and partly-dissenting opinion is seen a possible model to solve the issue under discussion: "Its rejection of a universal presumption of reviewability, implicit

attention to the public/private rights distinction, and downplaying of the "no law to apply" test in favor of assessing specific traditions of review track both the original meaning of § 701(a)(2) and the law/policy distinction" (1224).

Law Reviews' Abbreviations
Cornell L. Rev.: Cornell Law Review
Duke L.J.: Duke Law Journal
Stan. L. Rev.: Stanford Law Review
Minn. L. Rev.: Minnesota Law Review
U. Pa. L. Rev.: University of Pennsylvania Law Review
Admin. L. Rev.: Administrative Law Review
Yale L.J.: Yale Law Journal
Harv. L. Rev.: Harvard Law Review