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EDITORIAL

TOWARDS OPENNESS AND TRANSPARENCY: RECENT DEVELOPMENTS IN THE “ITALIAN-STYLE” CONSTITUTIONAL JUSTICE

*Tania Groppi**

1. A new wind blows at *Palazzo della Consulta*. The reason is not only the election, for the first time in the history of the Italian Constitutional Court, of a woman, Professor Marta Cartabia, to the Court's Presidency, a development that, for a moment, has put this institution, often neglected by media and public alike, in the spotlight. The press release of 11 January 2020, under the momentous title “The Court opens up to hearing the voice of civil society”, announced that substantial changes were introduced by the Court in its collegiality to the rules governing its proceedings. This is an unprecedented innovation in its sixty-four years of activity and one that is likely to reverberate on the Court's relationship with society and, not least, on the attitude of citizens towards public authorities.

To better understand this ground-breaking development, we should begin by considering that the “Italian-style” constitutional justice has been recently labelled as “cooperative” and “relational” by a successful book aimed at presenting at an international audience the activity and accomplishment of the more than 60 years' experience of the Italian Constitutional Court¹.

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¹ V. Barsotti, P. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context* (2016).

The authors considered that in “its historical development, its internal workings and methods, its institutional relations with other political bodies or courts, or in its substantive jurisprudence on a number of issues of global concerns, the Italian Constitutional Court operates with a notable attentiveness to the relations between persons, institutions, powers, associations, and nations”².

Nevertheless, other scholars pointed out that this relationality should at least be more carefully examined, as the Court only seldom explicitly refers in its reasoning to external arguments and materials. They pointed out that the Court’s approach towards “external materials” (i.e. foreign law, scholarships, third-parties and *amici curiae* intervention, legislative facts) is formally closed and not relational at all: thus its relationality should rather be considered as an “unofficial (or informal)” one³.

2. This was especially true for third-parties intervention and facts-finding powers. From the analysis of the legislative and autonomous framework (the “Supplementary Provisions Concerning Proceedings before the Constitutional Court”, hereinafter, S.P.) on one hand, and of the case-law on the other, the picture that emerged was labelled as “The III (Informal, Implicit, Indirect) attitude” (or “Triple I” attitude), in the sense that the Court acquires information on facts informally and reads briefs submitted mostly informally⁴.

As for third-parties intervention, lacking any legislative basis, the Court was at the beginning (from 1956 to 1990) completely closed in all the proceedings, including the incidental ones, based on the principle of the “formal coincidence between parties in the *principaliter* proceeding and parties in the *incidenter* proceeding”⁵.

² As summarized in V. Barsotti, *The Importance of Being Open: Lessons from Abroad for the Italian Constitutional Court*, 8 Italian J. Pub. L. 28 (2016).

³ T. Groppi, *Giustizia costituzionale "Italian Style"? Sì, grazie (ma con qualche correttivo)*, in 2 Dir. Pubbl. Comp. Eur. (2016).

⁴ T. Groppi, A. M. Lecis Cocco Ortu, *Openness and Transparency in the Constitutional Adjudication: Amici Curiae, Third-Parties Intervention and Facts-Finding Powers*, in V. Barsotti, P.G. Carrozza, M. Cartabia, A. Simoncini (eds), *Dialogues on Constitutional Justice. Comparative Reflections on the Italian Style* (2020 forthcoming), 61.

⁵ See critically on this phase, M. D’Amico, *Parti e processo nella giustizia costituzionale* (1991).

Later, beginning in 1991, the Court started to admit third-party interventions on a case-by-case basis, pursuant to an interpretation of Article 24 of the Constitution (the right to defence), according to a fluctuating case-law, widely criticized by scholars who sought greater clarity in the eligibility criteria for third-party interventions. In order to address those critics, in 2004 the Court amended the S.P., explicitly recognizing the possibility of third-parties intervention in Article 4, paragraph 3, according to which “possible interventions of other subjects [other than the President of the Council of Minister or the President of the Region], without prejudice to the Court’s competence to decide on their admissibility, must take place with the same formalities”. Therefore, the reform did not introduce any procedural rules, and it refrained from establishing any admissibility criteria. As before, the decision on the admissibility of the intervention was made by the Court in the very moment of the substantive decision, by way of an order published as an annex to the judgement and it remained fully discretionary. The “intervention” mentioned by Art. 4 S.P. is reserved to “third-parties holding a special interest directly concerned with the *principaliter* case and thus susceptible to be directly and immediately affected by the judgment”⁶.

The Court constantly rejects those third-parties interventions whose interest is based on the general effects of the constitutionality judgment because this would be founded on merely factual interests. The range of groups whose applications to intervene have been rejected includes professional orders and trade unions, professional representative groups, civil rights groups, and other advocacy groups defending the rights of their members. Their representative role and their engagement to defend the collective interests of a category of people are not taken into account.

Despite this well-established case-law, interest and advocacy groups continue to file third-party briefs with the Court in defence of the collective interests that may be affected by the decision. Since the institutionalization of third-party interventions in the S.P. in 2004, they submitted almost half of the overall

⁶ See among others: Judgment n. 194/2018.

intervention requests received by the Court⁷. Even if the subject who drafted such brief does not acquire any formal procedural status, they can be read and informally taken into account, as pointed out some years ago the actual President of the Court, Professor Marta Cartabia⁸.

This means that even rejected interventions can serve as information sources, despite their formal non-admission. In addition, until recently, third parties who submitted a brief had the possibility to accede to the case file before the decision on the admissibility (or inadmissibility) of their intervention⁹.

Therefore, even though *amicus curiae* interventions were not allowed before the Italian Constitutional Court, we can consider that a form of *amicus curiae* procedure seems to have developed, at least informally.

Against this background, scholars have proposed the introduction of two different types of third-party participation, according to a double track model existing at comparative level in many countries: a true third-party intervention and the *amicus curiae*¹⁰. The third-party intervention *stricto sensu* would have been reserved for third parties possessing a right that can be affected by the decision, while the *amicus curiae* brief would have been reserved for groups or public establishments whose interest to intervene lies in the general effects of the decision on the rights and interests they represent. This distinction was aimed at permitting the Court to find a balance between the advantages

⁷ See A.M. Lecis Cocco Ortu, *Les interventions des tiers porteurs d'intérêts collectifs dans les contentieux constitutionnels incidents français et italien* (2018) 302 ff.

⁸ M. Cartabia, *Qualche riflessione di un giudice costituzionale intorno al problema dell'intreccio tra diritto, scienza e tecnologia*, in *BioLaw Journal - Rivista di BioDiritto*, 1/2017, 11.

⁹ This practise was stopped by the Decision of the President of the Court of 21 November 2018, on the "Making the case file available to the interveners, before the declaration of admissibility of their intervention".

¹⁰ A. Concaro, M. D'Amico, *Proposte di modifica delle norme integrative*, in A. Pizzorusso, R. Romboli, G. Famiglietti, E. Malfatti, *Le norme integrative per i giudizi davanti alla Corte costituzionale dopo quasi mezzo secolo di applicazione* (2002) 454 ff. especially 460; A. Cerri, *Corso di giustizia costituzionale* (2008) 226-227. More recently, see also A.M. Lecis Cocco Ortu, cit. at 7; A. Pugiotto, *Per un'autentica dialettica a Corte*, and T. Groppi, *Verso un giudizio costituzionale "aperto"? Riflettendo su interventi di terzi e amici curiae di fronte alle sfide per la giustizia costituzionale nel XXI secolo*, in *Quad. cost.*, 2/2019, respectively 361 ff. and 371 ff.

and disadvantages of *amicus curiae*, submitting the two types of intervention to different procedural rules, also to avoid the risk of the Court being overwhelmed by a large number of briefs or lengthening the duration of the proceedings, especially taking into account the public hearing.

3. As for facts-finding powers, the Court refers to non-legal arguments in many decisions, especially to assess the “reasonableness” (*ragionevolezza*) of a legislative provision (that is, to measure the proportionality of the regulation to the factual situation) or to assess in advance the impact of its decisions (especially in terms of financial impact). However, very often the factual arguments are formulated very generically, without any reference to the source of the information and without using the formal fact-finding provisions contained in the rules on Constitutional Court proceedings (Articles 12-14 S.P.). As for its own *ex-officio* fact-finding, in the vast majority of cases the Court acquires facts or other non-legal arguments informally during the preliminary investigation carried out by the judge rapporteur and by his clerks. The Court does not mention this activity in the text of the decision – not even in the “in fact” section. In order to formally regulate this informal activity, in 2004 the S.P. were amended to allow the documents acquired to be made available to the parties, but this rule does not seem to have had any impact on the use of arguments (Article 7, paragraph 2, S.P.).

The Court has made use of its formal fact-finding powers, requiring a collegial deliberation and an evidence-gathering order, in very few cases. The analysis of those cases does not show any coherence, with regard to both the circumstances that prompted the Court to start a formal factfinding proceeding, the documents requested, and the recipients of the requests. The haphazard nature of the evidence-gathering orders has generated doubts, repeatedly raised by scholars, that these orders may likely be used by the Court in order to postpone complex decisions or to give notice to the legislature of a possible forthcoming declaration of unconstitutionality. In addition, once the Court has received the information requested in the order, only rarely has it referred to the order and to the evidence gathered in the actual judgment addressing the question of constitutionality. It may happen that no reference to the order is made in the judgment, either in the “facts of the case” (*fatto*) or in the “conclusions on points of law” (*diritto*).

This makes it even more difficult to understand the role played by the formal fact-finding procedure.

Against this background, scholars have pointed out the importance of using consistently the formalized facts-finding powers, for improving the transparency of the decisions¹¹, or have proposed to introduce new facts-finding tools, as the hearings of experts, according to the German model¹².

4. In conclusion, until today the Court appeared willing to keep some distance from society (from both facts and people), almost expressing a preference for relying on some mediation instances. This picture corresponds to the Italian model of judicial review as an indirect model (lacking a direct individual complaint), in which the Court turns primarily to ordinary judges, who are the main gatekeepers and implementing actors of its decisions. In addition, if we consider that courts always talk to their “supposed” audience, we can understand why the Italian Constitutional Court adopts an approach to external contributions which is consistent with the tradition of civil law judges.

However, more recently, this approach has been increasingly challenged by the evolving attitude of ordinary and supranational judges, who themselves have become more and more open to third-parties briefs and *amici curiae* and by the Court’s compelling need to preserve its legitimacy in an increasingly polarized political context. The Court has showed to be conscious of the new challenges, especially by developing in the last few years a new communicative attitude, by tailoring more carefully its press-releases, by making use of social media and by organizing dissemination activities, such as the “Travel in Italy” initiative (where judges of the Court visited schools and prisons), or a photographic exhibition open to the public in the building of the Court in March 2019, called “The face of the Court”. More precise signs of the dissatisfaction of the Court with the external relationality have been the seminar on “Interventions of third parties and ‘Amici Curiae’ in assessing the constitutional legitimacy of laws, also in the light of the experience of other national and supranational courts”, organized by the

¹¹ T. Groppi, *I poteri istruttori della Corte costituzionale nel giudizio sulle leggi* (1997).

¹² V. Marcenò, *La solitudine della Corte costituzionale dinanzi alle questioni tecniche*, in Quad. cost., 2019, 393 ff.

Constitutional Court on 18 December 2018 and a decision of the President of the Court regulating the access of subjects asking for intervention to the trial files and documents on 21 November 2018.

5. In what has been described as “an astonishing move”¹³, on January 11, 2020 a press release was posted on the web page of the Constitutional Court, titled “The Court Opens up to Hearing the Voice of Civil Society”, announcing that on January 8 the Court approved some amendments to the Supplementary Provisions. The amendments were published on the Official Journal some days later and then they entered into force.

They completely changed the legal framework, by introducing a “triple track route”, identifying three separate types of intervention of external subjects.

In particular, the new Article 4-ter introduces the most significant novelty of *amicus curiae* briefs in the Italian constitutional procedural law. It states that all non-profit social groups and all institutional bodies representing collective or diffuse interests relevant to the questions discussed in the proceedings can submit by email a brief (no more than 25,000 characters). The President, after consulting the judge rapporteur, may admit them, if s/he is persuaded that the briefs provide useful information to understand and evaluate the case, given its complexity. This provision would apply to all the proceedings falling within the competences of the Court, including principal proceeding and conflicts between State powers and State and regions.

In addition, with regard to incidental proceedings, the Court amended Article 4, codifying its previous case-law. The range of potential third-parties intervenors is now extended – in addition to the parties to the case and the President of the Council of Ministers (and the President of the relevant Regional Council, if a regional law is concerned) – to other subjects, provided they have a valid and directly and immediately relevant interest in the decision. Prospective third parties may, when appropriate, be also authorised to access the case files of the constitutional proceedings prior to the hearing before the Court, as stated by Article 4-bis.

¹³ M. Romagnoli, *The Italian Constitutional Court Opens Up to Hear the Voice of Civil Society*, *VerfBlog*, 2020/2/15, <https://verfassungsblog.de/the-italian-constitutional-court-opens-up-to-hear-the-voice-of-civil-society/>, as the reference to the “triple track”.

The Court also amended Article 14-*bis* on facts-finding, introducing the possibility for the Court to call renowned experts when it deems it necessary to acquire information on specific areas of knowledge. The experts will be heard in chambers, in the presence of the parties to the case.

In its press release, the Court itself pointed out the aim of the reform, by beginning with these words: "From now on, civil society too will be able to make its voice heard on issues discussed before the Constitutional Court". It also referred to the sources of inspiration, by underlying that the amendments (and especially the new provision on *amicus curiae*) are "in line with the practice followed by the supreme and constitutional courts of many other countries". We should add that they are also in line with proposals that have been advanced by many Italian scholars for decades.

Those provisions represent an important step (we could say a real "revolution of openness and transparency") towards a "true" relational approach in constitutional adjudication, which not only implies a positive and constructive dialogue, but also requires accepting the challenge of confrontation in a more open and transparent manner.

The Court accepted the challenge and the opportunity to move from the "triple I attitude" to the "FED (formal, explicit, direct) approach". However, the Court retains a large discretionary power on the admissibility and selection of *amici curiae* briefs and the experts to be heard, following "a calibrated approach that accommodates interpretative room for manoeuvre and recognizes that the judge very much remains a legal professional, primarily using formal legal reasoning and legal methodologies to ply her trade", as it has been suggested by renowned international scholars¹⁴. Therefore, the Court made the first move, but only future practice will tell us how this revolution in the rules will really influence the "Italian-style" constitutional adjudication.

¹⁴ M. de Visser, *Procedural Rules and the Cultivation of Well-Informed and Responsive Constitutional Judiciaries*, in V. Barsotti, P.G. Carrozza, M. Cartabia, A. Simoncini (eds), cit. at 1, 79 ff.

ARTICLES

ORPHAN DRUGS FOR THE TREATMENT OF RARE DISEASES. A COMPARATIVE PUBLIC LAW PERSPECTIVE

*Aldo Sandulli**

Abstract

This article aims to analyse the regulatory framework of the orphan drugs for the treatment of rare diseases. After defining the concepts of “orphan drug” and “rare disease” and reviewing the U.S. and European regulatory regimes, the essay examines the Italian legislation and, in particular, the balance of the current distribution of expenditure between public bodies and private economic operators. The article reaches the conclusion that current Italian framework represents a best practice: it allows the most appropriate constitutional balance between public interest, private economic operators interest and right to health of individuals.

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1. The concepts of “rare disease” and “orphan drug”. The distinction between orphan drug and innovative drug

The evocative name of American origin “orphan drug” is now in common use throughout the world. The term “orphan drug” refers to medicines for the treatment of rare diseases and conditions affecting a limited percentage of individuals¹. The high research, development, and commercialisation costs for these drugs is uneconomical² for pharmaceutical companies due to the small number of potential paying patients; so, being unable to “survive alone” in a competitive environment they need to be “adopted” by public health system³.

Legislation must therefore envisage a number of means to allow coverage for investment in research and development by private companies, including forms of financial or fiscal incentives, the distribution of costs between the State and private operators in the sector, and temporally limited exclusive drug commercialisation rights. The scenario is therefore one in which the market alone is unable to yield positive results, entailing substantial public intervention in terms of planning and management to bring about an adequate balance that will allow patients suffering from rare conditions to hope in a cure, and

¹ See, *ex multis*, S. Panunzio, G. Recchia (eds.), *Malattie rare: la ricerca tra etica e diritto* (2007).

² In addition to the term “orphan drugs”, the expression “uneconomic drugs” is also used.

³ On the positive effects of competition in the pharmaceutical market, see, *ex multis*, L. Arnaudo, G. Pitruzzella, *La cura della concorrenza. L'industria farmaceutica tra diritti e profitti* (2019).

pharmaceutical companies to meet the costs of research and development.

Consequently, European Union legislation has established appropriate multi-level administrative procedures for the designation of a medicinal product as an “orphan medicinal product” and to authorise placing it on the market (marketing authorisation), which has led to a specific and favourable regime for companies that produce medicines of this kind⁴.

A condition is considered “rare” when its prevalence (i.e. the number of cases diagnosed at a precise moment in time for a given population) does not exceed a certain conventionally fixed threshold. In Europe, the current rules on orphan medicinal products state that a “[c]ondition with a prevalence of not more than five affected persons per 10 thousand is generally regarded as the appropriate threshold”⁵. Community action programme runs along the same lines, according to which a rare disease is one which does not exceed the threshold of 0.05% of the population, or approximately one case per two thousand inhabitants or five cases per ten thousand individuals⁶. More recently, the rules governing clinical trials on medicinal products for human use have established that “severe, debilitating and often life-threatening diseases affecting no more than one person in 50,000 in the Union”⁷ are to be regarded as rare. In other parts of the world the parameters are different, although quite close to those established for Europe: in the United States, conditions affecting less than two hundred thousand people are considered rare (approximately 0.08% of the population; around 7.5 cases per ten thousand individuals); in Japan, all conditions that do not exceed fifty thousand cases (around four cases per ten thousand inhabitants);

⁴ Under Regulation (EC) No. 141/2000 of the European Parliament and of the Council of 16 December 1999, on orphan medicinal products, point 1 of the preamble states that “some conditions occur so infrequently that the cost of developing and bringing to the market a medicinal product to diagnose, prevent or treat the condition would not be recovered by the expected sales of the medicinal product; the pharmaceutical industry would be unwilling to develop the medicinal product under normal market conditions; these medicinal products are therefore called ‘orphan’”.

⁵ See Regulation (EC) No. 141/2000, point 5 of the Introduction.

⁶ Programme of Community action on rare diseases 1999-2003.

⁷ See Regulation (EU) No. 536/2014, point 9 of the Preamble.

in Australia, the parameter is narrower, as conditions affecting 1.2 people per ten thousand are considered rare.

Despite the rarity of these conditions, they affect a large proportion of the world population. In the United States, between twenty and twenty-five million inhabitants suffer from rare diseases; in Europe, 7% of the population, or just under thirty-five million inhabitants, suffer from such conditions; in Italy, estimated figures of over two million affected inhabitants have been returned. According to World Health Organization (WHO) statistics, rare diseases account for 10% of known conditions and are extremely diversified: it is estimated that the number of such diseases known and diagnosed falls between the seven- and eight-thousand mark⁸. In addition to being very difficult to diagnose, about 98% of rare diseases are not currently without pharmaceutical treatment of proven effectiveness (only about one-hundred-and fifty diseases are, at present, curable). This figure has serious repercussions: almost 30% of children suffering from a rare condition die before the age of five.

Under current European legislation, a drug for the treatment of a rare disease is classified as "orphan" "if its sponsor can establish: (a) that it is intended for the diagnosis, prevention or treatment of a life-threatening or chronically debilitating condition affecting not more than five in 10 thousand persons in the Community when the application is made, or that it is intended for the diagnosis, prevention or treatment of a life-threatening, seriously debilitating or serious and chronic condition in the Community and that without incentives it is unlikely that the marketing of the medicinal product in the Community would generate sufficient return to justify the necessary investment; and (b) that there exists no satisfactory method of diagnosis, prevention or treatment of the condition in question that has been

⁸ Internationally, there are at least three major lists of rare diseases: the National Organization of Rare Disease (NORD), the Office of Rare Disease, and Orphanet. Upon recommendation of the Italian Ministry of Health, with Ministerial Decree No. 279/2001 (Regulation establishing the national network of rare diseases and exemption from participation in the cost of related health services), the *Istituto Superiore della Sanità* drew up a list of rare diseases for the purposes of exemption from contribution. To exemplify the vastness and heterogeneity of the conditions, suffice it to mention glioma, multiple myeloma, cystic fibrosis, spinal muscular atrophy, and familial hypercholesterolemia, in addition to some better-known diseases, such as AIDS.

authorised in the Community or, if such method exists, that the medicinal product will be of significant benefit to those affected by that condition”⁹.

A number of points can be inferred from this definition: a) the product of a piece of scientific research must be submitted to an administrative procedure in order to obtain specific legal recognition; it is therefore subject to an authoritative provision with a view to verifying whether it meets a series of requirements established in the regulatory framework¹⁰; b) the drug has a sponsor¹¹ (often a pharmaceutical company) that submits the application for qualification: it follows that the procedure is at the request of one party and, therefore, the input comes from a private initiative; c) the drug may be defined as “orphan” under any one of the following sets of circumstances: the purpose of the drug (it must be used to diagnose the condition, as a prophylaxis, or a treatment), the severity of the disease (which must involve a threat to life or chronic debilitation), statistical data concerning the rarity of the disease at a given time (the disease must affect fewer than five people in ten thousand at the time the application is submitted), a need for the drug due to a lack of other effective treatments or the particularly beneficial results that the new drug can bring to patients; the second set is open, however, as it is not limited by statistical data; given the seriousness of the condition and the necessity of the medicine, it is linked to economic factors (the uneconomic nature of commercialisation in the absence of incentives)¹².

Italian law adds nothing new to the European definition of ‘orphan drug’, merely referring to Regulation (EC) No. 141/2000

⁹ See Article 3 of Regulation (EC) No. 141/2000.

¹⁰ See the next section about more on this.

¹¹ Regulation (EC) No. 141/2000 identifies the applicant as a “sponsor”, which it defines as “a legal or natural person, established in the Community, seeking to obtain or having obtained the designation of a medicinal product as an orphan medicinal product”.

¹² See also Commission Communication on the application of Articles 3, 5 and 7 of Regulation (EC) No. 141/2000 on orphan medicinal products. Commission Regulation (EC) No. 847/2000, establishing the provisions for implementing the criteria for defining a medicinal product as “orphan”, together with the definition of “similar” and “clinical superiority”, sets out more detailed criteria to enable applicants to prove that they meet the requirements for orphan medicines.

and its requirements¹³. The notion of orphan drug must be clearly distinguished from that of innovative drug, with which it is sometimes mistakenly confused. While the first concerns a rare condition (with all this entails in terms of the disadvantageous investment), “innovative” drugs relate to more common diseases whose prevalence exceeds the normal thresholds of distribution¹⁴. Once the degree of innovation has been assessed by the competent administrative authorities (in Italy by the Italian Medicines Agency, the *AIFA*), innovative drugs benefit from incentives to encourage pharmaceutical companies to invest in scientific innovation and improved treatments. Innovative drugs are identified as such using three parameters: the necessity for the treatment, its added therapeutic value, and the quality of evidence or the robustness of clinical studies. The need for treatment is conditioned by the existence of therapies for a given condition and indicates to what extent the new treatment can provide advanced responses to existing therapeutic needs; the added therapeutic value is determined by the extent of the clinical benefit, if any, that the new drug can bring compared with the alternatives available; the quality of the evidence is shown by the scientific validity of the elements produced to support the innovation. In conclusion, innovative drugs too can benefit from incentives due to the degree of scientific progress that the product can contribute to achieving, but – once on the market – they are able to support themselves through sale to a large number of patients, which is not the case of orphan drugs.

In order to examine the numerous legal issues surrounding orphan drugs, after focusing on U.S. regulation and other comparisons, it may be appropriate to take the analysis of organisational structure and procedural dynamics as a starting point for obtaining the status of orphan drugs and their commercialisation in Europe and Italy. There follows an examination of how the price of an orphan drug is established and how the exclusive rights normally enjoyed by companies commercialising the orphan drug work. The second half of the paper focuses on the topic of greatest interest in relation to orphan

¹³ See Article 15 (8) letters i) and i-bis) of Decree Law No. 95/2012, converted into Law No. 135/2012.

¹⁴ F. Anastasi, *La tutela della salute e le esigenze della concorrenza: un difficile bilanciamento per i farmaci innovativi*, in 2 *Amministrazione in cammino* 1 (2017).

drugs, namely the methods of distributing the costs envisaged by the various legal systems, with particular reference to Italy.

We use the European and Italian rules as a point of reference, aware that elements of global law and other important disciplines in the sector in other countries need also to be considered¹⁵ – starting from the oldest: the 1983 Orphan Drug Act (ODA)¹⁶, leading to amendments to the Federal Food, Drug, and Cosmetic Act – which we will use as a measure of comparison with the former.

Ultimately, this paper deals with two fundamental rights of the person. The first concerns the protection of the health of persons suffering from rare conditions. Diseconomies arising in this area must not be allowed to weaken the constitutionally protected right to health of patients suffering from such illnesses, meaning the right to health treatments of proven effectiveness and also to hope in the development of new forms of treatment as a result of the progress of pharmacological research. For these reasons, the indisputable need to ensure that people suffering from rare conditions receive the same treatment and healing opportunities as any other patient is the basis of special regulations for this type of drug, where the dynamics of the economy are largely replaced by corrective measures of an authoritative nature.

The second fundamental right, related to the first, concerns more generally the right of access to a drug and the circumstance that the major companies operating in the sector across the globe may, in order to be able to cover the costs of research and development in the absence of a sufficient number of beneficiaries, legally enjoy monopoly status, with sometimes serious repercussions in terms of costs for patients and/or the community (in some legal systems, even to the point of barring treatment, effectively condemning patients with rare conditions to death). It is necessary to understand what degree of profit margin companies need to be guaranteed under these circumstances when

¹⁵ With regard to the European (and global) regulation of pharmaceuticals, see, among others, A. Spina, *The Regulation of Pharmaceuticals Beyond the State: Global administrative law and global administrative law*, in E. Chiti, B.G. Mattarella (eds.), *Global Administrative Law and EU Administrative Law. Reports, Legal Questions and Comparison* (2011), 249 ff.

¹⁶ 97th Congress, Public Law 97-414, 4 January 1983 (H.R. 5238).

they invest capital in finding a cure for rare diseases and what dysfunctions are to be avoided in order to prevent excessive economic benefits for the pharmaceutical companies and costs that are too high for patients and their families to bare. The ideal starting point for an analysis of the administrative procedures for defining and placing orphan drugs on the market is the legal system of the United States, which was the first to introduce rules on orphan drugs.

2. U.S. regulation

The United States was the first country to introduce regulatory measures to encourage investment by pharmaceutical companies in unprofitable fields¹⁷. This means, for example, providing subsidies and tax incentives or guaranteeing exclusive distribution of a drug for a certain number of years, thereby ensuring such companies an adequate profit margin.

¹⁷ See, *ex multis*, C.A. Thomas, *Re-Assessing the Orphan Drug Act*, in 12 J.L. & Soc. Probs. 413 (1990); C.H. Asbury, *The Orphan Drug Act: The First 7 Years*, in 265 (7) JAMA 893 (1990); S.E. Lawton, *Controversy Under the Orphan Drug Act: Is Resolution on the Way?*, in 327 (46) Food Drug Cosm. L.J. 327 (1991); J.J. Flynn, *The Orphan Drug Act: an Unconstitutional Exercise of the Patent Power*, in Utah L. Rev. 389 (1992); A.M. Garber, *Benefits Versus Profits: Has the Orphan Drug Act Gone Too Far?* (1994), 88 ff.; M. Thamer, N. Brennan, R. Semansky, *A Cross-National Comparison of Orphan Drug Policies: Implications for the U.S. Orphan Drug Act*, in 23 J. Health Pol., Pol'y & L. 265 (1998); G.A. Pulsinelli, *The Orphan Drug Act: What's Right with It, Santa Clara Computer & High Tech*, in 12 L.J. 299 (1999); A.K. Rai, *Pharmacogenetic Interventions, Orphan Drugs, and Distributive Justice: The Role of Cost-Benefit Analysis*, in 19 Soc. Phil. & Pol'y 246 (2002); T. Maeder, *The Orphan Drug Backlash*, in 19 Sci. Am. 80 (2003); D. Loughnot, *Potential Interactions of the Orphan Drug Act and Pharmacogenomics: A Flood of Orphan Drugs and Abuses?*, in 15 Am. J.L. & Med. 365 (2005); R. Rogoyski, *The Orphan Drug Act and the Myth of the Exclusivity Incentive*, in 32 Colum. Sci. & Tech. L. Rev. 1 (2006); M. Abramowicz, *Orphan Business Models: Toward a New Form of Intellectual Property*, 12 Har. L. Review 1363, 1421 (2011); M. Herder, *Orphan Drug Incentives in the Pharmacogenomic Context: Policy Responses in the USA and in Canada*, in 12 Jour. L. & Biosc. 158, 166 (2016); J.B. Bannister, *Regulating Rare Disease: Safely Facilitating Access to Orphan Drugs*, in Fordham L. Rev. 1889 (2018).

2.1. The regulatory framework and organisational/functional solutions

The ODA assumes that there is a public interest in the development of orphan drugs and consequently in providing public incentives following the failure of the market¹⁸, granting drugs designated as “orphan” special legal status.

To this end, it provides that, in the event of approval, certification or licensing¹⁹ of the medicinal product by the Food and Drug Administration (hereinafter FDA) for the treatment of rare diseases, the Secretary of State for Health and Social Welfare will grant a seven-year industrial patent to the researcher or pharmaceutical company that submitted the application for accreditation of the medicinal product.

In addition, the Secretary grants funding to cover the costs of qualified clinical trials and the development of medical devices and medical foods²⁰. This legislation also establishes a number of tax incentives.

Lastly, the ODA provides for the establishment within, the Department of Health and Human Services, of an Orphan

¹⁸ “The Congress finds that (...): (1) there are many diseases and conditions, such as Huntington’s disease, myoclonus, ALS (Lou Gehrig’s disease), Tourette syndrome, and muscular dystrophy which affect such small numbers of individuals residing in the United States that the diseases and conditions are considered rare in the United States; (2) adequate drugs for many of such diseases and conditions have not been developed; (3) drugs for these diseases and conditions are commonly referred to as ‘orphan drugs’; (4) because so few individuals are affected by any one rare disease or condition, a pharmaceutical company which develops an orphan drug may reasonably expect the drug to generate relatively small sales in comparison to the cost of developing the drug and consequently to incur a financial loss; (5) there is reason to believe that some promising orphan drugs will not be developed unless changes are made in the applicable Federal laws to reduce the costs of developing such drugs and to provide financial incentives to develop such drugs; and (6) it is in the public interest to provide such changes and incentives for the development of orphan drugs”.

¹⁹ These are the three drug accreditation scenarios provided for in Sections 505 and 507 of the Federal Food, Drug, and Cosmetic Act and section 351 of the Public Health Service Act.

²⁰ “The term ‘medical food’ means a food which is formulated to be consumed or administered entirely under the supervision of a physician and which is intended for the specific dietary management of a disease or condition for which distinctive nutritional requirements, based on recognized scientific principles, are established by medical evaluation”.

Products Board²¹ tasked with promoting, assessing, consulting and sector budgeting.

²¹ "(a) There is established in the Department of Health and Human Services a board for the development of drugs (including Biologics) and devices (including diagnostic products) for rare diseases or conditions to be known as the Orphan Products Board. The Board shall be comprised of the Assistant Secretary for Health of the Department of Health and Human Services and representatives, selected by the Secretary, of the Food and Drug Administration, the National Institutes Health, the Centers for Disease Control and, any other Federal department or agency which the Secretary determines has activities relating to drugs and devices for rare diseases or conditions. The Assistant Secretary for Health shall chair the Board; (b) the function of the Board shall be to promote the development of drugs and devices for rare diseases or conditions and the coordination among Federal, other public, and private agencies in carrying out their respective functions relating to the development of such articles for such diseases or conditions; c) in the case of drugs for rare diseases or conditions the Board shall (...) (1) evaluate (...) (A) the effect of subchapter B of the Federal Food, Drug, and Cosmetic Act on the development of such drugs, and (B) the implementation of such subchapter; (2) evaluate the activities of the National Institutes of Health and the Alcohol, Drug Abuse, and Mental Health Administration for the development of drugs for such diseases or conditions, (3) assure appropriate coordination among the Food and Drug Administration, the National Institutes of Health, the Alcohol, Drug Abuse, and Mental Health Administration, and the Centers for Disease Control in the carrying out of their respective function relating to the development of drugs for such diseases or conditions to assure that the activities of each agency are complementary, (4) assure appropriate coordination among all interested Federal agencies, manufacturers, and organizations representing patients, in their activities relating to such drugs, (5) with the consent of the sponsor of a drug for a rare disease or condition exempt under section 505(i) of the Federal Food, Drug, and Cosmetic Act or regulations issued under such section, inform physicians and the public respecting the availability of such drug for such disease or condition and inform physicians and the public respecting the availability of drugs approved under section 505(c) of such Act or licensed under section 351 of this Act for rare diseases or conditions, (6) seek business entities and others to undertake the sponsorship of drugs for rare diseases or conditions, seek investigators to facilitate the development of such drugs, and seek business entities to participate in the distribution of such drugs, and (7) reorganize the efforts of public and private entities and individuals in seeking the development of drugs for rare diseases or conditions and in developing such drugs; (d) the Board shall consult with interested persons respecting the activities of the Board under this section and as part of such consultation shall provide the opportunity for the submission of oral views; (e) the Board shall submit to the Committee on Labor and Human Resources of the Senate and the Committee on Energy and Commerce of the House of Representatives an annual report (...) (1) identifying the drugs which

These forms of incentives have led to significant development in the orphan drugs sector. As early as 1993, the Office of Rare Diseases Research (ORDR) was informally established as part of the office of the Director of the National Institutes of Health (NIH), the federal agency for health research. In the light of its rapid development, Congress passed the Rare Diseases Act (RDA) in 2002, which gave the ORDR legal recognition. The ORDR is headed by a Director (appointed by the Director of the NIH)²².

have been designated under section 526 of the Federal Food, Drug, and Cosmetic Act for a rare disease or condition, (2) describing the activities of the Board, and (3) containing the results of the evaluations carried out by the Board. The Director of the National Institutes of Health and the Administrator of the Alcohol, Drug Abuse, and Mental Health Administration shall submit to the Board for inclusion in the annual report a report on the rare disease and condition research activities of the Institutes of the National Institutes of Health and the Alcohol, Drug Abuse, and Mental Health Administration; the Secretary of the Treasury shall submit to the Board for inclusion in the annual report a report on the use of the credit against tax provided by section 44H of the Internal Revenue Code of 1954; and the Secretary of Health and Human Services shall submit to the Board for inclusion in the annual report a report on the program of assistance under section 5 of the Orphan Drug Act for the development of drugs for rare diseases and conditions. Each annual report shall be submitted by June 1 of each year for the preceding calendar year”.

²² More specifically, the tasks of the Director of the ORDR are as follows: “ (1) IN GENERAL. - The Director of the Office shall carry out the following: (A) The Director shall recommend an agenda for conducting and supporting research on rare diseases through the national research institutes and centers. The agenda shall provide for a broad range of research and education activities, including scientific workshops and symposia to identify research opportunities for rare diseases. (B) The Director shall, with respect to rare diseases, promote coordination and cooperation among the national research institutes and centers and entities whose research is supported by such institutes. (C) The Director, in collaboration with the directors of the other relevant institutes and centers of the National Institutes of Health, may enter into cooperative agreements with and make grants for regional centers of excellence on rare diseases in accordance with section 404G. (D) The Director shall promote the sufficient allocation of the resources of the National Institutes of Health for conducting and supporting research on rare diseases. (E) The Director shall promote and encourage the establishment of a centralized clearinghouse for rare and genetic disease information that will provide understandable information about these diseases to the public, medical professionals, patients and families. Reports. (F) The Director shall biennially prepare a report that describes the research and education activities on rare diseases being conducted or supported through the national research institute and centers, and that

Thanks to the RDA, in addition to providing the ORDR with specific legal status, funding has been substantially increased to foster the development of diagnosis and treatment for patients with rare diseases.

Lastly, in 2012, again as part of the NIH scenario, the ORDR became a division of the National Center for Advancing Translational Sciences (NCATS), with the task, among other things, of overseeing the Rare Diseases Clinical Research Network and the Genetic and Rare Diseases Information Center.

Essentially, the ORDR is therefore tasked with planning research on rare diseases, promoting and supporting research, and training researchers in cooperation with other health institutions, promoting a clinical research network for rare diseases, managing and encouraging research cooperation on rare diseases. It will also boost scientific opportunities and help to increase international cooperation, promoting an extensive programme of scientific meetings, providing information concerning rare diseases, and will compile an annual report for Congress on the rare disease activities of the NIH.

The other front relating to orphan drugs is that within the FDA whose purpose is to perform all the activity that precedes – and leads up to – marketing authorisation of the drug. The Office of Orphan Products Development (the OOPD) was established there in 1983. Its purpose is to assess and develop products (medicines, biological products, equipment, medical foods) that may be promising in terms of diagnosing and treating rare diseases. The task of the OOPD is therefore to promote the availability of safe and effective products for the treatment of rare diseases by qualifying them as “orphans”. This status allows the drug, at any stage of development (research, development, and commercialisation), to benefit from incentives to implement them

identifies particular projects or types of projects that should in the future be conducted or supported by the national research institutes and centers or other entities in the field of research on rare diseases. Reports. (G) The Director shall prepare the NIH Director's annual report to Congress on rare disease research conducted by or supported through the national research institutes and centers. (2) Principal advisor regarding orphan diseases. - With respect to rare diseases, the Director shall serve as the principal advisor to the Director of NIH and shall provide advice to other relevant agencies. The Director shall provide liaison with national and international patient, health and scientific organizations concerned with rare diseases”.

until marketing authorisation is granted. In addition to collaborating with research and medical institutions, professional organisations, universities, government agencies, pharmaceutical companies, patients' associations for persons with rare diseases, on receiving a special request from the sponsor, the OOPD assesses the scientific and clinical results presented with a view to the possible qualification of the product in terms of effectiveness for the treatment of rare diseases and the advancement of scientific knowledge in the field, also creating the possibility of providing incentives for the development of this product. Drugs and biological products that are considered promising for the diagnosis and treatment of rare diseases are included in the Orphan Drug Designation Program; devices that pass OOPD screening are included in the Humanitarian Use Device (HUD) Program. If a drug or biological product is approved for the treatment of rare paediatric diseases, it will come under the Rare Pediatric Disease Priority Review Voucher Program. This means that a bonus is made available that can be used to obtain priority investigation for later marketing authorisation concerning a different product. This is a very interesting measure because of the originality of the reward system, but also due to the degree of importance that the legal system gives the treatment of diseases affecting children. Lastly, the OOPD runs various subsidy programmes for external subjects: the Orphan Products Grants Program allocates funds for clinical research aiming to demonstrate product safety and effectiveness; the Pediatric Device Consortia (PDC) Grants Program provides funding for the development of non-profit consortia with a view to developing pediatric medical devices; the Orphan Products Natural History Grants Program finances studies to encourage the development of knowledge about rare diseases through methods, paradigms, and indicators typical of natural history.

Drugs are classified as "orphan" upon successful completion of the procedure, and a seven-year patent is granted to the sponsor who submitted the application. In addition to data relating to the promoter and the drug (the name and address of the promoter, the name and address of the manufacturer, the international common name and trade name of the drug), the application must contain a description of the condition for which the use of the drug is to be used and the conditions of use, as well

as the number and main characteristics of the population likely to be treated. Furthermore, a description of the drug and its risk/benefit ratio or a summary of the main pre-clinical and clinical data on the use of the product, as well as basic documentation must be provided. Lastly, an estimate of the development and distribution costs and an assessment of the sales potential in the United States, confirming the lack of profitability of placing the product on the market in specific cases, must be submitted. The FDA must respond within a maximum of sixty days after receiving the request. Information regarding the "orphan" status awarded is published in the Federal Register. Achieving orphan drug classification and marketing authorisation are necessary steps in placing an orphan drug on the market.

If the drug is apparently identical to a product already approved for the same condition, the applicant company must be able to demonstrate the clinical superiority of its own drug, which will then be considered as a new active substance. The effectiveness of the drug must be demonstrated in terms of the prevention, diagnosis, or treatment of a rare disease. The products of more than one pharmaceutical company may be classified as orphan drugs for the same ailment, but the period of market exclusivity is granted to the sponsor who applies for commercialisation first. Competitors have the right to market drugs for other ailments during the period of exclusivity.

Obtaining orphan drug status gives a pharmaceutical company market exclusivity for seven years after the drug is placed on the market, plus the following benefits for product development: a 50% tax credit on the cost of clinical trials conducted in the United States; the preparation of written recommendations by the FDA regarding clinical and pre-clinical studies that must be completed in order to register the new drug, and an accelerated FDA registration procedure.

In certain cases of particular urgency, orphan drugs may be made available to patients before they are placed on the market. The compassionate use of a Treatment Investigational New Drug (T-IND) may be possible when the following conditions are met concurrently: the drug must be intended for the treatment of a serious or life-threatening condition; no alternative drug or treatment is available; the product must already be subject to clinical trials and must be in an active phase of marketing

authorisation approval. T-INDs are granted for a limited period of time.

2.2. Possible misapplications in the U.S. scenario

As mentioned above, in United States, the orphan drugs sector has experienced a surprising and over-rapid development, proving to be an important market area for pharmaceutical companies²³: over recent years, shares in the main companies in the sector have reached a rating of 25%, and the gains on sales of orphan drugs have been very high. This development has also given rise to sensitive application issues. The main problems that have come to light are outlined below.

For some orphan drugs, problems similar to those affecting non-orphan drugs have been identified: for example, it has been found that the selling price is disproportionate to the costs of the drug's research, development, and production (the case of hepatitis C drugs is sadly a well-known example). But there are also specific dysfunctions deriving from orphan drug classification.

The first of these is companies seeking orphan drug status in order to benefit from subsidies for research and development, tax and regulatory incentives, as well as patent benefits, only to apply later for permission to market the drug for the treatment of non-rare conditions. An emblematic example is a drug that was granted orphan status for the treatment of familial hypercholesterolemia, and the company enjoyed a significant number of economic benefits for development, testing, and bringing to the market. After some time, the company applied to the FDA for authorisation to market the product for the reduction of cholesterol levels in all diabetics, making enormous profits. EPO and the growth hormone (very well known for their use in

²³ See, *ex multis*, A.S. Kesselheim, *An empirical review of major legislation affecting drug development: past experiences, effects, and unintended consequences*, in 11 *Milbank Q.* 450, 502 (2011); U. Reinhardt, in *Probing our moral values in health care: the pricing of speciality drugs*, 314 *JAMA* 381 (2015); N. Bagley, B. Berger, A. Chandra, C. Garthwaite, A.D. Stern, *The Orphan Drug Act at 35: Observations and an Outlook for the Twenty-First Century*, in J. Lerner, S. Stern (eds.), *Innovation Policy and the Economy* (Volume 19) (2018), 97, 137; J. Sheridan, *Billion Dollar Orphans: Tension Between the Legal Intent and Social Purpose of the Orphan Drug Act*, 112 *Tex. A&M L. Rev.* 731 (2019).

doping in sport) followed the same path. The growth hormone is used to treat dwarfism in children: there are 10,000 children in the USA suffering from this condition, but the drug, which has very high prices due to the exclusivity regime, has brought an income of 120 million dollars per year.

It is indisputable that the pharmaceutical companies' earnings from orphan drugs are on the steady increase. Suffice it to recall the following data: while, in the past, the so-called blockbuster drugs (those capable of generating profits in excess of at least one billion dollars a year) were intended to treat traditional diseases, with a large pool of patients, in the 2015 ranking for the ten best-selling drugs in the world, seven were orphan drugs (the second best-selling drug is Humira which has a guaranteed revenue of more than fourteen billion dollars, while the other six all exceed revenues of five billion dollars). In the United States alone, in 2015, more than one-hundred-and-seven billion dollars were spent on the purchase of orphan drugs, and further growth in market share is forecast. These substantial earnings are mainly due to the cost of orphan drugs, on average twenty times higher than traditional drugs. But also – and especially – in addition to the abuse mentioned above, the original classification as “orphan” is later updated to include other “traditional” therapeutic uses: around 15% of the drugs classified as orphan are later recommended for other conditions; in Europe, eleven of the twenty best-selling orphan drugs have been designated for cancer treatment. In addition, orphan drugs can easily be used in off-label settings, regardless of the initial strict limitations, with all the ensuing benefits.

A second case of misuse of the special arrangements is the ability to enjoy exclusive market of an orphan drug for seven years, thus avoiding competition from other companies and keeping prices extremely high. In the case of two companies working simultaneously on the research and development of an orphan drug: the one that arrives first takes all, and the other company, despite all the expenses it has had to stand, will be out of the game for at least seven years, unless it can prove that its drug has a greater or, at least, distinct efficacy compared with the first one. In the political debate in Congress, several attempts have been made to remove the monopolistic system of rights. However, these attempts have all failed, and what is most striking is that, in

addition to the lobbying opposition of the companies involved, these initiatives have also had to face the opposition of associations of patients suffering from rare diseases, fearful of the introduction of measures that could jeopardise a system that has, all things considered, produced useful results. They argue that companies are willing to invest in this sector due to the opportunities for making significant profits, but if exclusive rights were eliminated, they would stop trying to treat rare diseases. It should also be borne in mind that there are enormous risks in this sector, so that for every company that makes huge profits, dozens of others will fail. Individual states can also have their own regulations, making it possible to obtain exclusive rights for longer periods; conversely, orphan drug classification may even be revoked. A case in point is a drug used to treat AIDS-related diseases, produced by a company based in North Carolina.

A third case, closely related to the first two, is the “black box” phenomenon, namely the fact that the price of the orphan drug should be proportionate to covering the costs of research and development, but thanks to rules relating to trade confidentiality, this information cannot be divulged and is known only to the company that produces it. Controversy over the very high prices of orphan drugs is commonplace. The latest such dispute involves a drug used to treat spinal muscular atrophy; in the first year of treatment alone the costs amount to \$750,000, and in subsequent years and for the rest of the patient’s life, they amount to \$375,000 per year. Insurance companies refuse to cover these expenses, which means that only wealthy patients can be treated; otherwise public funding must be used. It is true, however, that the pharmaceutical company has introduced ways of providing financial support for patients’ families and provides facilities for treating children. Another well-known case is the only existing drug for the treatment of two rare diseases (PNH, paroxysmal nocturnal haemoglobinuria, and AHUS, atypical haemolytic uremic syndrome) and costs each patient half a million dollars every year. On the basis of statements by university researchers who worked on the discovery of the drug, it is thought that around 80% of the research costs for this drug were covered by public funding and that the costs of development and commercialisation amount to about 1% of the sale price of the drug. The public system or the private insurance system can cope

with the huge costs. This drug brought its pharmaceutical company revenues of \$6 billion in eight years, making it one of the world's leading companies. Given the high cost, New Zealand's public health system has refused to cover it, and in Canada only a few provinces guarantee public coverage, thus creating a problem of access to medicine and survival for people with these rare diseases. Among other things, it has been found that the annual price of the drug is much higher in Canada than in other countries.

The fourth phenomenon, which also produces major abuse, is so-called 'salami slicing'. The technique involves applying for exclusive marketing authorisation for an orphan drug to be used for a specific rare disease and then, either at the same time or sometime later, applying for the same authorisation for a different rare disease. In this way, a drug can benefit from a variety of monopolistic advantages that can be distributed strategically over time in order to obtain maximum profit and cunningly prolong the exclusive commercial use of the drug.

Despite these abuses, for which the intervention of agencies and institutions working for the protection of competition between companies is required, the regulatory framework introduced has, in reality, produced positive results, as it has given a boost to research into, and industrial production of, drugs that pharmaceutical companies would otherwise have had no economic interest in producing.

3. Comparative notes on countries outside Europe

The second country to introduce special legislation on orphan drugs, with a regulation of 1993, was Japan, which is, one may recall, one of the most industrialised nations in the world.

In Japan, the status of orphan drug is granted to a pharmaceutical when two conditions are fulfilled, namely that it is to be used for incurable conditions for which no alternative health treatments are possible, or for conditions where the effectiveness and reliability of the drug are excellent in comparison with others on the market, and secondly that the number of patients with the condition in Japan be under fifty thousand, i.e., four cases per every ten thousand individuals.

Orphan drug status is granted by a branch of the Ministry of Health, Labour and Welfare, through a subcommittee within the Committee for Medicinal Products, whose conclusions are validated by a special committee. The applicant has to provide the administrative authority with the following data: the estimated percentage of patients in proportion to the overall population, and non-clinical studies and findings relating to the initial clinical phase, as well as the way the protocol has been developed. The authority that grants orphan status may revoke it if the above conditions cease to subsist.

The incentives that the Japanese government grants for research and development on orphan drugs fall into two types. First, they enjoy a simplified marketing authorisation procedure, as the law gives priority to the assessment of applications for the diagnosis or treatment of rare diseases. In addition, the Organisation for Drug Safety and Research advises pharmaceutical companies on the implementation of protocols and the preparation of approved applications. Furthermore, the duration of the industrial patent, which is usually six years for traditional drugs in Japan, is extended to ten years for orphan drugs, there are a number of financial incentives, including subsidies, such as those from the Pharmaceutical Fund for the reduction of side effects and the promotion of research, which provide financial assistance to cover part of the research and development costs of the orphan drug, as well as scientific work and consulting for development, and especially for clinical trials. Reimbursement of costs is available to cover fifty percent of drug development costs. In addition, there are tax incentives consisting of a six percent reduction in taxes for research and development expenses. Pharmaceutical companies that make a profit from the sale of orphan drugs must return part of the subsidies received as a contribution to the preservation of this kind of aid.

Australia has moved in a different direction since 1997-98, when it entered into an agreement with the United States for the exchange of information on rare conditions and orphan drugs. The Australian Therapeutic Goods Administration (TGA) signed an agreement with the US FDA, whereby the former transposes the provisions of the latter, incorporating them into its evaluation process. Specifically, criteria were established for the recognition

and evaluation of drugs not yet screened by the U.S. authorities or that do not meet the criteria established for the United States.

In Australia, the status of “orphan” was initially granted less easily than in other countries, being reserved for drugs to be used for treating conditions afflicting less than 1.2 cases per ten thousand and less than two thousand cases among the total population. New regulations came into force in 2017-2018, introducing amendments to the Therapeutic Goods Regulation of 1990 and providing for a limit of fewer than five cases per ten thousand individuals, a threshold closer to those found in other major industrialised countries.

Orphan drug status is valid for six months, and an extension may be requested every six months in order to keep the administrative offices up to date. This status entitles the holder to fiscal advantages (the TGA waives dues for applying for marketing authorisation and the annual registration fee). There are also financial perks (the TGA covers the costs of the process of designating a drug as orphan, compensating for the costs incurred via other items in the health budget), as well as privileged patent rights (the monopoly lasts five years).

Among non-European countries, South Korea, Singapore, and Taiwan have also adopted specific regulations for orphan drugs. There is an enormous gap between richer and more industrialised countries and poorer and less well-equipped ones in terms of health protection. Notably, no specific public policies on orphan drugs have been developed on the African continent. The situation is particularly delicate for so-called “orphan vaccines”, i.e. those used to treat rare infections or those with limited territorial impact (namely those affecting a limited geographical area but a very large number of people living there): the risk is particularly high for pharmaceutical companies, which would face development and research costs impossible to recover from product sales. If economic factors are negative, the incentive for a pharmaceutical company to work on an orphan vaccine may be dictated by non-economic motives, such as, for example, the decision to promote an ethical company image or else it may reflect a strategic choice by the company as a whole. Aid strategies may be implemented by richer countries or supranational bodies on the political level, or they may be inspired by humanitarian concerns through private donations, and they often work together.

For this, however, there is no supranational organisation to shoulder the task of coordinating the various policies in such a way as to concentrate energies on achieving the most important goals.

4. Orphan drugs in European legislation

European Orphan drug regulation came about almost 20 years after U.S. regulation and was clearly inspired by it. The recognition of orphan drug designation takes place through an administrative procedure governed by European Regulation No. 141/2000, which involves the European Medicines Agency (EMA) and the Committee for Orphan Medicinal Products (COMP), established within it²⁴.

Indeed, in order to qualify a medicine as “orphan”, the sponsor (almost always the manufacturer) applies to European Medicines Agency at each stage of the drug development process (but still prior to marketing authorisation). After an initial assessment of the admissibility of the application, the Agency sends a summary report to the Committee for Orphan Medicinal Products, which must reach an opinion on the recognition or otherwise of the designation of the drug as “orphan” within ninety days of receipt of the application. This opinion is then sent to the European Commission, which adopts a decision recognising the designation or rejecting the application within 30 days of receipt.

Under Article 8 of the Regulation, “the Community and the Member States shall not, for a period of 10 years, accept another application for a marketing authorization or grant a marketing authorisation or accept an application to extend an existing marketing authorisation for the same therapeutic indications in respect of a similar medicinal product with for a period of ten

²⁴ As stated in Article 4 of Regulation (EC) No. 141/2000, the Committee is composed of one member appointed by each Member State, three members appointed by the European Commission to represent patients’ organisations, and three members appointed by the Commission on the basis of the Agency’s recommendations. The term of office lasts three years and is renewable.

years”²⁵. This will ensure that the orphan medicinal product will have exclusive production for a period of one decade.

Regulation (EC) No. 726/2004 requires certain types of medicinal products, including orphans, to be subject to a “centralised” procedure in order to obtain marketing authorisation.

This procedure is carried out by the EMA through its Committee for Human Medicinal Products (CHMP). The Committee, after scientific assessment of the documentation submitted by the applicant, issues an opinion which is then forwarded to the European Commission. The Commission then adopts a decision that becomes binding on all Member States. The centralised procedure must be completed within two-hundred-and-ten days.

In Italy, the European Assessment Office plays an important role with regard to medicines authorised through the centralised procedure. It works through the *AIFA*, which carries out a scientific assessment of the dossiers of innovative medicinal products of high technological value.

This office classifies these drugs in a special section dedicated to pharmaceuticals that have not yet been assessed for reimbursement [class C(nn)], issuing a resolution of transposition to that effect. This class, established by Law No. 189/2012, can be considered provisional and includes drugs not yet assessed for reimbursement.

EC Regulation No. 141/2000 on orphan medicinal products now made it possible for companies manufacturing these products to request a prior opinion from the EMA on the various tests and trials necessary to demonstrate the quality, safety and efficacy of the drug; the Regulation also provides for the establishment of a procedure for the development of orphan drugs, consisting of

²⁵ Before applying for marketing authorisation, the sponsor of an orphan medicinal product may request an opinion from the Agency on the performance of the various tests and trials necessary to demonstrate the quality, safety and efficacy of the medicinal product under Article 51(j) of Regulation (EEC) No. 2309/93. 2. The Agency establishes a procedure for the development of orphan medicinal products, including normative consulting to define the content of the application for authorisation in accordance with Article 6 of Regulation (EEC) No. 2309/93.

regulatory advice from the Agency regarding the definition of the content of the application for authorisation.

Furthermore, on the basis of this Regulation, European Union – and consequently the Member States – undertake not to grant or accept other marketing authorisations for similar medicinal products with the same therapeutic indications for a period of ten years, thereby guaranteeing a period of protection.

In order to encourage the production of orphan medicinal products, the European Union has made it possible, for certain categories of medicinal products responding to unmet medical needs, to grant marketing authorisation more quickly, based on data less complete than those normally required. For this, there exist a conditional marketing authorisation and a marketing authorisation granted in exceptional circumstances.

In order to strike the right balance between reducing the time needed to access medicinal products and authorisation for medicinal products based on an unfavourable risk-benefit balance, it is necessary to subject these marketing authorisations to specific obligations. The holder should complete or undertake certain studies to confirm that the risk-benefit balance is favourable and to resolve any doubts regarding the quality, safety, and efficacy of the product.

Conditional authorisation, governed by Regulation (EC) No. 507/2006²⁶, consists of the rapid approval of a drug on the basis of less complete clinical data than those generally required. This form of authorisation may be required for a medicinal product intended for an unmet medical need, a seriously life-

²⁶ According to point 2 of the Preamble to Commission Regulation (EC) No. 507/2006 on a conditional marketing authorisation for medicinal products for human use falling within the scope of Regulation (EC) No. 726/2004, “In the case of certain categories of medicinal products, however, in order to meet unmet medical needs of patients and in the interests of public health, it may be necessary to grant marketing authorisations on the basis of less complete data than is normally the case and subject to specific obligations, hereinafter conditional marketing authorisations. And, according to point 6 of the Preamble, In the case of the conditional marketing authorisation, authorisation is granted before all data are available. The authorisation is not intended, however, to remain conditional indefinitely. Rather, once the missing data are provided, it should be possible to replace it with a marketing authorisation which is not conditional, that is to say, which is not subject to specific obligations”.

threatening or disabling condition, a rare disease, or for use in emergency situations in response to a threat to public health.

Conditional marketing authorisation may be issued if the Committee considers that, although full clinical data on the safety and efficacy of the medicinal product have not been provided, the risk-benefit balance of the medicinal product is nevertheless respected, it is likely that the applicant will be able to provide full clinical data at a later date, that the medicinal product is intended to meet unmet medical needs, and that the public health benefits deriving from the immediate availability on the market of the medicinal product in question outweigh the risk arising from the fact that additional data are still needed.

This authorisation is valid for one year and may be renewed. The company developing the drug is required to conduct further studies to provide complete data so that the conditional authorisation can be converted into a standard one. Authorisation is granted in urgent circumstances and may be granted on condition that the applicant puts mechanisms on the safety of the medicinal product in place and informs the competent authorities of any drawbacks related to the use of the product.

Conditional authorisation issued in exceptional circumstances, generally meaning extremely rare diseases²⁷, is different from conditioned marketing authorisation. Both procedures are laid down in Article 14 of Regulation (EC) No. 726/2004, (7) and (8) respectively. However, while conditional marketing authorisation is issued before all the data are available, and will subsequently be supplemented by the missing data, it

²⁷ Article 14(7) of Regulation (EC) No. 726/2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, which provides that "Following consultation with the applicant, an authorisation may be granted subject to certain specific obligations, to be reviewed annually by the Agency. The list of these obligations shall be made publicly accessible. By way of derogation from paragraph 1, such authorisation shall be valid for one year, on a renewable basis. The Commission shall adopt a Regulation laying down provisions for granting such authorisation. That measure, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 87 (2a)".

will never be possible, in principle, to compile a complete dossier for marketing authorisation issued in exceptional circumstances.

5. Italian regulation

In Italy, the European tendency to facilitate rapid entry onto the market of the drug and, therefore, simplified access to orphan drugs, is confirmed²⁸. Law no. 189/2012 made it possible for a pharmaceutical company to apply to the AIFA for pricing and reimbursement immediately after the issue of the CHMP's positive opinion and therefore even before the European Commission has issued a Community authorisation to market the drug. This exception to the normal procedure is not only reserved to orphan drugs but also those that can only be used in a hospital environment and drugs of exceptional therapeutic importance. With subsequent Law No. 98/2013, the AIFA was assigned the task of assessing orphan drugs of exceptional therapeutic importance as a matter of priority, with a maximum evaluation time of one-hundred days (so-called "fast track" authorisation)²⁹.

²⁸ For an overview of the regulation of drugs in Italy, see, *ex multis*, M. Gnes, *Farmaci*, in M.P. Chiti, G. Greco (eds.), in *Trattato di diritto amministrativo europeo, Parte speciale*, (2007), 1075-1111; C. Casonato, *I farmaci, fra speculazioni e logiche costituzionali*, in 4 *Rivista AIC* 1 (2017); about the legal regulation of orphan drugs in Italy, see, among others, F. Ficicchia, *Malattie rare e farmaci orfani. Profili giuridici*, in 4 *Contratto e impresa. Europa* 428, 458 (2007); F. Massimino, *Qualifica di "medicinale orfano": condizioni per l'assegnazione e giurisprudenza del Tribunale di primo grado*, in 1 *Diritto pubblico comparato ed europeo* 167, 171 (2011); A. Magni, *I c.d. "diritti della personalità", il diritto alla salute e le c.d. "malattie rare" nell'ordinamento Italo-europeo*, in 5-6 *Il Diritto di famiglia e delle persone* 1152, 1164 (2016); A. Parziale, *Il futuro dei farmaci orfani tra promozione della ricerca per la cura di malattie rare e i rischi di prezzi eccessivi: il ruolo del diritto della concorrenza*, in *Contratto e impresa* 1245, 1277 (2016); G. Sena, *Farmaci "orfani" e medicinali per uso pediatrico. Note critiche*, in 1 *Rivista di diritto industriale* 173, 178 (2016); A. Perfetti, *La tutela della salute nell'Unione europea attraverso l'azione nel campo delle malattie rare*, in 1 *DPCE online* 18 (2017); L. Scaffardi, G. Formici, *Farmaci orfani nel panorama europeo e nazionale: alla ricerca di un delicato equilibrio*, in 1 *Amministrazione in cammino* 1 (2017); A. Cauduro, *Il paradigma del farmaco orfano*, in *Costituzionalismo* 55, 70 (2018); A. Magni, *Il diritto alla salute e la creazione di sottogruppi: riproposizione di principi attivi già approvati e autorizzati nell'ambito della terapia delle c.d. "malattie rare"*, in 3-4 *Il Diritto di famiglia e delle persone* 305, 324 (2019).

²⁹ Pursuant to Article 44(4-ter) of Decree Law No. 69/2013 (converted into Law No. 98/2013), amending Law No. 189/2012 with the introduction of Article 5-

Products designated as “orphan medicinal products” are entered in a European register and, if authorised to be placed on the market, are eligible for a special preferential scheme designed to compensate the producers of any medicinal products for the diseconomies they have suffered and that are not offset by sales profits. Marketing authorisation for orphan medicinal products follows the same rules as any other medicinal product³⁰. In the case of orphan medicinal products, however, pursuant to Article 7(1) of (EC) Regulation No. 141/2000, the applicant may be exempted from the obligation to demonstrate the requirements set out in Annex B to (EEC) Regulation No. 2309/1993, namely that the medicinal product be of “major therapeutic interest” and constitute “a major innovation”. In the Communication from the Commission on the application of Articles 3, 5, and 7 of EC Regulation No. 141/2000 on orphan medicinal products, and in particular in relation to the relationship between orphan and non-orphan medicinal products, paragraph D states that the procedure for designation as an orphan medicinal product and for marketing authorisation are “governed by different criteria, which means that different decisions may be taken as regards, for example, the condition underlying the designation and the authorised therapeutic indication”.

The main benefit provided for by the European Regulation is that it is possible to grant the designated orphan medicinal product exclusive access to the market throughout Europe for a period of ten years³¹; moreover, under Article 9 of the Regulation,

bis, the AIFA assesses, for the purposes of classification and reimbursement by the National Health Service, the medicines referred to in paragraph 3, for which the relevant application for classification referred to in paragraph 1 has been submitted, accompanied by the necessary documentation as a priority and giving them priority over the classification proceedings pending at the date of submission of the application referred to in this section, including through the establishment of extraordinary sessions of the competent Commissions. In this case, the period referred to in the first sentence of paragraph 4 is reduced to one hundred days (so-called fast track authorisation).

³⁰ The framework was initially contained in Council Regulation (EEC) No. 2309/1993. Subsequently, Directive 2001/83/EC on the Community code relating to medicinal products for human use was adopted.

³¹ That market exclusivity referred to in Article 8 of EC Regulation No. 141/2000 is not the same as patent exclusivity, which may protect the same product at the same time, since the European regulation is without prejudice to the legislation on the protection of intellectual property. On this point, see G.

designated orphan medicinal products “may benefit from incentives made available by the Community and the Member States in order to promote research, development and placing on the market”.

Many drugs have been designated as “orphan” up to now, meaning they have completed the procedure to ascertain their necessity in the treatment of a condition considered serious and rare. In fact, there are over one-thousand-two-hundred of them. However, of the drugs that have obtained this designation, only slightly more than a tenth have gone on to receive marketing authorisation: this testifies to the level of risk associated with developing orphan drugs.

Recognition of the designation of orphan drug is not the desired outcome of research and testing geared to treating previously untreated diseases. It is actually an intermediate phase, following the identification of a drug suitable for the treatment of a serious and rare condition not previously treated, but prior to further testing, consisting of pre-clinical and clinical studies, after which it will be possible to apply for marketing authorisation for the drug. Statistically, it is during this phase that a drastic reduction in the number of orphan drugs eligible to be marketed occurs.

To date, just under one hundred orphan drugs have been authorised and reimbursed in Italy, making up 73% of those approved in Europe. Public health expenditure for orphan drugs has almost tripled in recent years, rising from six-hundred-and-fifty-million in 2010 to one-billion-six-hundred-million in 2017.

6. Incentive measures for pharmaceutical companies operating in the orphan drugs sector: comparative profiles

Measures such as granting a temporary monopoly or agreeing on a high price for the orphan drug aim to encourage pharmaceutical companies to invest large sums in research and development, substantially compensating for the risk of losing the money invested: the research may not bear fruit (as the cure may not be found), or once the cure is found, it may not be recognised

Sena, *Farmaci “orfani” e medicinali per uso pediatrico. Note critiche*, in 4-5 Riv. dir. industr. 173 (2016).

as an orphan drug, or authorisation to market the drug may not be granted. The sector is therefore subject to a high degree of uncertainty.

However, this need is hindered by the necessity of containing public expenditure and the need not to place an unlimited economic burden (inevitably growing and not wholly predictable) solely on the State budget and therefore on society as a whole.

Within the European scenario, the measures adopted by the individual States to compensate for the greater economic burden placed on them by the process of research and development related to medicines for rare diseases are diversified. Examining the regulations adopted in the various European countries to implement Regulation (EC) No. 141/2000, we can distinguish between measures that constitute incentives and funding for research (Cyprus, Poland, Spain), the provision of dedicated funds for spending on orphan drugs (Croatia), reimbursement measures from public funds (Estonia, Greece, Poland) or through the insurance system (Germany, Slovakia), tax exemptions for companies producing orphan drugs (France), and the joint negotiation of pricing by pharmaceutical companies and the State (Belgium, the Netherlands and Luxembourg)³².

As mentioned above, in the United States, the ODA introduced a series of tax reliefs for pharmaceutical companies and various forms of incentives (e.g., research funding or covering the costs of experimentation and development), as well as forms of temporary market monopoly (lasting seven years) provided for by law and authorised by the FDA.

All these mechanisms confirm the need to guarantee that the economic operators working in this sector receive some form of support regardless of the market dynamics in order to guarantee patients suffering from rare diseases their right to health.

The solution adopted in Italian legal system is based, on the other hand, on a payback principle, i.e. the distribution of costs among pharmaceutical companies when they exceed the budget

³² Please refer to 2015 European Commission document, "Inventory of Union and Member State incentives to support research into, and development and availability of, orphan medicinal products", SWD (2015) 13 final.

allocated to the national health fund by the State. On the other hand, this mechanism, which is applied in general to all annual pharmaceutical costs, contains a special provision reserved for pharmaceutical expenditure for orphan drugs for hospital use, which far exceeds that for prescription use.

This figure, despite contributing to the total national pharmaceutical expenditure, remains distinct from it for the purposes of distributing the associated costs, as any figure exceeding the State coverage ceiling is distributed only among pharmaceutical companies that do not produce orphan drugs (or in proportion to the turnover for non-orphan drugs in the case of companies that produce both types of drugs).

Before describing the mechanism adopted for orphan drugs in Italy, it is necessary to briefly illustrate the essential features of pharmaceutical expenditure coverage.

7. The pharmaceutical expenditure coverage mechanism in Italy

From a reading of the sources that regulate the national pharmaceutical expenditure coverage mechanism, it is clear that the legislator's aim is clearly to "guarantee the balance of the public purse"³³, and "efficiency in the use of resources allocated to the health sector"³⁴, given the strategic importance of the pharmaceutical sector to the country's industrial and innovation objectives and the contribution this sector makes to health goals in the provision of essential levels of care³⁵.

To do so, national and hospital pharmaceutical costs are borne by the State up to a pre-established percentage calculated by referring to the National Healthcare Requirement (NHR)³⁶ forecast

³³ See Article 21 (2) of Decree Law No. 113/2016.

³⁴ See Article 15 (1) of Decree Law No. 95/2012.

³⁵ See Article 21 (1) of Decree Law No. 113/2016.

³⁶ The National Health Requirement is the overall amount of resources of the National Health Service (NHS) to whose funding the State contributes and is established by law on an annual basis. Pursuant to Article 12 of Decree Law No. 502/1992, the *Fondo Sanitario Nazionale di parte corrente e in conto capitale* (National Health Fund for current and capital contributions) is entirely financed by State funds, and is established annually by the Finance Act on the basis of the presumed total amount of sickness contributions allocated to the Regions that year.

for the year of reference. The legislator has changed the percentage of State coverage over the years without prejudice to the different ceilings of coverage for national pharmaceutical and hospital pharmaceutical expenditure.

National pharmaceutical expenditure³⁷ (now “prescription” expenditure) includes pharmaceuticals supplied according to the rules for prescription medicines but not that for A-class pharmaceuticals supplied directly³⁸.

For this expenditure, the National Health Service guarantees coverage of costs up to a legally established percentage, which is currently equal to 7.96%³⁹ of the National Health Fund, corresponding to an amount annually quantified by the Ministry of Health⁴⁰. If this ceiling is exceeded, coverage for the overspend is distributed among the pharmaceutical companies with marketing authorisations for class A pharmaceuticals in proportion to their turnover, as well as among wholesalers and

³⁷ Total national pharmaceutical expenditure is determined on the basis of data sent monthly by the Regions to the Ministry of Economy and Finance, the *AIFA*, and the Ministry of Health.

³⁸ See Article 5 (1) of Decree Law No. 159/2007. Pursuant to Article 5(2)d, and Law No. 222 of 29 November 2007, the parameter for monitoring pharmaceutical expenditure under the agreement is the *Osmed* flow established under Article 68 (9) of Law No. 448 of 23 December 1998, while expenditure for the direct distribution of class A medicines, including distribution upon hospital discharge is recorded on the basis of the flow established pursuant to Ministerial Decree of 31 July 2007 (“Information flow regarding pharmaceutical services provided through direct distribution”).

³⁹ Article 1 (399) of Law No. 232/2016. The legislator has reduced the percentage several times over the last three decades, going from 16% per Region in 2004 (Article 48, Decree Law No. 269/2003) to 14% in 2008 (Article 5(1), Decree Law No. 195/2007), to 13.6% for 2009 (Decree Law No. 232/2016). Decree Law No. 39/2009, converted into Law No. 77/2009), 13.3% for 2010 (Decree Law No. 78/2009 converted into Law No. 102/2009), 13.1% for 2012 (Article 15(2), Decree Law No. 95/2012, converted into Law No. 135/2012), 11.35% provided for in Article 15(3), Decree Law No. 95/2012.

⁴⁰ Pursuant to Article 5(1) of Decree Law No. 159/2007, the absolute value of the burden on the National Health Service for the aforementioned pharmaceutical assistance, both at national level and in each individual Region, is to be established annually by the Ministry of Health by 15th November of the year preceding the year of reference on the basis of the allocation of financial resources to the National Health Service approved by the *CIPE*, or on the basis of the allocation proposed by the Ministry of Health, to be formulated by 15 October.

pharmacies that have supplied pharmaceuticals in category A, this time in proportion to the share of the retail prices of the products that they earn⁴¹.

Hospital pharmaceutical expenditure⁴² (now called “direct purchases”) is calculated on the basis of the total pharmaceutical expenditure excluding prescription medicines, vaccine costs, paramedicines, officinal preparations for hospital pharmacies, and foreign medicines⁴³, but including class A medicines distributed directly or on behalf of the company.

Coverage guaranteed by the National Health Service currently makes up 6.89% of the National Health Fund⁴⁴. If this state coverage ceiling is exceeded, 50% of the surplus hospital pharmaceutical coverage is distributed to the Regions where the expenditure ceiling has been exceeded, in proportion to their respective deficits, and 50% to the pharmaceutical companies with marketing authorisation for class H⁴⁵ medicines purchased by public health facilities.

For both expenditure flows under discussion, the “ceilings” for State coverage are essentially defined on the basis of previous expenditure calculated for pharmaceuticals and pharmaceutical companies and subject to annual adjustments by the legislator and the administrative authority.

Article 21 of Law No. 113/2016, converted into Law No. 160/2016, regulates the mechanism for covering hospital and territorial pharmaceutical expenditure in excess of State coverage ceilings, establishing a special mechanism for the years 2013-2014-2015 and 2016, in part overlapping with the provisions of Article 5

⁴¹ See Article 5 (3)(a) of Law No. 222/2007. For the share of overspend borne by the distribution chain, the *AIFA* can establish the percentage of discount on sales made in the six months following the effective date of the redistribution measure that will allow the National Health Service to recover the value of the redistribution among pharmacists and wholesalers.

⁴² This expenditure is calculated from the flow established in accordance with the Ministerial Decree of 31 July 2007.

⁴³ This percentage has seen a significant increase over time, since Article 5(5) of Decree Law No. 159/2007 established a coverage of 2.4%, and Article 15 of Decree Law No. 95/2012 established coverage of 3.5%.

⁴⁴ Article 1 (1) 398, of Law No. 232/2016.

⁴⁵ These are medicines reimbursable by the National Health Service when used in hospitals or similar facilities according to the provisions of the Regions or autonomous provinces, as defined in the *AIFA* Resolution of July 25, 2005.

of Decree Law No. 159/2007. In summary, after provisional quantification of the portion of coverage due to each pharmaceutical company with a medicine marketing authorisation, the *AIFA*⁴⁶ approves the final document for monitoring pharmaceutical expenditure, where it ascertains whether the National Health Service has exceeded the ceiling and calculates the final shares of coverage to be distributed among the pharmaceutical companies. In addition, the amount of coverage paid by the pharmaceutical companies the previous year is subtracted from the annual coverage budget, further reducing the margins of expenditure borne by the State.

8. Pharmaceutical expenditure coverage for orphan drugs

This regulatory framework contains a special regulation for expenditure on innovative and orphan drugs.

In the case of innovative drugs⁴⁷, pursuant to Article 15(8)(b), Decree Law No. 95/2012, a dedicated guarantee fund was established, details of which are established on a year by year basis⁴⁸. Only when pharmaceutical expenditure attributable to innovative medicines exceeds the amount of the fund does it

⁴⁶ The procedure involves pharmaceutical companies, companies specialised in the distribution of medicines, and trade associations, with which the *AIFA* provides data from two separate information flows: the OSMED data flow for national pharmaceutical expenditure, and data from the New Health Information System of the Ministry of Health for hospital pharmaceutical expenditure. They are entitled to submit a request for the data to be rectified before the final measure approving the amounts of coverage for pharmaceutical expenditure is ratified.

⁴⁷ These drugs are identified on the basis of three parameters: therapeutic need, added therapeutic value, and the quality of evidence or the robustness of clinical studies. Therapeutic need depends on the existence of therapies for the condition in question and indicates the extent to which the new therapy can give new answers to existing therapeutic needs; added therapeutic value is determined by the extent of clinical benefit brought by the new drug in comparison with the alternatives available, if any; the quality of the evidence is given by the scientific excellence of the elements produced to support innovation. The innovativeness of a drug is recognised by *AIFA*.

⁴⁸ The allocation for the years 2015 and 2016 was quantified by Law No. 190/2014.

contribute to reaching the overall pharmaceutical expenditure ceiling⁴⁹.

From 2016, national pharmaceutical coverage for innovative medicines is distributed equally among the pharmaceutical companies authorised to market the same innovative medicine and the other companies in proportion to their respective turnover for non-innovative medicines covered by a patent (see Article 5(3)(a), Decree Law No. 159/2007).

As for orphan drugs, hospital pharmaceutical expenditure in excess of the state coverage ceiling is covered by all companies holding marketing authorisation in proportion to their respective turnovers for non-orphan and non-innovative medicines covered by patent (see Article 21(15) Decree Law No. 113/2016)⁵⁰.

⁴⁹ Pursuant to Article 1(569) of Law No. 208/2015, “in order to allow the proper administration of innovative drugs in compliance with the planned financial framework for the national health service and in relation to measures to improve the efficiency of the health sector (...) for the years 2015 and 2016, expenditure for the purchase of innovative drugs contributes to reaching the ceiling for territorial pharmaceutical assistance as per Article 15 (3) of Decree Law No. 95/2012, converted into Law No. 135/2012 for the amount exceeding the amount of the fund referred to in Article 1(593) of Law No. 190/2014 for each of the years 2015 and 2016. Article 21 (15) of Decree Law No. 113/2016 establishes that the *AIFA* also determines the coverage of the portion of the amount beyond the ceiling of hospital pharmaceutical expenditure attributable to innovative drugs not complying with the ceiling of the specific fund referred to in Article 15(8)(b) of Decree Law No. 95/2012”, “distributing it among all the companies with marketing authorisation in proportion to their turnover for non-orphaned and non-innovative medicines covered by patent. Within the same period, the *AIFA* shall also establish the amount of coverage of the portion in excess of the national pharmaceutical expenditure ceiling attributable to the overrun of the specific fund referred to in Article 5, paragraph 2, letter a) of Decree Law No. 159/2007 by innovative medicines, distributing it among all companies with marketing authorisation in proportion to their respective turnover for non-innovative medicines covered by patents”.

⁵⁰ The exception for orphan drugs is provided for in Article 15(8) i) and i-bis), Decree Law No. 95/2012, referred to in Article 21(15) of Decree Law No. 113/2016. The explanatory report to Decree Law No. 95/2012, states that “On the basis of current legislation (Article 17(1)(b), Legislative Decree No. 98/2011) the expenditure ceiling for hospital pharmaceuticals amounts to 2.4 per cent and a payback to be paid by pharmaceutical companies if the ceiling is exceeded, equal to 35% of the overspend. The provisions in question replace the provisions of Article 17 (1) (b) in full, recalculating the expenditure ceiling from 2.4% to 3.2%, increasing the percentage of payback from 35% to 50% and excluding certain drugs (vaccines, class C and C-a drugs, foreign drugs, etc.)

In recent years, developments in scientific knowledge, technological equipment (also in the field of medicine), and innovation in research have led to increased levels of health protection and the production and commercialisation of increasingly advanced, effective, and safe drugs, which have, however, contributed to increased annual pharmaceutical expenditure and a consequent burden on pharmaceutical companies.

Consequently, there has also been a gradual increase in expenditure beyond the state coverage ceiling subject to the coverage mechanism: from 2013 to 2016, overspend has risen from 11% to 29% of total expenditure. These percentages include both expenditure for orphan drugs and other types of drugs subject to payback. Concerning orphan drugs, as shown by the 2015 Osmed report, expenditure has risen from €657 million in 2010 (equal to 3.5% of total pharmaceutical expenditure) to €1,393 million in 2016 (or 6.1% of total expenditure) in just five years.

This growth trend might well call for a fresh look at the balance found so far between protecting the health of patients with rare conditions and safeguarding the freedom of pharmaceutical companies required to bear the burden of coverage for them, in order to offset the growing burdens they have to face. For this reason too, it is particularly important to check the ability of a regulatory model drawn up in circumstances in part different from the current scenario to resist in time, checking whether the balance found by the legislator between the different constitutional rights involved is affected by new conditions on the reference market, or if it remains valid regardless of external variables.

In this regard, it is first necessary to examine what makes the regulatory framework special, and which solutions thus result unsatisfactory.

from the parameters for calculating the level of expenditure. Moreover, 50% of any excess in respect of the ceiling must be paid to the regional authority in proportion to the share of access to their health requirements”.

9. The need to contain public health expenditure and the right to health of patients suffering from rare diseases

There is a very close correlation between the possibility of satisfying the right to health of patients suffering from serious and less common conditions and the possibility, for the pharmaceutical companies that produce them, of administering them. When a new orphan drug is placed on the market, a certain number of people suffering from a rare disease (in most cases, between a few dozen and a few hundred, in a country with a population like that of Italy) have prospects of treatment and recovery for the first time.

This means that every orphan drug placed on the market corresponds to an increase in demand and expenditure, as the demand has so far been devoid of adequate supply. However, this increase in expenditure is not, in this case, an exceptional or anomalous circumstance. In some sense, it is the real purpose of the work of the companies working in the sector, namely that their research leads to the identification of a drug able to treat conditions that could not be treated before. Newly introduced orphan drugs are therefore added over time to those already on the market and for which expenditure remains almost constant over time (as rare conditions are normally chronic), necessarily leading to an overall increase in pharmaceutical expenditure. As for orphan drugs, a gradual increase in expenditure is therefore an inevitable (and in a sense desirable) consequence of the research being carried out in this sector, which leads to the discovery of new forms of treatment that did not exist before.

On the other hand, this does not happen with common drugs, because the commercialisation of a new drug on a competitive market determines (or may determine) a shift in preference from drugs already on the market to the new one, with no change in overall spending (the over-budget resulting from the purchase of the new drug is compensated for by the under-budget resulting from abandoning old drugs).

If we neglect what has been said so far, with regard to the need to contain public expenditure it might be said that the main cause of exceeding State budgeting for coverage lies with orphan drugs, so intervention is needed in order to ensure a constant balance between the opposing needs of public finance and health protection. However, this would mean ignoring the fact that

increased expenditure in this sector is non-reducible and completely predictable characteristic rather than a disaster to be corrected. Conversely, limiting pharmaceutical expenditure for orphan drugs would mean a reducing research activity on new orphan drugs, i.e., a limitation of the right of people with rare conditions to receive, or at least hope to receive, adequate treatment like anyone else suffering from common illnesses for which drugs are available.

The characteristics described so far make it impossible to apply the same methods of coverage of pharmaceutical expenditure envisaged for normal drugs to orphan drugs.

Article 21 (7), of Decree Law No. 113/2016 states that the *AIFA* has to allocate a portion of coverage to each pharmaceutical company considering all the products that the company is authorised to place on the market. This quota is calculated “on the basis of the turnover for the year prior to the year reference for each pharmaceutical company, increased or decreased according to the percentage variation between the figure established as the pharmaceutical expenditure ceiling of the year when the quota was allocated and the pharmaceutical expenditure resulting from the documentation produced for the previous year”.

In the case of orphan drugs, this method of calculating coverage is not applicable. Firstly, in the case of orphan medicinal products, setting an expenditure ceiling or laying the burden of overspend costs on the manufacturers themselves would simply discourage the development and commercialisation of orphan medicinal products, thus going against the provisions of the European regulations and Italian legislation. Secondly, in the case of orphan drugs, it is not possible to take previous pharmaceutical expenditure as a benchmark for calculating the share of coverage to allocate, as the demand for existing orphan drugs (generally used to treat chronic diseases) is supplemented each year by the demand coming from newly diagnosed patients and for newly marketed orphan drugs, which is satisfied for the first time, implying a steady increase in expenditure.

Thirdly, it should be remarked that the minute number of patients leads to discernible market variability for each orphan drug, because the addition or loss of even one patient can result in very high fluctuations in sales history. For this reason, it is particularly difficult to make expenditure forecasts for the

purpose of allocating suitable funds. Similarly, it is impossible to calculate coverage by considering the percentage variation between the figure established for the pharmaceutical expenditure ceiling in the year of allocation of the quota and the pharmaceutical expenditure resulting from the documentation produced for the previous year.

Lastly, even if the company were to comply with cost constraints, this would be tantamount to placing a limit on the number of patients suffering from rare diseases to be treated in the absence of an alternative offer to make up for the failure to supply the orphan drug. In the case of ordinary pharmaceutical supplies, given that there is usually competition between different manufacturers, should a company that has reached its budget not wish to supply a certain drug to the very end, other operators can step in. This does not happen with orphan drugs, where market exclusivity normally means that only one company producing a given drug is registered. It follows, therefore, that once its budget is reached, an orphan drug marketing authorisation holder would have no economic reason to continue to accept orders. Supply would then only be ensured if a pharmaceutical company voluntarily gave up its own profit (for ethical reasons), apart from an imposed financial obligation. Both solutions are, however, impossible: the first one because the protection of the right to health of citizens cannot be left to the liberal concession of a private entrepreneur, and the second because it is incompatible with the Italian legal and constitutional system⁵¹.

It should also be pointed out that from a quantitative and statistical point of view, the growing economic burden on pharmaceutical companies subject to the coverage mechanism is due to an increase in pharmaceutical expenditure across the board, not only in respect of orphan drugs, which continue to represent a rather low percentage. For the same reason, the onerousness of the payback mechanism imposed on companies

⁵¹ On the subject of the regulation of payback see T.A.R. Lazio, Rome, Sec. III-quater, No. 6173/2015, “Naturally, for the sake of the constitutionality of the entire system, in no way – once a supply contract has been entered into – can a company be obliged to provide a service of indefinite content or, in any case, liable to exceed the limits contractually laid down thereto as that this would result in an imposed service going against the limits mechanism for hospital pharmaceutical expenditure established by the legislator”.

would not anyway be reduced if the special regulations were eliminated and the general criterion for the coverage of hospital pharmaceutical expenditure were extended to orphan drugs.

Assessing the possible impact of a possible extension of the payback system currently applied to hospital pharmaceutical expenditure for orphan drugs to orphan drug manufacturers, on the basis of the documents made available by a company and based on data from 2013 (the last officially available), it can be assumed that the median figure⁵² would be as follows: companies should return 12% of their turnover, a very high percentage in comparison with the average payback levels for other pharmaceutical companies, which are much lower. It would also be not uncommon for companies to be required to pay more than 25% of their revenues. It is clear that such a mechanism would act as a disincentive to the production of new orphan drugs and, for companies already on the market, would prevent the treatment of a greater number of patients.

It follows therefore that the coverage mechanism for ordinary pharmaceutical expenditure requires different corrective measures than those in place for the coverage of orphan drug expenditure. The mechanism adopted by the Italian legal system requires that, once the ceiling for coverage by the State has been exceeded, hospital expenditure must be covered jointly by the pharmaceutical companies that produce non-patented non-orphan drugs, which are therefore not damaged, for the reasons mentioned above, by the fluidity of the market and the unpredictability of research costs and profits.

It is therefore necessary to verify whether the constitutional bases for this form of regulation are able to guarantee its continuity over time, regardless of any change in real-world circumstances.

⁵² The “median” value rather than the “mean” value is used, since it is more suitable for intervals with a wide dispersion of values. If payback were applied to orphan drug manufacturers, around two thirds of them would be affected.

10. The non-reducible core of the right to health in the case law of the Constitutional Court

The rationale of the current regulation on orphan drugs has been analysed above. Specifically, it emerges that the exemption of this category of drugs (and the companies that produce them) from certain mechanisms for the containment of public health expenditure (especially “payback”) is the prerequisite for allowing, on the one hand, future patients suffering from rare conditions, for whom adequate drugs are already available, to receive assistance on a par with those already receiving treatment without the risk of being subjected to limitations or quotas. On the other hand, it would allow research institutions and pharmaceutical companies to continue developing scientific research on rare conditions still deemed incurable or not adequately treatable, so that new and useful drugs may be developed.

Having ascertained the usefulness of the current legislative framework, it is also necessary to verify its constitutional necessity, necessarily following two trajectories. First of all, it must be ascertained whether there is any obligation (unavailable, in theory, even from the legislator), on the part of the National Health System as a whole, to endow companies holding marketing authorisation with the sums negotiated with no ceiling for orphan drugs.

Secondly, it needs to be considered whether the resulting burden must be borne by the public sector or may continue to be borne – as the law currently stands – by other private economic operators and, if so, within which limits. The first problem will be addressed in this section and the second question in the next one.

It must be recognised that, where the issue is considered solely from the point of view of the companies that market orphan drugs and the interest of which they are the bearers, it is difficult to establish any non-reducible right on their part not to have to face – in absolute terms – reductions in their revenues.

For reasons that (for a different purpose) will be discussed in the next section, in the “administered market” of medicines, neither the principle of freedom of economic enterprise protected by Article No. 41 of the Constitution nor the principle of protection of legitimate expectations, deriving from Article No. 3 of the Constitution, absolutely prohibit the legislator from

impinging on the expected profit margins of pharmaceutical companies, naturally within the limits of reasonableness. On the subject of obligatory discounts on the prices of drugs reimbursed by the national health service, suffice it to quote a judgment handed down by the Constitutional Court, Judgment No. 279/2006, according to which, the sphere of private autonomy does not receive absolute protection from the legal system, so any disputed constraint in the determination of price is not constitutionally illegitimate when it proves to have been wrought to allow the simultaneous satisfaction of a plurality of constitutionally significant interests.

However, in the subject matter presented, a number of conclusions may be reached, considering the impact of possible changes to the current legislative framework for orphan drugs on citizens' health. Indeed, for the reasons set out above, the main negative effect of the possible application of spending caps in connection with rare conditions would seem to be that it would jeopardise the system of production or distribution of effective drugs for all those in need of them (see also below).

This connection, however, is not a mere *de facto* consequence of a legislative amendment (as such constitutionally irrelevant), but would be a direct effect and an immediate corollary of it. Moreover, this connection was positively and expressly acknowledged in parliament and was the main and declared reason, during the law-making process, for exempting orphan drugs from payback, especially when the Stability Law for the year 2014 was adopted, which makes it possible to discount one argument that draws on the case law of the Constitutional Court on the subject.

Quite recently, with a Judgment of 2006 (No. 203/2006), the Constitutional Court rejected the possibility that Article 32 of the Constitution (on the right to health) might represent a ground for challenging a legislative measure that did not aim directly to regulate the treatment rights of patients, but rather concerned the economic operators of the national health service. In this case, it concerned legislative measures for the "reduction of the outlay and corresponding volumes of purchase" by private bodies authorised to provide care services). However, the Court based its decision on a precise factual supposition, namely that "there is no evidence that the right to health of citizens is affected by the rule"

(since the benefits can be provided in other ways). In the case of orphan drugs, on the other hand, the direct impact on the consideration payable is expressly acknowledged by the legislator itself.

Having clarified this point, one can consider the obligations arising from Article No. 32 of Constitution with regard to the right to health and, more specifically, the right to health care. The question has been the subject of numerous rulings by the Constitutional Court and the Courts of Legitimacy in the most general terms and has been amply addressed in the legal literature.

However, some preliminary caveats are also in order. Not even the right to health, like any other right to protection by the State, can be wholly exempt from balancing with other principles and requirements of constitutional rank, especially to the ends now of greatest interest, with restrictions of a financial nature under Article No. 81 of the Constitution. In the light of the scarcity of resources or, at any rate, of available ones, the allocation of one subsidy may prove incompatible with another, even if equally worthy of protection and consideration.

Hence the principle repeatedly reaffirmed by the Constitutional Court, that “health protection cannot but be affected by the circumstances that the legislator itself encounters in distributing the financial resources available to it” (Constitutional Court Judgment No. 203/2016). It follows that, in general, the right to health care “is guaranteed to every person as a constitutional right conditioned by the implementation that the legislator works through the balancing of the interest protected by that right against other constitutionally protected interests, bearing in mind the objective limits that the legislator encounters in relation to the organisational and financial resources available to it at a given moment” (consolidated case law, at least since Constitutional Court Judgment No. 455/1990: see, among many others, Judgment No. 432/2005, No. 267/1998, No. 304/1994, and No. 247/1992).

Ordinarily, therefore, the constitutional right to health treatment is conditioned by the necessary intermediation of Parliament and is not a “full and unconditional” right *a priori* but becomes so following legislative intervention (“to the extent that the legislator, through a not unreasonable balancing of

constitutional values and the proportionality of the objectives consequently determined by existing resources, ordains adequate opportunities to have access to health care”: Constitutional Court Judgment No. 304/94; with opportune “determination of the instruments, times and methods of implementation”: Judgment. No. 455/1990).

All this, however, does not imply unconditional discretion at the hands of the legislative power with regard to identifying the health treatments that can be provided; nor can financial requirements be used to indiscriminately reduce the right to health of citizens at will. On the contrary, the Constitutional Court subjects legislative regulation to checks of the double cascade type.

On the one hand, the Court reserves “external” control over the correct “balancing of the constitutional values that the legislator carries out in implementing the right to health care” to itself. This, in particular, is to ascertain that the albeit justified “requirements relating to the equilibrium of public finance” do not assume “an absolutely preponderant weight”, a symptomatic indicator of being “presented with a plainly unreasonable exercise of legislative discretion” (Judgment no. 260/1990).

On the other hand, the Court sets a peremptory limit to the same legislative discretion, excluding any possible balance with other values or needs: the guarantee of “an inalienable and Constitutionally protected core consisting of the right to health as an inviolable domain of human dignity that requires the pre-empting of situations without protection and that may undermine the implementation of that right” (among many, see No. 509/2000, No. 252/2001, No. 432/2005; and similar, No. 354/2008, No. 299 and No. 269/2010, and No. 61/2011; the Court sometimes adopts similar expressions, such as “essential”, “irreducible” or “non-reducible” nucleus).

The case law of the Italian Supreme Court also follows this line of interpretation. It is now an *acquis*, in the precedents of the Italian Supreme Court, “that health has acquired the qualification of a subjective, fundamental and absolute right, and it has been added that at present a “solid nucleus of the law” has been identified that cannot be suppressed whatever the needs of the community, imposed by the very principle of social solidarity”

(according to a recent and well-known pronouncement of the Joint Civil Sessions in Judgment No. 174611/2006).

It follows that the right to health “stands above the administration in such a way that it has no power, even for reasons of particular public interest, not only to weaken it, but even indirectly to prejudice it in point of fact”, because by affecting a fundamental right, the Administration “acts in point of fact”, since “its power on this matter cannot be legally configured” (Judgment No. 17461/2006, cited above; and in the same vein, Joint Sessions, Judgment No. 20922/1992). Ultimately, a “constitutionally protected right with a rigid core” emerges, one that “cannot be definitively sacrificed or compromised”, in the face of which the public authorities have only the task of the mere practical verification of the conditions that make protection indispensable, with no possible balancing of different interests.

Although these principles are affirmed in relation to the administrative authorities, the Court infers them directly from constitutional constraints (and on the basis of constitutional case law) and they are therefore well equipped to oppose legislative power too.

Having thus framed the conceptual terms, a further analytical effort is now required in order to consider, in particular, the cases examined by the Constitutional Court in order to identify the boundaries of the “essential, non-reducible nucleus” of the right to health and to verify whether it can be invoked in the case presented today.

As might be imagined, the cases concretely taken into consideration by the Judge’s ruling on legislation are very diversified.

For example, the Constitutional Court held that it is not possible to infer from the “core” of the right to health (among other things) the universal provision of so-called additional services not directly provided for as essential at national level but at Regional level (Judgment No. 455/1990): voluntary recourse to “indirect assistance” (i.e. in private centres) for continuous or prolonged rehabilitation services, where (albeit under different conditions) they are available in public ones (Judgment No. 304/1994); reimbursement for treatment abroad for contingent reasons by financially able individuals or those with spending limits (Judgment No. 247/1992); the right to receive treatment

under particular conditions (with reference to thermal treatments, heliotherapy and so forth: Judgment No. 559/1987).

On the other hand, the Court held that the irreducible core of the right to health was particularly compromised by the exclusion of reimbursement for essential diagnostic services, albeit costly ones, with facilities holding external contracts, if the public ones were not supplied with the same equipment, whenever “particular conditions of necessity that cannot otherwise be resolved” or “treatments and interventions that cannot otherwise be fulfilled”; other cases are the exclusion of the reimbursement of expenses incurred in private centres, in the absence of prior authorisation, whenever there are “conditions of utter urgency” (Judgment No. 267/1995 and No. 509/2000), and the exclusion from clinical trials of new drugs “in urgent cases of extreme therapeutic need without alternative solutions”, when “it is unacceptable, by virtue of the principle of equality, that the material enjoyment of this fundamental right depends on the different economic conditions of the individuals concerned”. In such cases, “from the point of view of the constitutional guarantee of health as a right [...], neither the establishment of reduced sales prices for medicinal products [...] nor the allocation [...] of a sum apportioned to municipalities [...] for the support of indigent persons” (Judgment No. 185/1998) appear to be adequate solutions; more generally, in any case, the provision of so-called life-saving therapy is prejudiced.

It is therefore clear that the cases examined are varied and far from homogeneous; nevertheless, some interpretative constants do seem to emerge. The “non-reducible nucleus” of the right to health (which allows of no balancing) is recognisable under the following conditions: the objective gravity of the condition; the *urgency* of or the absolute *need* for the treatment; the unsustainability of the cost for the patient, or the *unsuitability* of alternative treatments on a clinical or organisational level.

Under such conditions, the public authorities have a constitutional obligation to ensure that health care is provided, otherwise they would be exposing the patient to an “absolute lack of protection” (Judgment No. 309/1999). Expressed with regard to innovative treatments, the obligation set out in Article 32 of the Constitution emerges “in relation to patients suffering from conditions” for which “there are no other valid treatments using

drugs or treatments already authorised for these conditions”, while “in other cases, namely when there is the possibility of a treatment already tested and validated, any claim that the State must still be required to provide other medical services, even if only hypothetically effective, free of charge would not be reasonable” (Judgment No. 185/1998).

Albeit with some necessary amplifications outlined below, the subject of orphan drugs appears to meet the constitutional requirements set out so far. The prerequisites of the special legal framework more amply described above are, in fact, the particular gravity of the condition to be treated (such as causing danger to life or seriously disabling chronic disorders, thus making treatment both indispensable and urgent), the absence of serious alternative interventions, both on the clinical level (because, by definition, there are no other suitable drugs for treatment on the market, as the law does not allow, in such a case, a drug to be classed as orphan), and from the financial point of view (because the rarity of the disease makes any return on investment highly uncertain, so that, given the absence of a clear and guaranteed legal framework, it is unlikely that a pharmaceutical industry will invest in the sector), the impossibility for citizens to bear the cost of providing health care (because, once again, the rarity of the disease makes it difficult to amortise the costs of research and development of the drug, leading to an inevitable increase in the cost of individual treatment).

In other words, the current legal framework on orphan drugs seems to be designed expressly to protect the essential and irreducible core of the right to health of patients suffering from rare conditions. This is achieved through the inclusion of a series of derogations, prerogatives and incentives, necessary and sufficient to counterbalance (or at least reduce) the diseconomies that would otherwise inevitably arise in scientific research and the treatment of rare diseases.

This does not rule out, of course, that in the abstract, equivalent regulatory solutions may be found that would be able to produce an equal degree of defence for the protected interest (which, it must be reiterated, is directly that of patients and only indirectly that of companies holding marketing authorisation in the orphan sectors).

11. The balance of the current distribution of expenditure, borne jointly by public and private economic operators

In view of the impossibility of denying protection to patients suffering from rare diseases by setting limits on the cost of orphan drugs, it is necessary to verify whether the coverage of such charges must in fact be borne by the public sector or whether it can (and to what extent) continue to be borne by other private economic operators, as established by the current provisions.

In this regard, two elements have to be considered: the need to ensure the containment of public spending (and therefore not to lay the entire burden of pharmaceutical expenditure on the public purse) and, on the other hand, the right of pharmaceutical companies not to suffer unjustified prejudice to their freedom of enterprise.

The following aspects thus need to be assessed: whether there is a constitutionally supported criterion whereby the sacrifice of a specific category of economic operators for the sake of the public interest in containing expenditure is not only allowed but also necessary, and what the conditions necessary for this sacrifice to take place are, all the while respecting the principle of proportionality and non-discrimination. Furthermore, it must be assessed whether this sacrifice continues to be justified, also in the light of the constitutional principles, despite the increase in pharmaceutical expenditure on orphan drugs.

In order to examine these aspects, on the one hand, the experience of other sectors (relating to the provision of services of general economic interest) in which the obligations of universal service are covered by forms of compensation between all the operators would appear particularly useful as would the conclusions that have become consolidated in case law regarding the regulation of obligatory discounts on the negotiated price of medicines (the effects of which can be likened, for our purposes, to the current legislative framework on containment), imposed on pharmaceutical companies and wholesalers⁵³ to safeguard the objectives of containing public spending⁵⁴.

⁵³ See F. Sorrentino, *I principi costituzionali che regolano i prezzi dei farmaci*, in *Seminari di studi giuridici in materia di farmaci* (1995), "The reference to Article 32 of the Constitution takes on different meanings. With regard to prices it may justify the possibility for the State to impose 'discounts' on companies as an exception to the provisions on general price regulation. The discount

Of course, a number of essential public services have been affected by processes of opening up to competition law. If market logic were strictly applied in these sectors, access to essential services would be precluded to a wide range of citizens, especially the weakest and most needy, if, for example, they reside in sparsely populated areas or areas that are more difficult to reach, or find themselves in economic or social difficulties. The European legal order, based, among other things, on the principles of social and territorial cohesion and solidarity, stipulates that the community should be guaranteed access to these essential services, even if doing so does not meet economic criteria and, therefore, there is no economic return for the company providing the service. In this case, although the service provided cannot be remunerated, Member States may impose public service or universal service obligations on operators.

The concept of universal service is particularly important in certain service sectors of general economic interest, such as electricity, postal services, rail services, and electronic communications, and this, perhaps, is the most noteworthy. The public service obligations that must be guaranteed to all users include, among other things, telephone line connection and an Internet service with a connection above a certain transmission speed.

Operators providing this service receive a refund for the costs from a specially created fund to which all operators using public telecommunications networks contribute. As a result, the

necessarily erodes the profit margin of the entrepreneur and can also cancel it and turn it into a loss, but it is an imposed financial obligation, which draws its foundation from Article 23 of the Constitution, arising from a result that relates to the value of health codified in Article 32. If Article 41 guarantees any entrepreneur, including the medicine manufacturers, a profit margin for a single product, the need for an investigation to establish the costs of individual products, it is possible that - under other constitutional provisions, these profits might in some way be cancelled, eroded, or even turned into imposed forms of consideration and then into losses”.

⁵⁴ As of 1998, a mechanism for the annual planned pharmaceutical expenditure ceiling has been set up (see Law No. 449/1997), so that in the event of exceeding the maximum spending ceiling borne by the national health service, the deficit is shared between producers and distributors, in particular through the imposition of a proportional reduction in the producers’ revenue margin of up to 60% with the remaining 40% coverage of the breakthrough to be borne by the Regions.

costs of the universal service in the sector are proportionally “spread out” among the companies that receive benefits in terms of profits operating in a given market.

Thus, as the firms in the specific sector benefit from operating in that particular market area, they have to bear the financial burden of those parts of the sector’s business that are less, or only marginally, profitable. From this point of view, the hypothesis of universal service – even if, strictly speaking, it cannot be considered fully superimposable on that of orphan drugs – can however constitute a useful reminder in analogical terms, because it allows us to confirm that the case examined here is not the only one where the law considers that the companies enjoying the greatest economic benefits in the sector of reference have to bear the costs for activities that are less or only marginally remunerative and that, however, must necessarily be carried out in the pursuit of the constitutional rights of individuals and the good functioning of the overall system.

Returning now to the pharmaceutical sector, it has on several occasions been reiterated that “the additional sacrifice imposed on producers is part of a complex economic manoeuvre that expresses an overall and broader plan intended, on the one hand, to reduce healthcare expenditure and, on the other, to acquire resources to finance it by forfeiting part of the revenues of the players in the drug supply chain, in order to meet the non-reducible need to guarantee essential medicines or medicines for chronic diseases to the widest possible number of citizens without further aggravating the State budget beyond the limits of the financial sustainability of a national economy already in crisis” (Council of State., Sec. III, No. 2686/2014).

In other words, there are requirements that the legislator considers paramount (in the case at hand, the containment of public expenditure and the protection of the health of patients without alternative therapies), for which it is justified to impose compulsory financial obligations⁵⁵ on a specific category of

⁵⁵ In its Judgment No. 70/1960, the Constitutional Court clarified that “a financial obligation is imposed in accordance with Article 23 of the Constitution when it is established by an act of authority without the consent of the party on which it is imposed, whatever the name given by the law imposing it may be” and can occur not only “when the obligation established by the authority

entities, whose freedom to conduct a business, although constitutionally guaranteed under Article 41 of the Constitution, may be to some extent reduced.

And, in fact, “social goals cannot replace economic calculations as a guiding criterion for business activity, but they do indicate that when there are specific objectives to pursue, and there is a need to protect social needs of equal or greater constitutional importance than market autonomy, the legislator may well intervene with regard to commercial activities, reducing the margin of autonomy of enterprises, thus directing economic activity for social purposes”.

Recently, in its Judgment No. 70/2017, the Constitutional Court, called upon to rule on the coverage mechanism for pharmaceutical expenditure for innovative medicines, stated that “the balance between the need to disseminate and promote pharmaceutical innovation and thus protect public health, and that of rationalising and containing healthcare expenditure is achieved by the challenged provision through a reduction in the margins obtainable by companies producing non-innovative medicines protected by a patent”, and these companies are called upon to contribute to a system, that of the refundability of medicines supplied under the convention, “from which they themselves derive undoubted benefits”.

The Community Courts too (with a judgement of the Court of Justice, Sec. IV, 2 April 2009 in C-352/07) have affirmed that States can issue regulations to regulate the consumption of pharmaceutical products, “safeguarding the financial balance of their health systems” also through the reduction of the sale price of all or only some drugs. In such cases, unlike what has been said for orphan drugs above, the fact that the State receives part of the revenues of pharmaceutical companies does not automatically (and indeed not even on average) translate into a failure (or reduction) in the provision of essential health care to citizens. This, once again, is by virtue of the different characteristics and structures of these markets (competition, profit margins, absolute numbers of patients treated, and the actual impact of annual fluctuations in treatment provided, etc.).

consists in the payment of a sum of money, but also when the pecuniary sacrifice results from the reduction of a part of the profit otherwise due”.

In the conflict between the need to contain public expenditure and free economic initiative, therefore, the latter may be recessionary: it is therefore necessary to verify within which limits this sacrifice is admissible as non-discriminatory and not disproportionate. The question thus arises as to whether, among the various economic operators involved, the manufacturers of non-orphan drugs are the category that can and should actually bear the cost of spending for them. In the pharmaceutical sector, “manufacturers occupy a very peculiar and prominent position, contributing directly and incisively to determine the reduced price of the reimbursable drug and are, therefore, in a position (known as “information asymmetry”) of undoubted advantage over other players in the supply chain and, on the other hand, are able to increase the volume of demand through promotion and dissemination” (Council of State, Sec. III, No. 2686/2014).

Compared to the other parties involved (such as wholesalers or pharmacists, and assuming the need not to involve the producers of orphan drugs), the pharmaceutical companies that produce non-orphan drugs hold, in the market of reference, a position of greater advantage, which diversifies them from other operators and makes the sacrifice imposed on them less burdensome. The principle of tax equality implies that “like situations must match like tax regimes, and in the case of different situations there must be a different tax regime” (Constitutional Court July 6, 1972, n. 120). In the case at hand, the different treatment given to manufacturers of non-orphan drugs is justified precisely because of their different position within the market in question.

Moreover, in compliance with the provisions of Article 53 of the Constitution, the solidarity-based ability to contribute justifies drawing more greatly on the wealth of those with greater economic possibilities and “may involve a redistribution of such wealth in favour of subjects who, even within the same economic sector, bear overwhelming burdens and difficulties in any case disproportionate to their current possibilities” (Council of State, Sec. III, No. 2686/2014). The coverage mechanism for the pharmaceutical expenditure for orphan drugs creates, in reality, the effect of a “redistribution of wealth among the elements of the supply chain” (Council of State, Sec. III, No. 2686/2014) and, moreover, respects the ability of the individual company to

contribute, as the share of coverage is determined proportionately to the turnover from the sale of non-orphan drugs⁵⁶.

It should also be borne in mind that the burden of covering pharmaceutical expenditure in excess of the state coverage ceiling is not entirely borne by pharmaceutical companies producing non-orphan drugs, since in the case of hospital pharmaceutical expenditure, the burden is shared equally between the pharmaceutical companies and the Regions that have exceeded the regional expenditure⁵⁷ ceiling. As for national pharmaceutical expenditure, coverage not only falls to the pharmaceutical companies but also to the distribution chain, namely to wholesalers and pharmacists (in retail sales, the costs are also borne by the companies that produce orphan drugs)⁵⁸.

In conclusion, in the words of a ruling by the Council of State, the legislator did not intend to “expropriate the profits of pharmaceutical manufacturers, sacrificing their economic freedom protected by Article 41 of the Constitution, but to impose a modest and temporary levy on profits in such a way as to guarantee both a saving in pharmaceutical sector health expenditure in the pursuit of the public interest - which certainly prevails over the selfish interest asserted by the producers themselves - in the provision of essential levels of pharmaceutical assistance, in the face of the increasingly pressing need to contain public expenditure; and finally, with regard to producers and despite the current extraordinary negative economic circumstances, to generate a reasonable profit margin constituting the inviolable nucleus and the irrepressible goal of private economic initiative”.

Having established therefore, that the need to guarantee the protection of the health of those suffering from rare diseases justifies a lessening of private economic freedom and that, in the case at hand, this lessening necessarily involves the category of pharmaceutical companies that produce non-orphan drugs, the question now arises as to whether this mechanism has been undermined in any way by the progressive increase in pharmaceutical expenditure for orphan drugs in recent years. In

⁵⁶ On this point see the case law of the Constitutional Court concerning discounts on the price of medicines and, in particular, Judgment No. 102/1993, No. 144/1972, and No. 70/1960.

⁵⁷ See Article 15(7) Decree Law No. 95/2012.

⁵⁸ See Article 5(3) Decree Law No. 159/2007.

other words, the question arises as to whether the reduction in the rights of the pharmaceutical companies that have to bear the cost of coverage is also justified in terms of the increase in this expenditure.

The question must be addressed from the points of view of two distinct and concurrent terms: the proportionality of the measure and the tolerability of the sacrifice on the part of non-orphan drugs marketing authorisation holders; the absence of the risk of bias (in terms of undue enrichment) in favour of companies holding marketing authorisation for orphan drugs.

As for the first profile, the necessary starting point must be the statistical data available. As already mentioned above, expenditure on orphan drugs grew between 2010 and 2015 from €657 million to €1,393 million, rising from 3.50% to 6.1% of total pharmaceutical expenditure. This growth appears, in absolute terms, far from negligible; what stands out, however, is the share of the actual cost shift borne by the other pharmaceutical companies within the overall cost per pharmaceutical expenditure and payback dynamics. Considering the data (the latest certain figures), for the year 2013 (recording an expenditure of €914mln, equal to 4.65% of the total), the overall data are as follows: a) total pharmaceutical expenditure borne by the State amounting to €16,625.2 mln; b) hospital pharmaceutical expenditure amounting to €4.497 mln; c) an overspend in terms of the ceiling of €773 mln, d) the total share of the coverage borne by marketing authorisation holders amounting to €368 mln (the other half being borne by the Regions, as explained above in §3), and e) the coverage specifically attributable to orphan drugs borne by marketing authorisation holders, amounting to €59mln.

In concrete terms, the cost of coverage for orphan drugs, spread pro quota among all the marketing authorisation holders is therefore 1.3% of their aggregate turnover in relation to hospital pharmaceutical expenditure and just 0.4% of the total turnover for the sale of drugs covered by the national health service. This figure, however, is not yet fully representative of the actual annual turnover of pharmaceutical companies in Italy, which obviously also includes medicines paid for directly by patients.

In the light of these data, the sums levied on pharmaceutical companies (also considering the presumable increase of the estimates in 2013, following the mentioned trend)

still appears to amount to a fraction of their total revenues, both in terms of modalities and quantities, which can be considered quite tolerable from the economic point of view, also considering the profit margins from the average revenues in the pharmaceutical sector. This is without prejudice, therefore, to the “reasonable profit margin” that, in the current economic circumstances, the Council of State considers “the inviolable nucleus and the irrepressible goal of private business”. On the contrary, as mentioned above, extending the payback system to orphan drugs would produce a substantial erosion of the revenues and profit margins of manufacturing companies (up to the median value of 12% of the turnover), beyond the thresholds of tolerability and proportionality of the duty discussed so far. It should also be borne in mind that the coverage for in-hospital pharmaceutical expenditure is borne equally by the pharmaceutical companies and Italy’s Regions, in a context in which orphan drugs are used mainly in the hospital sector. National legislation therefore hooks the sacrifice required of private individuals to a similar sacrifice borne by the regional budgets in order to ensure the overall sustainability of the measure. Lastly, the amount of duty payable is substantially predictable, as is its evolution over time.

On the whole, this form of levy is not unjustified in the light of the case law of the Constitutional Court on the ability to pay and the corollaries of predictability, reasonableness, congruity, and proportionality. Essentially, the existing coverage system, despite growing pharmaceutical expenditure for orphan drugs, does not seem to call for a disproportionate or intolerable sacrifice on the part of the companies concerned, nor does it conflict with the principles of equality, equal treatment, and respect for the ability to contribute. On the contrary, it seems to include a reasonable balance of conflicting interests: the protection of the health of those suffering from rare illnesses and the containment of public spending.

The problem of the general sustainability, in the medium and long term, of the current mechanisms to cover overspending in the health sector (as a whole) is different and broader, in the context of a prolonged quota system applied to available public resources. Of course, it is likely that, with respect to the current dynamics, the model will have to be rethought in the future; on the basis of the data set out above, however, the share of coverage

arising from overspending for orphan drugs (2013 data) amounts to just 16.1% of the total costs of the coverage for in-hospital pharmaceutical expenditure, a percentage that shrinks even more compared with total pharmaceutical expenditure. It therefore appears difficult, at present, to attribute to the cost of orphan drugs an impact such as to undermine the constitutional adequacy of the payback system as it is currently regulated.

With regard to the second question, relating to risks of overcompensation to the undue benefit of orphan drug marketing authorisation holders, it has been conjectured that this may occur when a drug is improperly termed “orphan” in the absence of any real clinical grounds (constituting a waste for the national health service and super-profits for the pharmaceutical companies). It may also happen when a drug is used outside its own sphere for diseases that are not actually rare (for example, when they contain active ingredients that can be used to treat both rare and common illnesses; or when the orphan drug is developed for a rare sub-population of patients suffering from a common condition but can also be used also to treat all the other patients suffering from that condition).

In practice, however, such risks are averted both upstream and down. Upstream, by means of procedures for the classification of orphan medicinal products (EC Regulation 141/2000 expressly provides for cases of designation for sub-populations, introducing appropriate safeguards; moreover, in the case of designations for rare and non-rare diseases, diverse medicinal products exist, and are accounted for differently). Downstream, they are avoided thanks to mechanisms for monitoring and controlling the use of the drugs themselves (it is, in fact, common knowledge that in most cases, the use of orphan drugs is directly detected in the so-called *AIFA* registers and therefore subject to direct monitoring for each single clinical case treated; moreover, 86% of orphan drugs are authorised for just one type of treatment and a further 11% for two).

At the very least, such risks may be invoked to justify revisions to the authorisation and control procedures but not to call into question a legislative framework whose constitutionality and effectiveness do not appear to be in doubt.

12. Extension of the payback obligation to pharmaceutical companies producing orphan drugs, and possible effects on the right to health of patients suffering from rare diseases

The analysis carried out so far has ascertained the constitutional need for legislation to guarantee preferential treatment for research on - and production of - orphan drugs. At the same, it has confirmed the constitutionality, within the limits of reasonable proportionality, of mechanisms for the partial offload of the costs incurred onto companies operating in the ordinary pharmaceutical sector. It has also shown that the current legal framework, based on negotiated prices for orphan drugs, in the absence of “ceilings” on final expenditure, is a model capable of validly ensuring the need to safeguard the “non-reducible core” of the right to health of patients with rare conditions.

At this point in the analysis, however, it remains to be considered, following the logical-expositive line of thought set out in the introduction, whether there are any other possible regulatory alternatives capable of respecting the constitutional constraints on the subject, likewise able to guarantee the ultimate goal of health protection but offering a different distribution of the economic burden this entails compared with the current system. In other words, the issue is that of the existence of possible forms of sharing and partial reallocation of the sacrifice previously inflicted on pharmaceutical companies and the Regions, including at the expense – under certain circumstances and conditions – of the very companies that produce orphan drugs.

This question is also reasonable in the light of the proposals for reform within the sector, the legislative amendments already proposed (but not yet adopted), and the models applied in apparently similar cases. Serious reflection on the subject, moreover, is also called for by the principles upheld in constitutional case law on the subject of innovative medicines, most recently set out in repeatedly cited sentence No. 70/2015.

Here, the Court considered it constitutional to transfer the overspend on State coverage to the rest of the pharmaceutical companies; nevertheless, it also remarked that this system may also be of temporary duration, with periodic review of the legislation, in virtue, among other things, of a “reduction of the contributions for companies holding marketing authorisation for non-innovative drugs”, the “gradual transfer of the burden onto

the companies with marketing authorisation for innovative drugs", and the plurality of "options available to the legislator". For example, if they are contemplated possible corrections to the current system for covering overspend on orphan drugs, we might consider establishing *ad hoc* funding up to an annual maximum figure, which is what happens in the case of innovative drugs, or else fixing annual budget ceilings, established or negotiated per individual orphan drug or manufacturing company.

Beyond the obvious need to evaluate the actual configurations of these hypotheses on a case by case basis, these solutions raise some serious doubts in terms of conceptual approach. First of all, it would appear highly questionable to use the legislative framework for innovative drugs as a parameter of comparison. While it is true that the two categories – innovative drugs and orphan drugs – are comparable in that they impact on and change the consolidated flow of demand for treatment, there are some features that distinguish them: an innovative drug may compete with other drugs for treatment of same condition (thus creating compensation between over - and under-budgeting), unlike an orphan drug that by definition operates in a field not covered by another comparable drug. Innovative drugs are open to potentially vast consumption, whereas that of orphan drugs is extremely limited. Lastly, orphan drugs (with very few exceptions) do not normally guarantee a cure but rather the stabilisation of an illness in its chronic phase: the number of patients treated is therefore inevitably destined to increase.

In concrete terms, considering the current methods of quantifying and allocating the percentages of national health spending allocated to pharmaceutical expenditure, it is difficult to imagine an imposition of ceilings or quotas that would not produce direct negative effects on the production and administration of an orphan drug. The fundamental problem is how to establish the degree of public funding due to (positive or negative) variation in historical expenditure: an approach structurally incompatible with the introduction of new orphan drugs or even, simply, with the extension of existing drugs to new patients. Expenditure on orphan drugs is in fact by definition incremental, so a ceiling based on historical trends could never be respected.

Once the annual expenditure ceiling has been reached, in the absence of market competitors and ruling out a reduction in the number of patients being treated, a random patient will find him/herself bereft of treatment, unless the manufacturing company agrees to deliver the drug anyway and free of charge. Naturally, the health system cannot rely on liberal concessions on the part of the entrepreneurial class, nor (in such cases) can it speculate on the ethical constraint that may have led them to make such concessions.

Practically speaking, the imposition of spending “ceilings” that can also be sustainable for companies producing orphan drugs would presuppose a radical rethinking of the current models of financing health expenditure, with a shift away from the criterion of previous expenditure to techniques for forecasting increases in demand. In other words, “programmatic” spending thresholds must be established, quantifying the foreseeable increase in patients suffering from rare diseases needing treatment, considering their inevitable growth as an effect of the chronicization of existing patients and the onset of new cases. These solutions, apart from the obvious technical difficulties, do not appear realistically feasible.

It is true, from another perspective, that some specific orphan drugs could be identified whose levels of turnover are such as to be able to allow them - in the abstract and from a purely financial point of view - to be subjected to an albeit partial or gradual payback regime. Beyond ethical aspects outlined above, such measures could have a very negative effect on future investment in new orphan drugs, undermining the confidence of the industrial sector in the stability of the current regulatory framework and the economic guarantees it can provide. Moreover, it should be borne in mind that the drugs with the highest sales revenues are also those that ensure the best clinical results and target a wider pool of patients. Imposing a payback obligation on these drugs would therefore discourage other pharmaceutical companies from investing in that sector (affecting the profit differential), and thus prevent the growth of competition in research into the most promising drugs and sectors.

The stability of regulatory framework, on the other hand, appears to be even more important in the light of current production scenario, which is result - as previously described - of

a rigorous selection of companies that have been able to remain on the market and drugs that have been able to reach the stage of final approval and commercialization. In order to assess sustainability of a compulsory levy on proceeds of individual orphan drugs on the market today, the dissuasive effect on the entry of new operators in this market and the launch of new trials cannot be ignored.

The same consideration also holds for an additional possible alternative solution: the “payment at results” mechanism, in other words a payment conditional on the successful efficacy of the orphan drug on the single patient suffering for a rare disease. This mechanism could be effective for innovative drugs: the aim of these drugs is improving the condition of the patient compared to drugs that are already on the market. Therefore, it is expected that innovative drugs are better than the previous ones. Considering that the number of patients targeted by the innovative drug is not limited, pharmaceutical companies are encouraged by the market to develop such drugs.

However, for orphan drugs for the treatment of rare diseases the situation is different. These drugs are intended to treat a limited number of patients and, usually, in the absence of any previous treatment for the disease. We have already described the system of incentives aimed at covering research and development costs and the strict rules for marketing authorization. The “payment at results” mechanism would be a strong disincentive to pharmaceutical companies’ investments in the sector. On the contrary, it is necessary to work at the removal of the distortions reported in the first part of this article. But, if anything, we need to improve effective and proper controls and develop rules in order to prevent distortive effects.

A UNIVERSAL DILEMMA IN A SPECIFIC CONTEXT: THE INTEGRATION OF FOREIGNERS IN ITALY

*Cristina Bertolino**

Abstract

Ascertaining that today's migrations have considerable effects on legal systems, it comes to light an apparently irreconcilable dilemma: on one hand, the ideal and universal freedom of movement, theorized by the Cosmopolitans; on the other hand, the sovereign self-determination of the States, predicted by the Communitarians, and today reiterated by the Sovereignists.

Even in the Italian legal system it is possible to find these divergent positions, especially in the decisions and policies of the sub-state territorial authorities, which have progressively assumed a crucial role in the management of immigration. In fact, it is possible to find regulatory measures aimed at hosting and integrating foreigners, but there are periodically interventions aimed at rejecting them and limiting their access to the use of social rights and services.

In relation to these final measures, the Constitutional Court has also had a crucial role in these years, contributing to the construction of a social citizenship, based on the fundamental principles of our republican system. However, the paper aims to demonstrate - by presenting the SPRAR project and the actions implemented by some Municipalities - that the research of a balance between an unconditional openness to immigration and a hostile and rigid closure of the territories can find a suitable solution in the sub-state territorial authorities, which could become a privileged place for integrated hospitality.

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1. The migration phenomenon and the crisis of States

Although it has been at the centre of political and constitutional debate of modern-day democracies in recent years, the topic of migration processes and legal condition of foreigners is nonetheless not new, existing since the dawn of the modern history¹. What is new may be, instead, the perception of vulnerability which is linked to migration episodes: a *stricto sensu* physical insecurity – initially perceived after September 11, 2001 – as well as socio-economic insecurity, worsened in 2008 and for which a solution still appears remote.

The 'strong' presence of foreigners in our States or at our «doorstep»² may in any case not be kept under control by the State by means of an individual and 'solitary' action, and even less so by its citizens. It is, rather, the clear witness and personification of the 'collapse' of world order that had come about after World War II; the order that has slowly lost its foundation and is still far from a reaffirmation or reconstruction. It thus appears clearly utopic to think that a global management of immigration, even only at a European level, may be created in the short term. At the same time, the search for balance between unconditional openness to immigration and hostile and rigid closure seems to be gradually

¹ See on the topic, among others, M. Livi Bacci, *Il pianeta stretto* (2015); S. Allievi, G. Dalla Zuanna, *Tutto quello che non vi hanno mai detto sull'immigrazione* (2016); V. Calzolaio, T. Pievani, *Libertà di migrare. Perché ci spostiamo da sempre ed è bene così* (2016).

² A clear reference is made to the work by Z. Bauman, *Strangers at Our Door* (2016).

leading to a fragmentation of the citizenship³, a territorial crisis⁴, and the dissolution of the principle of State sovereignty – or, oppositely, the consolidation of non-liberal sovereignty.

With regards to its citizens, the methods used by the State in dealing with the migration phenomenon – in particular, a certain degree of ‘hostility’ that certainly does not belong to the democratic values it is based upon – is causing, as will be dealt with hereinafter, the emergence of regional and local ‘citizenships’ and an accentuated ‘territoriality’ of the related rights. The increased complexity of social demand has in fact forced regional and local entities to reconfigure citizen rights (at times even fundamental rights), social services, and their ‘boundaries’, implying an alarming rise of intra-state ‘citizenships’ that seem incompatible with the definition of united legal and social citizenship, and rather encourage inequality within the State.

As for a possible dissolution and crisis of the principles of sovereignty and state territoriality, a precise statement shall be made. Territory and sovereignty have established themselves as the traditional, founding elements of a State in the post-Westphalia age, with the birth of national States, implying a perspective lay-out of the planet in essentially closed spaces. The consequence of such idea is that a territory and its borders allow a distinction between inside and outside; they allow to define a «barbarian», a «foreigner», an «other»⁵, as well as a distinction – at the international level – between the sphere of sovereignty and responsibility and that, instead, of due ‘abstention’.

Upon occurrence of the global and intra-country changes we have witnessed in the past few years, the said idea of territory

³ On this matter, see S. Staiano, *Migrazioni e paradigmi della cittadinanza: alcune questioni di metodo*, in 21 *federalismi.it* 21 (2008); A. Morrone, *Le forme della cittadinanza nel Terzo Millennio*, in 2 *Quad. Cost.* 303 (2015).

⁴ See B. Badie, *La fin des territoires. Essai sur le désordre international et l'utilité sociale du respect* (1995), Italian translation made by M. Cadorna, *La fine dei territori. Saggio sul disordine internazionale e sull'utilità sociale del rispetto* (1996), 118, 123 ff., who states that «the identity appropriation of territories paves the way for political crosshatching which is constantly renewed, it makes the borders and boundaries fragile, and weakens the work of political construction of communities; it erases the work time has done in creating space, thus – to put it differently – marks the end of territories themselves».

⁵ See F. Kratochwil, *Of Systems, Boundaries, and Territoriality: an Inquiry into the Formation of the State System*, in 39, 1 *World Politics* 33 (1986).

implies a growingly exacerbated attachment of public authorities and citizens to their territorial space, and a renewed attention to the principles of territoriality and sovereignty. More recently, such attachment has found expression – at State level – in the intensification of control at the national borders, the reconstruction of boundaries, and erection of new ‘walls’; at the intra-state level, it has found expression in a rise in requests for greater autonomy, if not independence, and the consequent secession in parts of State territory.

Moreover, there are certain factors that at the same time compromise the relationship between State and territory, and generate a new concept of territorial dimension, borders, and state sovereignty. Among these, above all, there is globalization and the participation in international organizations and in the European Union, which cause and increase a «disassociation»⁶ of political spaces from the places more specifically related to the construction of law. These are not new phenomena, but the dimension they are reaching and the struggle that States endure in their attempt to ‘tame’ them certainly is⁷.

Secondly, there is the desperate search for a more ‘dignified’, and certainly «precious»⁸ citizenship – which keeps pushing thousands of refugees and immigrants every year to challenge the insidious Mediterranean Sea to reach new lands and try to overcome their borders – that is wreaking havoc not only in the foundations of the welfare state and the principles of pluralist democracy, but even more in terms of very ability of western democracies to rule their own territories and exercise full dominion over them. Therefore, in some cases it seems we are witnessing the dissolution of the principle of territoriality⁹;

⁶ See G. Scaccia, *Il territorio fra sovranità statale e globalizzazione dello spazio economico*, in 3 Rivista AIC 14 (2017).

⁷ See among others, more recently published, S. Cassese, *Territori e potere. Un nuovo ruolo per gli Stati?* (2016), 10.

⁸ See D. Zolo, *La strategia della cittadinanza*, in Id. (ed.), *La cittadinanza. Appartenenza, identità, diritti* (1994), 42.

⁹ On this statement, see G. Sciortino, *Rebus immigrazione* (2017); a symptomatic and worrying trend is represented by growingly frequent episodes recorded seeing the French police force trespassing the Italian border, causing the risk of a diplomatic crisis with France.

oppositely, in other instances we seem to witness the reinstatement, even through use of force, of State sovereignty¹⁰.

Nevertheless, it does not appear impossible to envisage the will – at local level – in order to find occasions for human and institutional encounter and growingly deep contact, with a hope that a concrete fusion of horizons – rather than a forced, artificial, and increasingly exacerbated scission – may be reached.

2. Cosmopolitanism and sovereignty: two apparently incompatible positions

In the past few years, a dichotomy that had already found expression in prior ages returned to life: on one hand, the ideal, universal freedom of movement; on the other, the sovereignty of States over self-determination. On one hand, cosmopolitanism, which has always hoped for universal hospitality; on the other hand, communitarianism, which instead anticipated – much like modern-day sovereigntists – the rejection of those not belonging to the community, namely foreigners.

In the view of cosmopolitanists, as is well known, the borders of/between States are arbitrary, they violate people's fundamental freedom of movement, and impose a condition of inequality among individuals and discriminatory separation between the 'included' and the 'excluded'. The obligation to provide help to migrants and to host foreigners is thus viewed to be absolute and unconditional, not being there space for classification nor distinction of any kind. According to such current of thought, man's primitive condition is in fact distinguished by equal dignity of humans as such, regardless of their national or social origins; the individual is viewed as part of a universal system in which boundaries – even State boundaries – would require a justification as such. This is the basis for a principle – a moral principle above all, to then be transposed to the legal sphere – of equalitarian and universal reciprocal respect among individuals, as well as universal hospitality.

¹⁰ An example of this is the position of the ex-Italian Minister of Home Affairs, Matteo Salvini, who on more than one occasion has expressed a clear, rigid opinion on closing Italian borders and ports to immigrants.

A compulsory reference must be made of course to Immanuel Kant and his essay 'Perpetual peace'¹¹, in which the philosopher claims the existence of a «universal hospitality»: a right belonging to all human beings as potential members of a global republic; the «planet's neighbours», owning the natural and fundamental right to the «undivided surface of the Earth». In his view, States thus do not have exclusive arbitration over their borders – as in the more Westphalian idea of sovereignty – but are held to respect human rights and universal democratic principles, with the latter granting them their very legitimacy.

More recently, Jacques Derrida seems to have adopted the same philosophy in terms of «hospitality»¹², as he distinguished between absolute hospitality and the pact of hospitality.

«Absolute hospitality should break with the law of hospitality as right or duty, with the 'pact' of hospitality». In other words, «absolute hospitality requires that I open up my home and that I give not only to the foreigner (provided with a family name, with the social status of being a foreigner, etc.)» but even more «to the absolute, unknown, anonymous other, and that I 'give' place to them, that I let them come, that I let them arrive, and take place in the place I offer them, without asking of them either reciprocity (entering into a pact) or even their names». Moreover, while on one hand «the law of absolute hospitality commands a break with hospitality by right», on the other hand it does not condemn or oppose the latter, but instead may «set and maintain it in a perpetual progressive movement».

Again, similar reflections have been made by Hannah Arendt when, in 'The Origins of Totalitarianism', the Author hypothesized «the right to have rights»¹³, namely a moral demand for belonging and citizenship by humanity as a whole, which would be followed – within the tangible and social borders of a State – by the necessary legal treatment. The right to have rights may thus come about only within a logic that transcends differences between people, in a system of absolute and universal equality, in virtue of the decision to allow one another equal

¹¹ I. Kant, *Zum Ewigen Frieden. Ein philosophischer Entwurf* (1795), Italian translation by M. Montanari, L. Tundo Ferente, *Per la pace perpetua* (2016), 66.

¹² A. Dufourmantelle, J. Derrida, *De l'hospitalité* (1997), 29.

¹³ H. Arendt, *The Origins of Totalitarianism* (1948), Italian translation made by A. Guadagnin, *Le origini del totalitarismo* (2009), 410.

rights. A similar logic would thus imply the required overcoming of the state model in favour of the cosmopolitan model.

Supporters of the so-called «communitarianism»¹⁴ instead of taking a different stand. In their view, duty to exercise hospitality, equality, and solidarity are only valid within the limited social or territorial circle, and not with regard to foreigners. As is known, it is a current of thought that – by shifting the focus on the individual within a society or community – relates the former directly to the latter, recognizing them the rights guaranteed by such society only in case he already belongs to it.

Just like Aristotle¹⁵ viewed citizenship as a model of belonging to a self-determined ethical/cultural community, a society in which each person relates to one another given the belonging to a given community, and whose collective identity is the expression of stable – and improvable over time – sharing of the common good would be deemed fair and equal. Oppositely to the view of cosmopolitanists, society is thus not the result of universally equal individuals on the moral and/or legal level, but a self-creating community including ‘members’ rather than ‘individuals’. Citizenship is thus a legal *status* «bestowed on those who are full members of a community»¹⁶ and all those who possess such *status* are equal in terms of rights and duties.

The legal right of foreigners to be hosted would thus exist only from the moment they own the *status* of legal citizens (and thus, apodictically, as citizens they would no longer be considered foreigners), and – symmetrically – it would be the prerogative of a State to establish who may belong to a community and who instead should be rightfully rejected from it. There would thus be no universal principle – neither moral, nor least of all legal – on which the contents of such citizenship rights and duties would be based. Nonetheless, it is possible that within a given political

¹⁴ Among supporters of communitarianism, see C. Taylor, *The Malaise of Modernity* (1991), Italian translation made by G. Ferrara degli Uberti, *Il disagio della modernità* (1999); M. Walzer, *Spheres of Justice. A defence of Pluralism and Equality* (1983), Italian translation made by G. Rigamonti, *Sfere di giustizia* (2008); T.H. Marshall, *Sociology at the Crossroads* (1963), Italian translation by P. Maranini, *Cittadinanza e classe sociale* (1976).

¹⁵ Aristotele, *Politics*, book III, 1 ff.

¹⁶ Please refer to T.H. Marshall, *Sociology at the Crossroads*, cit. at 14, 24.

community the image of an «ideal», «developing»¹⁷ citizenship may be presented, and that this may push towards a higher degree of equality and a tangible enrichment of the citizenship *status*, also in favour of those to which such *status* may be granted at a later stage.

The provision of legal guarantees and the tangible advantages related to owning citizenship status may, moreover, always be compliant with the «political code of the sovereign State»¹⁸, namely a code of operation that may also find its fulcrum in the particular instance of safety and exclusion, not the universal instance of equality among individuals. Moreover, according to communitarianists, it is not only impossible to speak of a universal community, but even the national community would risk being «too large and remote to activate a single belonging». This consideration may thus imply the development and recognition of more limited belongings – at the local level – and, as underlined initially, a ‘fraying’ of citizenship and republican belonging, with a consequent loss in sense of solidarity and collective responsibility, not only for the human community as a whole, but even the national community.

3. Immigration between State and Regions

Upon explaining how the aforementioned antithetic theories find validation not only in the social, anthropological, and political context, but also in national and regional legislation, it is necessary to assess about legal conditions of foreigners within the Italian Constitution, and in particular the national, regional, and local duties within its scope.

Articles 2 and 3 of the Constitution – upon outlining an «emancipating democracy»¹⁹ plan, sets human beings as such, as well as their dignity, at the basis to build a democratic State²⁰, and

¹⁷ T.H. Marshall, *Sociology at the Crossroads*, cit. at 14, 24.

¹⁸ See D. Zolo, *La strategia della cittadinanza*, cit. at 8, 19.

¹⁹ See M. Dogliani, A. Di Giovine, *Dalla democrazia emancipante alla democrazia senza qualità?*, in 2 *Questione giustizia* 323 (1993).

²⁰ On the topic, among others, see A. Barbera, *Commento all'art. 2 Costituzione*, in G. Branca (ed.), *Commentario della Costituzione* (1975), 50 ff., in which the author sees in Article no. 2 of the Constitution the will to detach fundamental human rights from the *status civitatis*.

calls upon the Republic to foster formal and substantive equality among individuals, by linking them by means of a rigid solidarity bond. Such democracy plan thus appears – without a shade of doubt – to fall under the logic of unconditional hospitality. At the same time, Article 10, paragraph 3 of the Constitution – once again, symbolically, among the first articles dedicated to fundamental principles at the basis of the entire legal system – upon sanctioning the right to seek asylum by foreigners ‘configures’ it as a «perfect, subjective, constitutional right»²¹. The right to asylum would thus impose that the State – in the presence of a foreigner whose own State prevents exercise of the democratic freedom guaranteed by the Italian Constitution – has the duty to give up its sovereignty and affirm and protect the inviolable rights of human beings, thus ensuring the Kantian commitment to hospitality. Consequently, this implies that rejection at the border is forbidden, and that there are clear limits to an eventual exile.

It is nevertheless identically clear how, on one hand, there is an ongoing resistance by legislators – particularly at the regional level – to adopt predominantly equalitarian and inclusive policies and how, on the other hand, the enduring absence of a comprehensive legal system in terms of right to seek asylum²² has augmented the role and discretion of competent administrative and judicial authorities, so that asylum – theoretically a subjective right of the foreigner – «has been configured more and more as a right of the State, which has distorted the principle expressed in the Constitution itself»²³.

A clear example of the above claims are the guidelines of the so-called ‘*Decreto Sicurezza*’ (Security Decree) no. 113 issued on 4 October 2018, and converted to Italian Law 13 December 2018, no. 132, in which the State – with the intent of restricting the pool

²¹ See A. Cassese, *Commento all’art. 10, III comma Costituzione*, in G. Branca (ed.), *Commentario della Costituzione*, cit. at 20, 534. See, among others, Court of Cassation, SS.UU., 26 May 1997, no. 4674; Court of Cassation, SS.UU., 4 April 2004, no. 8423.

²² The most significant provisions on the matter are following Italian Laws, 28 February 1990, no. 39; Law 6 March 1998, no. 40; Law 30 July 2002, no. 189; Law 13 April 2017, no. 46; Decree-Law 25 July 1998, no. 286 and more recently Decree-Law 4 October 2018, no. 113 converted to Law 13 December 2018, no. 132.

²³ See F. Rescigno, *Il diritto di asilo* (2011), 227.

of individuals who may access and settle on our national land – has abolished the concept of residence permit and has established the issuance of certain special, temporary residence permits for humanitarian purposes (Article 1). Before the entrance into force of the Decree, the protection system for foreigners included three levels: recognition of refugee status; subsidiary protection – based upon both international and EU standards²⁴; and humanitarian protection. The latter – in accordance with the well-established legislation of the Court of Cassation²⁵ – related directly to the constitutional right to asylum as specified in Article 10 of the Italian Constitution, along with the ‘complementary’ protection that EU legislation allows member States to provide²⁶ to those individuals who – though threatened in terms of their fundamental rights in case of repatriation to their country of origin – may not claim refugee status nor benefit of subsidiary protection.

It is believed that the new Italian legislation, although not violating specific international or EU restrictions²⁷, may clash with

²⁴ See, in particular, the Geneva Convention released on 28 July 1951, relating to the status of refugees, and the Directive 2011/95/EU of the European Parliament and of the Council, on «*Standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted*».

²⁵ See, among many others, sentences of Court of Cassation, Sec. VI, 26 June 2012, no. 10686; Court of Cassation, Sec. VI, 4 August 2016, no. 16362; Court of Cassation, Sec. I, 23 February 2018, no. 4455; Court of Cassation, SS. UU., 12 December 2018, no. 32177; Court of Cassation, SS.UU., 11 December 2018, no. 32044.

²⁶ See Article 6, paragraph 4, Directive 2008/115/EC of the European Parliament and of the Council, on «Common standards and procedures in Member States for returning illegally staying third-country nationals», who states that «Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permission or other authorisation offering a right to stay».

²⁷ See on the topic, among others, C. Sbailò, *Immigrazione: il fallimentare approccio europeo e i limiti della risposta neo-sovranista*, in 3 *federalismi.it* 4 (2019).

Article 10, paragraph 3, of the Italian Constitution²⁸. Over the years, humanitarian protection has in fact complemented the other mentioned forms of protection and – in the absence of a specific standard to implement the said article – has also supported the right to asylum²⁹, which still awaits – as stated above – an accurate and specific measure by the lawmakers.

Therefore, a short-term increase in rejection of residence permit applications has been recorded³⁰ along with, on one hand, the consequent need – incompatible, among other things, with the principle of *non-refoulement*³¹ – to remove foreigners from the national territory and, on the other hand, the impossibility for those holding a regular residence permit for humanitarian reasons to obtain a renewal, and their probable shift to a status of illegal aliens. Thus, a situation of instability and vulnerability has come into existence for those who, ever since the entrance into force of the '*Decreto sicurezza*', appeared to be potential and legitimate owners of the right to asylum within our legal framework and in its safeguard.

As for the Constitution-based subdivision of roles, the 2001 reform of Title V has attributed exclusive sovereignty and competence to the State in terms of: «right to asylum and legal

²⁸ See, on the topic, the first reaction by the Constitutional Court on Decree Law 4 October 2018, no. 113 namely Constitutional Court, 4 September 2019, no. 194 in 16 federalismi.it (2019).

²⁹ As constantly supported by out of guidance of the Court of Cassation. See, in particular, Court of Cassation, Sec. VI, 26 June 2012, no. 10686; Court of Cassation, Sec. VI, 4 August 2016, no. 16362; Court of Cassation, Sec. I, 23 February 2018, no. 4455.

³⁰ See, on the topic, the data presented by the *Dipartimento per le libertà civili e l'immigrazione* (Department of civil rights and immigration) of the Italian Ministry of Home Affairs (<http://www.libertaciviliimmigrazione.dlci.interno.gov.it/it/documentazione/statistica/i-numeri-dellasilo>), which highlight a dramatic fall – upon entrance into force of Decree Law 4 October 2018, no. 113 – in issuance of permits for humanitarian protection reasons, and an increase in rejection of residence permit applications.

³¹ On the principle of *non-refoulement*, see, among others, A. Saccucci, *Espulsione, terrorismo e natura assoluta dell'obbligo di non-refoulement*, in 2 I diritti dell'uomo 33 (2008); F. Salerno, *L'obbligo internazionale di non-refoulement dei richiedenti asilo*, in 3 Diritti umani e diritto internazionale 487 (2010); P. Papa, *L'esclusione per non meritevolezza, i motivi di sicurezza e di pericolo, il principio di "non refoulement" e il permesso di soggiorno per motivi umanitari*, in 2 Diritto, immigrazione e cittadinanza 25 (2018).

condition of citizens of States not belonging to the European Union» (Article 117, paragraph 2, letter *a*); «immigration» (letter *b*); «determination of essential levels of civil and social rights services» (letter *m*); «public order and safety» (letter *h*); and in terms of «citizenship, civil status, and civil registry» (letter *i*). At the basis of such choice there is of course the need to guarantee the legal system's uniformity and unity, the respect of the principle of equality with regard to all those present within a given territory, and more in general the demand to place policies related to immigration in the hands of State.

While the State is deemed competent at the national level and in terms of governance of the formal citizenship and its mode of acquisition, it is the regional level – and in terms of administration, even the local level – which have taken on an undeniable role and scope of action in terms of possible pro-immigration policies³². The scopes of sub-state intervention, which were also defined in the 1990s, have been indeed extended in the Constitution as a consequence of the increased regional legislative power, not only in terms of social services but also in terms of education, professional training, safeguard of health, and – in general – all sectors that may somewhat affect the life of a foreigner permanently or temporarily residing on national territory³³.

In the well-known judgment 7 July 2005, no. 300, the Italian Constitutional Court itself – upon identifying the ranges of national and regional power in terms of immigration – has underlined how «public intervention is not limited to the due control of entrance and permanence of foreigners on national land, but also necessarily involves other fields, such as assistance, education, health, and housing. Such subjects combine – as written in the Constitution – State and regional competences, either exclusively or jointly».

Moreover, it is significant to highlight how the Constitution itself – in Article 118, paragraph 3 – acknowledges the need for a

³² The distinction between policies *related to* immigration and *pro-immigration* policies is owed, as well-known, to T. Hammar, *Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration* (1990).

³³ On the topic, among many others, see G. Serges, *Le competenze normative delle Regioni in tema di immigrazione*, in G. Caggiano (ed.), *I percorsi dell'integrazione* (2014), 805.

national coordination of immigration and public order/safety. In fact, in such fields more than any other, the constitutional legislator recognizes the need to balance – on one hand – unity and State sovereignty requirements with – on the other hand – pluralism in legal decisions, and how there exists such a complex network of national, regional, and local functions, that they may only find agreement through forms of systematic and/or procedural coordination.

In the past 20 years – taking into account social science, and in particular the theories by Thomas Humphrey Marshall³⁴ – a different and multidimensional concept of citizenship has come about: the so-called social citizenship³⁵. We have in fact witnessed a gradual loosening of the link between Countries and individuals, rooting from the Country-nation crisis, related to globalization and its consequences on economic-financial, political, and even social systems. A crisis which is also motivated by the progressive participation of individuals to economic, social, and welfare contexts of modern democracies – regardless of their *status civitatis* – and not least by the pressure exerted on Western politics by people from underdeveloped and densely populated areas of the continent, in search of a more ‘high-class’ citizenship.

³⁴ T.H. Marshall, *Sociology at the Crossroad*, cit. at 14, 24.

³⁵ On the concept of social citizenship and on the consequent strong debate see, among others D. Zolo, *La strategia della cittadinanza*, cit at. 8, 5; Id., *La riscoperta della cittadinanza*, in J.M. Barbalet (ed.), *Citizenship. Rights, Struggle and Class Inequality* (1988), Italian translation made by F.P. Vertova, *Cittadinanza. Diritti, conflitto e disuguaglianza sociale* (1992), 7; L. Ferrajoli, *Dai diritti del cittadino ai diritti della persona*, in D. Zolo (ed.), *La cittadinanza. Appartenenza, identità, diritti* (1994), 263 ff.; G. Zincone, *Da sudditi a cittadini* (1992); E. Grosso, *Le vie della cittadinanza. Le grandi radici. I modelli di riferimento* (1997); M. Cuniberti, *La cittadinanza. Libertà dell'uomo e libertà del cittadino nella costituzione italiana* (1997); G. Berti, *Cittadinanza, cittadinanze e diritti fondamentali*, in 1 Riv. Dir. Cost. 3 (1997); G.U. Rescigno, *Cittadinanza: riflessioni sulla parola e sulla cosa*, in 1 Riv. Dir. Cost. 37 (1997); A. Morrone, *Le forme della cittadinanza nel Terzo Millennio*, in 2 Quad. Cost. 303 (2015); C. Panzera, A. Rauti, C. Salazar, A. Spadaro (eds.), *Metamorfosi della cittadinanza e diritti degli stranieri*, (2016); G. Bascherini, *Verso una cittadinanza sociale?*, Osservazione a C. Cost. 30 dicembre 1998, n. 454, in 1 Giur. Cost. 381 (1999); D. Bifulco, *Cittadinanza sociale, eguaglianza e forma di Stato*, in L. Chieffi (ed.), *I diritti sociali tra regionalismo e prospettive federali*, (1999), 27; G. Romeo, *La cittadinanza sociale nell'era del cosmopolitismo. Uno studio comparato* (2011); P. Barcellona, *A proposito della cittadinanza sociale*, in 2-3 Dem. e Dir. 15 (1988).

Therefore, a different concept of citizenship has come into being, according to which citizens are those who live and *participate* to a given community, and citizenship would grant the existence of the complex of social relationships between its members, and between the latter and authority.

Such citizenship is distinguished by new and multidimensional traits and, in particular, by the fact it is founded upon the recognition and sharing of rights and obligations ascribed to people as such, and regardless of their *status civitatis*. A concept of *social* citizenship that, compared to the strictly legal/formal idea, implies an outstandingly inclusive dimension, tending towards equality and dignity, overcoming national borders and the thorny 'barriers' of legal citizenship; not least, a citizenship focused on the universalization of rights³⁶. Therefore, social citizenship as «a tangible prerequisite for democracy»³⁷.

The contents of a substantial³⁸ citizenship may thus no longer be considered exclusively attributed to the State: in fact, new decision-making centres have replaced the latter. Just consider the international and European restrictions³⁹, as well as the judgements issued by Court of Justice of the European Union and the European Court of Human Rights. Moreover, a less-than-insignificant role was played – as underlined above – by institutions at the territorial sub-national level, whose actions are questioning not only the concept of social citizenship, but even that of formal citizenship, and are bringing to life a large number of citizenship models.

³⁶ In an extreme sense, such form of citizenship would lead, according to certain authors, to a status of «cosmopolitical citizenship», or *civis mundi*. See, on all such topics, L.J. Cohen, *The Principles of World Citizenship* (1954); J. Habermas, *Recht und Moral*, (1986), Italian translation by L. Ceppa, *Morale, Diritto, Politica*, (2011), 136.

³⁷ See: F. Belvisi, *Cittadinanza*, in A. Barbera (ed.), *Le basi filosofiche del costituzionalismo*, (2007), 141.

³⁸ On the topic, among others, see L. Ronchetti, *La cittadinanza sostanziale tra Costituzione e residenza: immigrati nelle regioni*, in 2 *Costituzionalismo.it* (2012).

³⁹ See on the topic, among others, S. Staiano, *The Crisis of State sovereignty and social Rights*, in 2 *The Age of Human Rights Journal* 25 (2014).

4. 'Hospitality' and 'rejection': evident divergence in local pro-immigration policies

One of the main issues related to 'composed' governments⁴⁰ is doubtlessly the struggle in 'building' a unitary citizenship that may contrast the division of the political power in the national territory⁴¹. In such form of government there emerges on one hand the need – in the words of the Italian Constitution – to «recognize and promote local government bodies» (Article 5), and on the other hand – at the same time – the duty the Republic has to «recognize and guarantee fundamental human rights» (Article 2) as well as «identical social dignity and equality among individuals» (Article 3). There is a constant tension and delicate balance between the unity and differentiation of the system: no matter how much a legal status may wish to tend towards the greatest level of decentralization possible, there is always an egalitarian legal *status* involving the person, whose core is the guarantee of fundamental rights. It is moreover not easy to understand how far the imposition of a system unity may go, and how much – instead – unity and equality themselves do not translate to an excessive uniformity, going to the detriment of differentiation and independence.

The growing migration flows and the long-term presence of foreigners within our territory – as well as, consequent to the economic crisis, the growth in the category of citizens suffering poverty and weakness – have deeply affected regional and local economies in the past years, thus calling for a more substantial, though (as highlighted above) necessary, action by such government bodies concerning the regulation of social rights and a more efficient guarantee of the same. The 'complication' of social service demand has thus forced the regional legislators and local administrators to reconfigure – in a number of cases – rights (even fundamental rights) and their 'boundaries', thus causing a clear divergence among areas that have taken a more cosmopolitanist, welcoming approach towards foreigners, and those that have instead adopted more sovereigntist and communitarianist positions, pushing clearly and consciously for exclusion.

⁴⁰ R. Bifulco, *La cooperazione nello Stato unitario composto* (1995).

⁴¹ On the topic, among others, please refer to A. Poggi, *I diritti delle persone. Lo Stato sociale come Repubblica dei diritti e dei doveri* (2014) 93.

The first pool includes the Regions that have adopted laws in support of the rights and integration of foreigners, without making particular distinctions in terms of the latter's residence permits, and going as far as including illegal immigrants⁴².

The second group includes, instead, the Regions that – highlighting the citizenship requirements and, more often, residence within the regional territory – have generated a gradual exclusion of portions of people from social policies⁴³, raised the level of inequality within the republican State, and consequently set up a marked 'territoriality' of rights on a regional or local basis.

Actions of the latter kind are especially identified in regional laws applicable to Italian citizens only⁴⁴ and – on a wider scale – to regional provisions that require not only legally

⁴² See Tuscany Regional Law 8 June 2009, no. 29, *Norme per l'accoglienza, l'integrazione partecipe e la tutela dei cittadini stranieri nella Regione Toscana*, which has envisaged social/welfare actions also «in favour of foreign citizens present within the regional area», thus even not owning a residence permit; Campania Regional Law 8 February 2010, no. 6, «*Norme per l'inclusione sociale, economica e culturale delle persone straniere presenti in Campania*», targeted to 'foreign' people, thus not further specifying their status; Puglia Regional Law 4 December 2009, no. 32, *Norme per l'accoglienza, la convivenza civile e l'integrazione degli immigrati in Puglia*, targeted to foreigners living «on any basis» on the regional land, thus including foreigners not owning a valid residence permit; Marche Regional Law 26 May 2009, no. 13, *Disposizioni a sostegno dei diritti e dell'integrazione dei cittadini stranieri immigrati*, targeted even to foreign citizens «awaiting conclusion of a legalization process»; Liguria Regional Law 20 February 2007, no. 7, *Norme per l'accoglienza e l'integrazione sociale delle cittadine e dei cittadini stranieri immigrati*, targeted to «foreigners present on the regional land»; Abruzzi Regional Law 13 December 2004, no. 46, *Interventi a sostegno degli stranieri immigrati*, which sets out that immigrant foreigners are the recipients of the actions included in the law itself, «upon condition that they are permanently or temporarily resident or otherwise present – in accordance with current legislation – on the regional territory, both in case of definitive immigration and in cases of temporary and finalized permanence».

⁴³ On the recipients of the regional social policies, see I. Carlotto, P. Cavaleri, L. Panzeri, *Servizi sociali*, in L. Vandelli, F. Bassanini (eds.), *Il federalismo alla prova: regole, politiche, diritti nelle Regioni* (2012), 87; F. Dinelli, *Le appartenenze territoriali. Contributo allo studio della cittadinanza, della residenza e della cittadinanza europea* (2011), 204 ff.

⁴⁴ Lombardy Regional Law 9 December 2003, no. 25 foreseeing free local public transportation for fully disabled civilians only upon possession of Italian citizenship; Veneto Regional Law 18 November 2005, no. 18 and Friuli-Venezia Giulia Regional Law 23 May 2007, no. 11 foreseeing access to the regional civil services only for those having Italian citizenship.

certified residence, but also that the individual requiring a service has resided within the issuing territory for a certain period of time and on a continuous basis, thus making the required conditions more complicated to meet⁴⁵.

In addition to the regional laws, certain Municipalities have also issued decrees⁴⁶ to explicitly limit the criteria for legal

⁴⁵ Examples of this are: the Campania Regional Law 19 February 2004, no. 2, ruling the so-called '*reddito di cittadinanza*' (citizen's wage) for those having resided within the Region for at least the previous five years; the Basilicata Regional Law 24 December 2008, no. 33 which requires a minimum 12-month residence within the Region to benefit of the funds allocated to disabled individuals; the Lazio Regional Law 20 March 2009, no. 4 which requires a minimum 24-month residence within the Region in order to access the minimum income in favour of the unemployed, the non-employed, and temporary workers; Trento Provincial Law 27 July 2007, no. 13 relating to the social policies within the Province, which established the requirement of a 3-year period of residence in order to benefit of all services provided by law; Friuli-Venezia Giulia Regional Law 31 March 2006, no. 6 that – in terms of provision of social/welfare, education, and health services – established the requirement of an extended residence period, limiting access only to EU citizens residing in the Region for over three years, and excluding non-EU or even EU individuals having legally resided in the Region for less than three years; Lombardy Regional Law 8 February 2005, no. 7 requiring – for the assignment of public housing – a minimum 5-year period of residence or work within the Region, adding that «residence within the regional territory is a factor in establishing the point-based ranking». More recent examples include, e.g. Trentino-Alto Adige Regional Law 14 December 2011, no. 8 limiting access to regional child benefits to citizens and foreigners residing within the territory for at least 5 years; Trento Provincial Law 24 July 2012, no. 15 that – in terms of persons who are not physically independent – has distinguished bonuses for Italian or EU citizens residing in the Province for a minimum of 3 years and bonuses for foreigners owning a residence permit for a minimum of 3 years; Bolzano Provincial Law 28 October 2011, no. 12 that – in terms of access to bonuses for social services and right to education – set a minimum limit of a 5-year residence for non-EU citizens.

⁴⁶ Please refer to the Municipality of Brignano Gera d'Adda (Bergamo) that issued Decree no. 9/2007, requiring – in terms of being granted residency – the proof of a valid residence permit, or the proof of renewal request for the same to the Bergamo Police Station, should it have expired; Municipality of Ospitaletto (Brescia) decrees n. 25/2009 and n. 30/2009, which require that the foreigner shall present a residence permit and a self-certification that he/she has not been subject to punishment restricting civil liberty in Italy; and finally, decrees by the Municipality of Palosco (Bergamo) issued on March 2011, and by the Municipality of Calcinato (Brescia) issued on March 2011, requiring proof of a minimum annual income, possession of a long-term residence permit, a

residence, by – illegitimately – introducing more restrictive requirements compared to those in national legislation, thus causing the *a priori* impossibility to access social services⁴⁷. Moreover, there are examples of interoffice memos issued with the purpose of excluding – directly or more subtly and indirectly – foreigners from the benefit of social services, thus obstructing the permanence within the urban context of groups of people that are not welcome or are considered a ‘burden’ on local resources. Within the same context, it is possible to mention examples of Municipalities that have granted financial support to families with children under three years of age (the so-called *bonus bebè*), essentially limiting their issue only to Italian citizens⁴⁸; or more recently, the decrees by certain Municipalities of the Lombardy Region⁴⁹ that have imposed strict communication procedures for those providing their houses to host international asylum seekers, with the purpose of discouraging private entities and individuals from the adherence to hospitality plans arranged by local government authorities.

The result of the above is a clear issue of inequality in terms of rights, even fundamental rights⁵⁰, between Italian and foreign

valid passport including a valid visa to enter the national territory, and the certification of compliance of housing specified by the individual requesting residence.

⁴⁷ On the topic of registered residence as a factor of exclusion for foreigners, see M. Gorlani, *Accesso al welfare state e libertà di circolazione: quanto ‘pesa’ la residenza regionale?*, in 2-3 *Le Regioni* 345 (2006); E. Gargiulo, *Dalla popolazione residente al popolo dei residenti: le ordinanze e la costruzione dell’alterità*, in 1 *Rass. It. di Sociologia* 3 (2015).

⁴⁸ See Resolution by Brescia Municipality Council no. 1062/52053 issued on November 2008, establishing the issuance of the so-called *bonus bebè* (baby bonus) only to parents having Italian citizenship and residing in the municipality for at least 2 years since the birth of the child; Regulation by Municipality of Palazzago (Bergamo) issued on May 2001, requiring Italian citizenship or formal presentation of a request for Italian citizenship by at least one parent/guardian of the minor; Resolution issued by Municipality of Tradate (Varese) issued on September 2007, requiring Italian citizenship by both parents and the further requisite of a minimum 5-year residence in the municipality by at least one of the parents.

⁴⁹ On the topic see G. Sobrino, *Fonti del diritto e (in)attuazione del principio di eguaglianza*, in A. Giorgis, E. Grosso, M. Losana (eds.), *Diritti uguali per tutti? Gli stranieri e la garanzia dell’uguaglianza formale* (2017), 38 ff.

⁵⁰ While Article 2, paragraph 1, of the Italian Consolidated Act on immigration expressly outlines that «the foreigner present at the border or within the State

citizens. Moreover, the said measures discourage and hinder forms of «internal migration» within a State⁵¹ by citizens who – upon changing residence – find themselves disadvantaged compared to others, even foreigners, having resided in the area for a longer time. In short, we are witnessing the rise of «intra-country borders», with residence being «a source of privilege, thus inequality»⁵².

At the same time, one cannot claim that Regions and local governments must provide quantitatively and qualitatively equal services, in that – should this occur – local autonomy would be severely affected or nullified. In order to consider the legitimacy of regional and local social policies, it is necessary to ascertain the existence – as stated by the Italian Constitutional Court – of a «reasonable correlation» between the nature of the performance provided and the requirements established to benefit of such performance. This once again unearths the crux of the matter: the coexistence of unity/equality and independence/differentiation demands.

5. The Constitutional Court and the construction of a social citizenship

Since its very first rulings, the Italian Constitutional Court has supported a less formal and more substantive idea of citizenship, by promoting and extending the recognition of fundamental rights to all individuals, whether Italian citizens or otherwise. «The conceptual basis» of the path followed by the

territory shall be granted the fundamental human rights as prescribed by domestic law, international agreements in force, and the broadly recognized principles of international law».

⁵¹ P. Carrozza, *Noi e gli altri. Per una cittadinanza fondata sulla residenza e sull'adesione ai doveri costituzionali*, in E. Rossi, F. Biondi Dal Monte, M. Vrenna (eds.), *La governance dell'immigrazione. Diritti, politiche e competenze* (2013), who makes a distinction between 'internal' and 'external' migration within a State, and claims – oppositely to this paper –, how the former is irrelevant from a legal perspective. While 'internal' migration is undoubtedly irrelevant in terms of formal citizenship, today it appears, instead, to take on a high relevance in terms of substantive citizenship.

⁵² See G. Lombardi, *Spazio e frontiera tra eguaglianza e privilegio: problemi costituzionali fra storia e diritto*, in 1 Dir. Soc. 47 (1985).

Court is «already clearly laid out»⁵³ in judgment no. 120 issued in 1967, endorsing the need to consider the constitutional rulings – Articles 2, 3, and 10 in particular – in combination, and thus stating that, given that the principle of equality applies specifically to national citizens, it is implied that it «also applies to the foreigner, when concerning the respect of fundamental rights».

Without the need to follow the legal milestones achieved by the Court⁵⁴, it may be stated that it has always, even recently⁵⁵, advocated that the fundamental rights granted by Italian law and, above all, the Constitution, are owned by individuals «not as members of a given political community, but as human beings». It is thus unacceptable that the legal condition of non-citizenship is the basis for different and discriminatory treatment, forbidden by way of the principle of equality pertaining to fundamental human rights. Consequently, the matter of conceptually identifying which such fundamental rights are arises⁵⁶ – though it will not be possible to discuss it in this paper.

Moreover, even in case the performance of a social service cannot be unequivocally and directly correlated to a specific fundamental right, the choices made in identifying the categories of beneficiaries shall nonetheless, according to the Court⁵⁷, «be

⁵³ See A. Ruggeri, *Note introduttive ad uno studio sui diritti e i doveri costituzionali degli stranieri*, in 2 *Rivista AIC* 6 (2011).

⁵⁴ On the topic, see, among others, S. Gambino, G. D'Ignazio (eds.), *Immigrazione e diritti fondamentali* (2009); B. Pezzini, *Una questione che interroga l'uguaglianza: i diritti sociali del non-cittadino*, in Vv. Aa. (eds.), *Lo statuto costituzionale del non cittadino* (2010), 163 ff.; A. Ruggeri, *Note introduttive ad uno studio sui diritti e i doveri costituzionali degli stranieri*, cit. at. 53; F. Biondi Dal Monte, *I diritti sociali degli stranieri. Politiche di appartenenza e condizioni di esclusione nello Stato sociale*, in E. Cavasino, G. Scala, G. Verde (eds.), *I diritti sociali dal riconoscimento alla garanzia: il ruolo della giurisprudenza* (2013), 189 ff.

⁵⁵ See, among many others, Italian Constitutional Court judgments 14 February 1968, no. 11; 26 June 1969, no. 104; 15 January 1970, no. 224; 20 January 1977, no. 46; 24 February 1994, no. 62, in 8 *Riv. Dir. Intern.* 1054 (1994); 1 June 1995, no. 219, in 11 *Cass. Pen.* 2780 (1985); 15 July 2004, no. 222, in 7 *Giur. It.* 1363 (2004), 8 July 2010, no. 249, in 5 *Giur. Cost.* 3984 (2010); 20 April 2011, no. 145, in 2 *Giur. Cost.* 1849 (2011).

⁵⁶ On the topic, see, among others, A. Spadaro, *Il problema del "fondamento" dei diritti "fondamentali"* (1995), 235 ff.; G. D'amico, *La "fondamentalità" dei diritti tra giudici e legislatori*, in V. Baldini (ed.), *Cos'è un diritto fondamentale* (2017), 481 ff.

⁵⁷ On the statement, see the well-known judgment of the Constitutional Court 25 October 2005, no. 432, in 6 *Giur. Cost.* 4657 (2005) (with note by Rimoli, Gnes)

always made following the principle of rationality», even should they have «the intention to balance the maximum accessibility to the benefit with the degree of limitation of financial resources».

The legislator shall be allowed to «introduce distinguished access to the single applicants, only in the presence of a legal ‘reason’, which is not clearly irrational, or even worse, arbitrary». A reasonable distinction may thus be made in terms of fruition of rights and performance of social services – following the complex argumentation by the Constitutional Court⁵⁸ – in cases where there is a correlation among satisfied requirements for admission to a service and the social function of the latter. In the event that such correlation should reasonably not apply, distinctions based either on citizenship or on certain types of residence intended to exclude the same people who are most exposed to conditions of need and disadvantage are unacceptable.

The Constitutional Court has thus contributed, in the past few years, to ‘break ground’ towards the construction of a unitary substantial citizenship, targeted to individuals in the capacity as human beings, regardless of possession of legal Italian citizenship.

issued by the Court concerning Lombardy Regional Law 12 January 2002, no. 1 (action for development of regional and local public transportation), which does not include foreigners residing within the Region among those having the right to free local public transportation, granted to fully disabled civilians.

⁵⁸ On the statement, see, by way of example, Constitutional Court 9 February 2011, no. 40, in 11, I Foro it. 2930 (2011), which has proclaimed the constitutional unlawfulness of Article 9, paragraphs 51-53, of Friuli-Venezia Giulia Regional Law 30 December 2009, no. 24, limiting access to the integrated system of social services and actions only to «EU citizens who have resided in the Region for at least 36 months», thus excluding other individuals, including Italian citizens, having resided in the Region for a shorter time. More recently, see judgments 24 May 2018, no. 106, in 9 Foro it. 1423 (2019), 25 May 2018, no. 107, in 7-8 Foro it. 2252 (2018) (with note by Romboli) and 20 July 2018, no. 166, in 4 Giur. Cost. 1728 (2018) (with note by Bilancia) with which the Constitutional Court – in a strong effort to guarantee compliance with EU legislation (in particular, Directive 2003/109/EC (concerning the status of third-country nationals who are long-term residents) and the principles of rationality and proportionality – seems to reduce the possibility to create excessively discriminating regional welfare states). Please refer to M. Belletti, *La Corte costituzionale torna, in tre occasioni ravvicinate, sul requisito del radicamento territoriale per accedere ai servizi sociali. Un tentativo di delineare un quadro organico della giurisprudenza in argomento*, in 5-6 Le Regioni 1138 (2018); C. Corsi, *La trilogia della Corte costituzionale: ancora sui requisiti di lungo-residenza per l'accesso alle prestazioni sociali*, in 5-6 Le Regioni 1170 (2018).

It is a pondered and reasonable step, founded on the principle of equality and social solidarity, which may at times prevail even over limited financial resources; a path for which the principle of rationality appears to serve as a «criterion for assessment» of disparity in treatment introduced by the legislator⁵⁹.

Nevertheless, for a tangible creation of true unity of and within citizenship one cannot rely simply on the hope that it is fully safeguarded at the judicial system⁶⁰; in order to 'reconstruct' the system, it is rather necessary that the legislators – both at the national and regional level – confidently share, set out, and perform an all-encompassing and systematic social citizenship project, and regain a role as privileged «seats»⁶¹, able to more convincingly transpose «universal [dilemmas] to the specific context». In other words, a 'reconstruction' not so much with the purpose to deny the correlation between a moral dimension of human rights value that transcends the different political contexts and, oppositely, the historic, cultural, and social peculiarities of the different legal contexts, but rather to attempt a 'negotiation' of their inevitable «interdependence»⁶².

6. Searching for a 'reconstruction' of the system: universal dilemma in specific contexts

The principle of territorial autonomy that seems to generate a more accentuated 'territoriality' of rights may be in fact reassessed and no longer be considered a shock to the 'virtuous'

⁵⁹ See M. Cuniberti, *L'illegittimità costituzionale dell'esclusione dello straniero dalle prestazioni sociali previste dalla legislazione regionale*, in 2-3 *Le Regioni* 515 (2006).

⁶⁰ On the statement, see, among others, S. Staiano, *Per un nuovo paradigma giuridico dell'eguaglianza*, in M. Della Morte (ed.), *Diseguaglianze nello Stato costituzionale* (2016), 421, who rightfully highlights how «an 'empty' or 'neutral' legislation in terms of values – namely [...] one that is incapable of interpreting, in itself above all, the constitutional framework, then translating it in accordance with such ongoing interpretation – would give free hand to the judicial creation of inequality suppression policies (or inequality conservation policies, should they be deemed 'tolerable' or 'necessary')».

⁶¹ On the statement, see C. Galli, *Spazi politici. L'età moderna e l'età globale* (2001); S. Sicardi, *Essere di quel luogo. Brevi considerazioni sul significato di territorio e di appartenenza territoriale*, in 1 *Pol. Dir.* (2003).

⁶² See S. Benhabib, *The Rights of Others. Aliens, Residents and Citizens* (2004), Italian translation made by S. De Pretis, *I diritti degli altri. Stranieri, residenti, cittadini* (2006), 107.

cycle of State sovereignty, unitary citizenship, equality, and social solidarity. Territorial autonomy does not oppose the principle of legal unity but, as stated in Article 5 of the Italian Constitution, it finds stability and confirmation within it. Intra-state areas thus not only can, but have the right to define, safeguard, and promote social citizenship, by nurturing its contents – not disintegrating them – and thus stimulating a dynamic vision of citizenship itself.

As it is clear that for modern-day democracies to ‘endure’ they must find a balance between ‘opening’ and ‘closure’ to foreigners, it is worth highlighting significant examples of sub-state bodies that have managed to provide an integrated hospitality to immigrants⁶³, not designed to break, but to regenerate and strengthen the bond of solidarity uniting all those – Italian citizens and not – that believe in their territory, and to repopulate certain areas of the Country, thus creating growth and development opportunities for all.

Therefore – upon implementation of certain decentralized and networked hospitality practices and experiences, developed especially in southern Italy, in the so-called ‘hospitality belt’⁶⁴, starting from the late 1990s, upon arrival of Kurd refugees – there has been an attempt to overcome the logic of mere control and recognition existing at identification centres, through insertion and, more specifically, integration of immigrants in the social and urban contexts. Moreover, in 2001 the Italian Minister of Home Affairs has drafted with ANCI (the national organization of Italian Municipalities) and UNHCR (United Nations Office of the High Commissioner for Refugees) a letter of intent for the creation of a «national asylum programme». Law no. 189 issued on 30 July 2002 has subsequently institutionalized the announced measures of organized hospitality, including the setup of a so-called SPRAR

⁶³ On the topic, see, in particular, C. Panzera, A. Rauti, C. Salazar, A. Spadaro, *Metamorfosi della cittadinanza e diritti degli stranieri* (2015); D. Loprieno, *Regionalismo e immigrazione. Le risposte degli ordinamenti regionali italiani al fenomeno migratorio*, in 1 Consultaonline 280 (2018).

⁶⁴ The areas in the Calabria Region, in particular the townships of Acquaformosa (Cosenza), Badolato (Catanzaro), Caulonia (Reggio Calabria), Camini (Reggio Calabria), Stignano (Reggio Calabria), and the most famous Riace (Reggio Calabria), in cooperation with non-profit organizations and NGOs.

(*Protection System for Asylum Seekers and Refugees*), assigning its coordination and management to ANCI⁶⁵.

In particular, the initial reception phase, with the purpose of first aid, immediate assistance, and identification – which took place in government structures close to locations most affected by immigrant flow – was followed by a phase of ‘primary reception’, which included the request for protection and the initiation of its assessment procedure, along with medical screening of the foreigner. Finally, the so-called ‘secondary reception’ stage took place, during which the foreigners – who had formalized their request for protection and that they did not have suitable means of subsistence – had access, along with their family members, to the SPRAR reception measures set up by the local authorities on a voluntary basis.

The so-called ‘*Decreto Sicurezza*’ (Article 12 of Decree-Law no. 113 issued in 2018) has also affected the SPRAR system, with the purpose of restricting integration and social inclusion actions to subjects having already been recognized the right to international protection, unaccompanied minors, and owners of the specific residence permits identified in the Decree-Law itself that, as mentioned above, have replaced residence permits for humanitarian reasons. Moreover, such legislation has increased the number- and the time of residence – of people undergoing, or who will undergo, ‘illegitimate’ measures to limit their freedom in CPR holding facilities for repatriation purposes, hotspots, CAS centres of extraordinary reception, or CARA centres for asylum seekers: structures that – as highlighted in specialist research for some time⁶⁶ – turn out to be true detention, confinement, and

⁶⁵ On the statement, also see Decree-Law no. 142, issued on August 18th, 2015, «*Attuazione della direttiva 2013/33/UE recante norme relative all'accoglienza dei richiedenti protezione internazionale, nonché della direttiva 2013/32/UE, recante procedure comuni ai fini del riconoscimento e della revoca dello status di protezione internazionale*», as well as the Italian Ministerial Decree issued on August 10th, 2016 «*Modalità di accesso da parte degli enti locali ai finanziamenti del Fondo nazionale per le politiche ed i servizi dell'asilo per la predisposizione dei servizi di accoglienza per i richiedenti e i beneficiari di protezione internazionale e per i titolari del permesso umanitario, nonché approvazione delle linee guida per il funzionamento del Sistema di protezione per richiedenti asilo e rifugiati (SPRAR)*».

⁶⁶ Centres that, in different measures, are – as is well-known – allocated to the identification and detention of foreigners. On the topic, see, among others, E. Grosso, *Il modello originale: “reconduite à la frontière” e “rétention administrative”*

ghettoization facilities, which are unsuitable in terms of structure and management, detrimental to human dignity, and breaking the legal and jurisdictional requirements of Article 13 of the Italian Constitution.

A reorganization – in the negative sense – of such facilities has taken place, and those who no longer had the right to be hosted in them were forcibly expelled, in the pursuit of ‘dismantling’ a multilevel integration system (known as a SIPROIMI⁶⁷), which had already given positive results. Along with the loss of an added value reached until that moment, additional outcomes of the new legislation are: increase in expenditure of national and local public funds invested in related initiatives; growth in cost of personnel which was hired in SPRAR centres and is currently unemployed; facilities fallen into disuse; an increase in legal proceedings; and not least, the release of illegal immigrants across the national territory. Likewise, there has been a downsizing of funding criteria and the fund bidding methods for local institutions for the creation and progression of reception projects, within the limits of FNSPA (national fund for asylum policies and services) resources available⁶⁸.

nell’esperienza costituzionale francese, in R. Bin, A. Pugiotto, P. Veronesi (eds.), *Stranieri tra i diritti. Trattenimento, accompagnamento coattivo, riserva di giurisdizione* (2001), 107 ff.; I. Gjergji, *Il trattenimento dello straniero in attesa di espulsione: una “terra di nessuno” tra ordine giuridico e fatto politico*, in 3 *Costituzionalismo.it* (2006); A. Pugiotto, *“Purché se ne vadano”. La tutela giurisdizionale (assente o carente) nei meccanismi di allontanamento dello straniero*, in Vv. Aa. (eds.), *Lo statuto costituzionale del non cittadino*, cit. at. 53, 333 ff.; D. Loprieno, *“Trattare e punire”. La detenzione amministrativa dello straniero* (2018).

⁶⁷ Acronym used to define the new system for protection of international protection right holders and of unaccompanied foreign minors.

⁶⁸ Among the first to have commented on the new legislation, see S. Curreri, *Prime considerazioni sui profili d’incostituzionalità del decreto legge n. 113/2018 (c.d. “decreto sicurezza”)*, in 22 *federalismi.it* (2018); A. Algostino, *Il decreto “sicurezza e immigrazione” (decreto legge n. 113 del 2018): estinzione del diritto di asilo, repressione del dissenso e disuguaglianza*, in 2 *Costituzionalismo.it* 167 (2018); M. Benvenuti, *Audizione resa il 16 ottobre 2018 innanzi all’Ufficio di Presidenza della Commissione 1a (Affari costituzionali) del Senato della Repubblica nell’ambito dell’esame del disegno di legge recante “Conversione in legge del decreto-legge 4 ottobre 2018, n. 113, recante disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell’interno e l’organizzazione e il funzionamento dell’Agenzia nazionale per l’amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata”*, in 3 *Osservatorio AIC* 165 (2018); M. Ruotolo, *Brevi note sui possibili*

Despite this most recent reform, it is important to highlight how today, across the Italian territory – and in 1200 townships in particular – 877 social, economic, and cultural development projects have been activated⁶⁹, and stand out for the fact their protagonists are not just foreigners, but even territories, which find expression as meeting places between the alien and the host community. Therefore, a dense network of solidarity, sustainability, growth of social cohesion, and neighbourhood policies has been defined, not with the mere purpose of welfarism, but also to foster «empathy and the culture of dialogue»⁷⁰. This has been brought about through actions such as: teaching the Italian language as well as cultural/language mediation; psychological-social-health protection; orientation for immigrant minors in schools; training programs and orientation/support actions for work placement and housing. A hospitality network has thus been created to promote a structured involvement of public institutions and private-social institutions. Moreover, it has been attested how – considering the competence and responsibilities of the Municipalities and Regions in terms of welfare policies and services – the local ‘adaptation’ and ‘push’ is fundamental for the success of social inclusion.

It is by all means a solidarity model that allows a shift from the temptation to build walls and close ports to an integration process that may lead to a new cosmopolitanist culture and

vizi formali e sostanziali del d.l. n. 113 del 2018 (c.d. decreto “sicurezza e immigrazione”) Audizione presso la Commissione affari costituzionali del Senato in relazione all’esame in sede referente del disegno di legge n. 840 (d.l. 113/2018-sicurezza pubblica), 3 Osservatorio AIC 173 (2018); N. Vettori, Servizio pubblico di accoglienza e diritti fondamentali dei richiedenti asilo. Profili di illegittimità della riforma introdotta dal d.l. n. 113/2018, in 3 Diritti, Immigrazione e Cittadinanza 135 (2019).

⁶⁹ In 2009, SPRARs hosted 8,400 people, in 2018 the number reached 35,881, then fell again to 33,625 in 2019, following the so-called ‘Decreto Sicurezza’. Please refer to data available on the SPRAR website www.sprar.it.

⁷⁰ See T. Groppi, *Multiculturalismo 4.0*, in 1 Rivista AIC 9 (2018), moreover, I share the conclusions of the statement made by the Author: «the ‘mother of all causes’ of the current transformation [...] in humanity» lies in the so-called mind blindness, one «that turns the inability to assess the consequence of one’s actions on others, which in turn originates from the inability to recognize such others as human beings». The author also underlines the importance of «imagining policies that lead to ‘seeing others’ and every single person in their substance and uniqueness».

guarantee the right to respect who we are and all be definitively recognized as part of a «common social circle»⁷¹. The spaces for a new social and – ultimately – legal citizenship, more apt to being ‘humane’ and guaranteeing rights, would thus come about within local communities.

In conclusion, upon facing a political stand that claims to be pragmatic but, instead, appears to mainly respond to the ‘immune’ logic of exclusion, I strongly believe that foreigners may offer an occasion to reflect on the fact that, in reality, they are not dichotomous opponents to citizens, but share a common condition with the latter. The issue, in other words, is not so much the net distinction between hospitality, on one hand – intended as an absolute and impossible proposal, apparently beyond the scope of politics and relegated exclusively to the good heart and ethical commitment of individuals – and, on the other hand, rejection. The point in question is rather the fact that each one of us is, indeed, a «foreign resident»⁷² in a given place where we have been given – not by choice – the opportunity to citizenship and to live with others, with whom we have a reciprocal commitment to spatial closeness, cohabitation, and solidarity.

⁷¹ See A.E. Galeotti, *La politica del rispetto. Fondamenti etici della democrazia* (2010); G. Zagrebelsky, *Diritti per forza* (2017), 55.

⁷² D. Di Cesare, *Stranieri residenti. Una filosofia della migrazione* (2017).

THE RIGHT OF ASYLUM AFTER THE “SECURITY DECREE”: THE ABOLITION OF HUMANITARIAN PROTECTION

*Cecilia Corsi**

Abstract:

This essay intends to focus on the effects produced on the right of asylum by the reform approved with Decree-Law no. 113 of 4 October, converted, with amendments, into Law no. 132 of 1 December 2018: in particular, the essay concentrates on the consequences resulting from the abolition of humanitarian protection. After an initial reconstruction of the difficulties tied to the implementation of Article 10, paragraph 3 of the Italian Constitution, and an overview, also in the light of European Union legislation, of the residence permit for humanitarian protection provided for in the law of 1998, broad emphasis is laid on the evolution of case law in this area. Over the years, in fact, a fundamental role has undoubtedly been played by ordinary courts, which have lent concrete substance to this form of protection. Finally, the essay addresses all the critical issues raised by the abolition of humanitarian protection and the possible unconstitutionality of the reform, also taking into account that the “special temporary residence permits on humanitarian grounds” do not by any means fill the gap caused by the so-called Security Decree.

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1. A history of non-implementation

Article 10, paragraph three of the Italian Constitution provides broad protection for the right of asylum, guaranteeing any alien who is denied, in his or her own country, the effective exercise of the democratic liberties guaranteed by the Italian Constitution, the right of asylum in the territory of the Republic, in accordance with the conditions established by law. The constituent assembly, also in the light of Italian history, which had seen many exiles during the Fascist period, adopted a broad definition of a right that “figured as a symbol of the Rights of Man in the sphere of international relationships”¹.

However, the implementation of this protection came late and has never been fully satisfactory. Although Italy ratified the Geneva Convention in 1954², it was not until several years later that the geographical and time limitations were set aside. In any case, the transposition of the Convention relating to the Status of Refugees was far from representing an actual implementation of the constitutional provision. To begin with, the Geneva Convention established precise geographical and time limitations, as it referred to events occurring in Europe before 1 January 1951; these limitations were removed with the amendment protocol of 1967 ratified in 1970³ and Law no. 39 of 1990, respectively (see further below). Furthermore, the definition of refugee is far more restrictive in scope than Article 10 of the Constitution, since “the term ‘refugee’ shall apply to any person who: owing to a well-founded fear of being persecuted for reasons of race, religion,

¹ H. Arendt, *The Origins of Totalitarianism* (1962), 280. For a reconstruction of the debate in the Constituent Assembly, see M. Benvenuti, *Il diritto di asilo nell'ordinamento costituzionale* (2007). It should be noted that provisions dedicated to the right of asylum were also introduced into other contemporary constitutions, such as the French Constitution of 1946 and the German Constitution of 1949. In the same years, Article 14 of the Universal Declaration of Human Rights proclaimed that “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” Although the European Convention for the Protection of Human Rights and Fundamental Freedoms does not lay down any specific provisions on the right of asylum, Arts. 2 and 3, relating respectively to the ‘Right to life’ and ‘Prohibition of torture or to inhuman or degrading treatment or punishment’, have played a fundamental role also in respect of the right of asylum. See also F. Rescigno, *Il diritto di asilo* (2011).

² Law No. 722 of 24 July 1954.

³ Law No. 95 of 14 February 1970.

nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.

It should also be considered that for many years there was actually no legislative framework defining procedures for recognising refugee status, which was ascertained through a proceeding that took place before a commission set up on the basis of an agreement between the Italian government and the UNHCR. It was only with the so-called Martelli law of 1990⁴ that some first legislative provisions⁵ were laid down; these were amended in 2002 by what was dubbed the Bossi-Fini law⁶. And as emerges clearly also from the report illustrating the draft law submitted to the Parliament, through the reform of 2002 the legislator had mainly intended to establish rules for some procedural aspects pending comprehensive legislation regarding the right of asylum⁷. Indeed, neither the Martelli law nor the Bossi-Fini law outlined the situations that could give rise to the right to asylum in our country, in accordance with the constitutional provision, as they made reference to the notion of refugee as defined in the Geneva Convention.

The continued failure to implement Article 10, paragraph 3 of the Constitution was thus evident.

Within this legislative context, starting from the end of the 1990s, the ordinary courts accepted some requests for asylum submitted directly to the judicial authorities: given the lack of an

⁴ Decree-law No. 416 of 30 December 1989, converted, with amendments, into Law No. 39 of 28 February 1990. Among other things, the Martelli law generated a certain amount of confusion, because the title referred to “political asylum”, whereas the contents regarded exclusively refugees.

⁵ The scant legislation was supplemented by some regulatory provisions contained in Presidential Decree No. 136 of 15 May 1990.

⁶ Law No. 189 of 30 July 2002.

⁷ See the report outlining the draft law, Senate bill No. 795, 14th Legislature. Provisions supplementing the 2002 law were introduced in Presidential Decree No. 303 of 16 September 2004, which perpetuated the confusion between refuge and asylum, defining “asylum applicant” as a foreign national who was asking for refugee status.

implementing law specifying the conditions for exercising and enjoying the right of asylum, it was judged that requests for asylum could be submitted to the courts themselves. In these court rulings, it was stressed that the constitutional provision defined the specific circumstances giving aliens the right of asylum with sufficient clarity and precision, as it identifies the deprivation of democratic liberties as grounds justifying the right and recognises the right of aliens to enter and stay in the territory of the Italian Republic⁸.

It should be noted, however, that in the following years (starting from 2005), the case law of the Supreme Court of Cassation took some steps backwards from this more courageous stance; it came to affirm, based on reasoning that was not altogether clear, that in the absence of a law implementing Article 10(3) of the Constitution, an alien's right to be received in Italian territory could be recognised only if his or her situation fell within the scope of the refugee protection regime. Moreover, the right to asylum was to be understood as a right to obtain access to the procedure for applying for the recognition of refugee status⁹.

Therefore, while a situation of stasis persisted on the national level in those years, the most important new developments were taking place at the Community level. With the Maastricht Treaty, asylum policy had made its entry into European law, albeit merely as an “area of common interest” within the so-called third pillar. Moreover, though it had been necessary to resort to the conclusion of international agreements (Schengen Convention of 1985 and Dublin Convention of 1990) in order to establish provisions governing some particularly delicate aspects, under the Amsterdam Treaty the rules on asylum together with those on immigration and the other policies related to the free movement of persons became part of the first pillar. And as emerges from the first documents published by the European Commission and the conclusions of the European Council adopted in Tampere in 1999, the expectations with regard

⁸ See Court of Cassation, joined sections, no. 4674/1997; Cassation, joined sections, no. 907/1999; Cassation, section I, No. 8423/2004. It is worth mentioning the 1999 judgment of the Court of Rome in the Ocalan case (Ocalan was the head of the Kurdish party PKK).

⁹ Court of Cassation Judgments no. 25028/2005; no. 26278/2005; no. 18353/2006; no. 18549/2006; no. 18940/2006; no. 18941/2006.

to the role of the Union and its ability to respond to humanitarian needs with solidarity were very high¹⁰.

By virtue of the “communitarisation” of these policy areas, the first directives relating to asylum were approved. In particular, Directive 2004/83/EC “on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted” specified the characteristic forms of persecution that entitled a person to refugee status under the Geneva Convention, on the one hand, and on the other hand introduced the regime of subsidiary protection for those who would face a real risk of suffering serious harm if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence. And as the directive itself specifies, serious harm consists of: (a) death penalty or execution; or (b) torture¹¹ or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

As highlighted in recital 5 of Directive 2004/83/EC¹², this further form of protection was introduced to implement the resolutions adopted at Tampere and was designed to be complementary and additional to the refugee protection enshrined in the Geneva Convention¹³. And as also confirmed recently by the

¹⁰ C. Favilli, *L'Unione che protegge e l'Unione che respinge. Progressi, contraddizioni e paradossi del sistema europeo di asilo*, 2 *Questione giustizia* (2008), 29; the author highlights that in Council meetings taking place after Tampere and above all after the terrorist attacks of 11 September 2001 and 11 March 2004, the European agenda changed significantly, as a priority was placed on the fight against terrorism and international crime. See also B. Nascimbene, *Asilo e statuto di rifugiato*, in *Lo statuto costituzionale del non cittadino. Associazione italiana dei costituzionalisti. Atti del XXIV Convegno annuale*, (2010); C. Urbano de Sousa, P. de Brycker (eds.), *L'Émergence d'une politique européenne d'asile* (2004); M. Savino, *Le prospettive dell'asilo in Europa*, 5 *Giornale di diritto amministrativo*, (2018), 553 ff..

¹¹ Cf. for a definition of torture the art. 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

¹² “The Tampere conclusions also provide that rules regarding refugee status should be complemented by measures on subsidiary forms of protection, offering an appropriate status to any person in need of such protection”.

¹³ See Recital 24 of the Directive.

Court of Justice “it is clear from recitals 5, 6 and 24 to Directive 2004/83 that the minimum requirements for granting subsidiary protection must help to complement and add to the protection of refugees enshrined in the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951, through the identification of persons genuinely in need of international protection and through such persons being offered an appropriate status”¹⁴.

Directive 2004/83/EC was transposed by the legislator with Legislative Decree 251/2007 and ‘subsidiary protection status’ was thus introduced into the Italian legal system alongside ‘refugee status’. Subsequently, in 2008, with Legislative Decree no. 25¹⁵, it was established that in cases in which the application for ‘international protection’ was rejected, but there were serious concerns of a humanitarian nature, the competent commission would pass on the relevant documentation to the police commissioner, who could grant a residence permit on humanitarian grounds.

This ‘humanitarian’ residence permit was regulated by Article 5, paragraph 6 of the Consolidation Act on Immigration no. 286/1998¹⁶, which lays down general provisions concerning the legal status of aliens, without, however, addressing the subject of asylum. Article 5, paragraph 6 of the Consolidation Act gave the police commissioner the option of issuing a residence permit if there were serious grounds, in particular humanitarian concerns or reasons deriving from constitutional or international obligations of the Italian State.

A connection between this provision of the Consolidation Act and the subject of asylum was made by Legislative Decree no. 25/2008¹⁷. So it was that the Italian legislative framework governing asylum came to include a humanitarian protection

¹⁴ Court of Justice, Fourth Chamber, 30 January 2014, case C-285/12 *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides*.

¹⁵ Legislative Decree No. 25/2008 which transposed Directive 2005/85/EC “on minimum standards on procedures in Member States for granting and withdrawing refugee status”.

¹⁶ The prohibition of denial or revocation of a residence permit, if there were serious grounds, humanitarian concerns or reasons deriving from constitutional or international obligations of the Italian State, had been introduced by Law no. 388/1993 which authorised the ratification of the Schengen agreement.

¹⁷ See previously Law 30 July 2002, no. 189.

regime alongside the ‘international protection’ regime (embracing refugee protection and subsidiary protection). Therefore, although Article 10, paragraph 3 of the Constitution had never been implemented through a specific law, the courts, as reflected in case law (and despite criticism from some legal theorists¹⁸), maintained that Article 10 had been fully implemented and was governed through the pluralistic system of protection (refugee protection, subsidiary protection and humanitarian protection)¹⁹ and that there was no longer any margin of residual direct application of Article 10, paragraph three. Accordingly, the three protection measures were judged to represent a full implementation of the constitutional right of asylum²⁰, hence the impossibility of asylum requests other than in the cases provided for in State legislation²¹.

This view was shared and backed up by some legal commentators²², but criticised by others, who doubted that the different levels of the asylum regime – international, European and national – had been successfully harmonised and completed one another, thus contributing to the codification of the asylum system and a full implementation of Article 10, paragraph 3 of the

¹⁸ M. Benvenuti, *La forma dell’acqua. Il diritto di asilo costituzionale tra attuazione, applicazione e attualità*, 2 *Questione Giustizia* (2018).

¹⁹ A fourth form of protection (temporary protection) must be added: it is provided by Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof which was transposed by Legislative Decree no. 85/2003. It is an exceptional form of protection which has never been gone into effect.

²⁰ C. Favilli, *La politica dell’Unione in materia d’immigrazione tra carenze strutturali e antagonismo tra gli Stati membri*, *Quaderni costituzionali*, 2 (2018). The constitutional right of asylum came to represent a general category embracing all forms of protection, each of which represents only a part of the broader protection guaranteed by Article 10, paragraph 3.

²¹ See Court of Cassation 26 June 2012, no. 10686.

²² P. Bonetti, *Il diritto d’asilo in Italia dopo l’attuazione della direttiva comunitaria sulle qualifiche e sugli status di rifugiato e di protezione sussidiaria*, 1 *Diritto, Immigrazione e Cittadinanza* (2008) 13 ff.: “60 years after the entry into force of the Constitution, thanks to the implementation of those two Community directives, Italian legislation has undergone such substantial changes as to suggest that a form of complete implementation of the right of asylum guaranteed by Article 10, para. 3 Const. has finally been reached.”

Constitution²³. It was stressed that legislation formulated in supranational contexts and pursuing different aims did not reflect the principles which had inspired the constitutional provision, nor the scope thereof.

Though some legal scholars thus complained of the Parliament’s failure to approve a specific implementing law, the idea that the legislative framework deriving from the transposition of European directives and the provision made for humanitarian protection would enable an effective implementation of the constitutional provision increasingly took hold.

2. Humanitarian protection

The humanitarian protection regime thus played a fundamental role in corroborating the view that Article 10 of the Constitution was duly implemented. Given its broad scope, it was interpreted as a last resort instrument enabling protection in situations where there were serious grounds for concern from a humanitarian perspective, though they were not covered by the refugee or subsidiary protection regimes.

The Court of Cassation emphasized that humanitarian protection constituted “one of the forms of implementation of constitutional asylum, precisely by virtue of its open nature and the fact that the conditions for its recognition are not wholly precisely definable, consistently with the broad scope of the right of asylum contained in the constitutional provision, which expressly refers to denial of the exercise of democratic liberties” (Court of Cassation Judgment no. 4455/2018). It further underscored that humanitarian protection, though not precisely defined by European legislation and left up to the discretion of the States, is nonetheless referred to in Directive 115/2008/EC “on common standards and procedures in Member States for returning illegally staying third-country nationals”, which provides that “Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a

²³ M. Benvenuti, *Andata e ritorno per il diritto di asilo costituzionale*, 2 Diritto, Immigrazione e Cittadinanza (2010), 39.

right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory”²⁴.

As mentioned earlier, the residence permit for humanitarian protection was regulated by the Consolidation Act of 1998 according to a formulation, necessarily broad in scope, designed to safeguard the legal status of aliens. It was accompanied by other types of permits, which have been preserved and are likewise aimed at protecting persons in a condition of particular vulnerability but regarded specific situations. These permits may be issued to victims of violence or severe exploitation, victims of domestic violence or labour exploitation²⁵. Unlike the latter cases, the specific conditions of which have been precisely defined by the legislator, Article 5, paragraph 6 of the Consolidation Act had the nature of an open standard that outlined only a framework within which concrete cases should be interpreted: cases that could not be objectively predetermined, given the impossibility of foreseeing all the circumstances in which serious humanitarian concerns might arise²⁶. This character should not be confused with vagueness, as it was aimed rather at allowing the possibility for the interpreter to grant protection in situations where it was warranted²⁷. Article 5, paragraph 6 was thus conceived as a safeguard clause against the rigid system delineated by the Consolidation Act in respect of residence permits and the expulsion of aliens. This type of permit was explicitly linked to the subject of asylum with the approval of Legislative Decree no. 25/2008 which, as already noted, established that in cases in which the application for “international

²⁴ Article 6, paragraph 4 Directive 115/2008/EC. Cf. also recital no. 15 of the “Qualification Directive”. In recognising the possibility for States Members to provide further forms of protection, the Court of Justice of European Union clarified, however that they must always be compatible with EU directives and in particular they must be based on different protection needs, so that they would not be confused with those envisaged by EU legislation. See CJEU, 9 November 2010, C-57/09 *B. e D.* § 118-121; 18 December 2014, C-542/13 *M’Body*, § 43-47.

²⁵ See Articles 18, 18bis and 22 of the Consolidation Act.

²⁶ N. Zorzella, *La protezione umanitaria nel sistema giuridico italiano*, 1 Diritto, Immigrazione e Cittadinanza (2018), 8.

²⁷ M. Balboni, *Abolizione della protezione umanitaria e tipizzazione dei casi di protezione: limiti e conseguenze*, in F. Curi (ed.), *Il Decreto Salvini. Immigrazione e sicurezza* (2019).

protection” was rejected, but there were serious concerns of a humanitarian nature, the competent commission would pass on the relevant documentation to the police commissioner, who could grant a residence permit on humanitarian grounds.

As a result, this residence permit came to have a sort of double face, as it could be followed up with an application for international protection (in which case a “causal derivation from what was experienced or suffered in the country of origin”²⁸ had to be determined), or issued directly by the police commissioner independently of a situation that could in some way be considered related to asylum.

In order to get an idea of the specific situations that have fallen under the humanitarian protection regime, it may be useful to go over the case law of recent years, which provides some examples of the types of cases deemed worthy of protection. The courts have, for example, recognised that situations of instability in the country of origin carrying risks of the violation of fundamental rights, even where they do not allow access to international protection²⁹, give asylum seekers the right to obtain a residence permit on humanitarian grounds³⁰. They have judged that discrimination perpetrated in the country of origin against the whole Roma ethnic population entitled a Roma asylum seeker to humanitarian protection³¹. They have also deemed that the conditions for humanitarian protection are met in the event of severe poverty and social exclusion, also where the applicant

²⁸ M. Acierno, *La protezione umanitaria nel sistema dei diritti umani*, 2 *Questione Giustizia* (2018), 105. Cf. Cass, 21 December 2016, no. 26641; 3 October 2017, no. 28015; 19 February 2018, no. 3933, 12 December 2018, no. 32213: it must be shown that the condition of vulnerability of the alien is the effect of a severe violation of his or her human rights in the country of origin.

²⁹ Subsidiary protection presupposes serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

³⁰ See Court of Appeal of Cagliari, 7 June 2017 no. 476; Court of Florence, 3 March 2017 e 10 April 2017; Court of Milan 17 July 2017, available at: <https://bit.ly/2T6JdLS>. See also Court of Appeal of Milan, 28 February 2017 no. 873, available at: <https://bit.ly/2DeJd78>.

³¹ Court of Trieste 4 July 2017, (<https://bit.ly/2T6JdLS>); this ruling is also interesting because it evokes Art. 8 ECHR by emphasising the applicant's family ties in Italy, where her partner and daughter lived.

received no family support in the country of origin³². In this regard, it should be pointed out that there has been a great deal of debate, also among legal scholars, on the issue as to whether situations of extreme poverty in the country of origin would give aliens the right to humanitarian protection on the grounds that a severe curtailment of rights in the economic and social spheres should be considered a violation of fundamental individual rights³³. The Court of Cassation recently affirmed (case no. 4455/2018) that a situation of vulnerability could arise not only from conditions of political and social instability that exposed persons to situations in which their personal safety was threatened, but also from a severe political-economic situation resulting in drastic impoverishment tied to the lack of basic necessities or a geopolitical situation that offers no guarantees of survival within the country of origin (drought, famine, ...) ³⁴.

Moreover, situations of vulnerability due to severe health problems undoubtedly entitled persons to humanitarian protection³⁵. Finally, it is interesting to consider the decisions in

³² Court of Bologna, 12 April 2018, (<https://bit.ly/2JyHpIS>). The Court made a comparison between the living experience in Italy and that in the country of origin and assessed the risk of further severe social exclusion in the event of repatriation. Cf. Court of Perugia, 12 March 2019 (<https://bit.ly/2qebln6>) which took into account that the applicant, native of Gambia and left motherless, had arrived in Italy still a minor, making the journey alone and that a possible repatriation would have forced him to live in conditions of probable extreme poverty without any family support.

³³ E. Castronuovo, *Il permesso di soggiorno per motivi umanitari dopo la sentenza della Corte di Cassazione n. 4455/2018*, 3 Diritto, Immigrazione e Cittadinanza (2018), 8: some courts have ordered the issuance of a residence permit on humanitarian grounds to nationals of countries currently affected by a major natural disaster or famine or severe food emergency certified by international bodies which explained their flight from their country or would have in any case placed their life and food safety in jeopardy should they be returned, thus constituting a violation of the right to life or inhuman treatment prohibited by Arts. 2 and 3 ECHR.

³⁴ Of a different opinion Court of Cassation no. 23757 of 24 September 2019 which, without further arguments, states that situations of difficulty, even extreme, of an economic and social nature, are not sufficient in themselves, in the absence of specific vulnerable conditions, to justify the issuance of the residence permit for humanitarian reasons.

³⁵ A fundamental point of reference with regard to the right to health of foreigners, even if their presence in Italian territory is unauthorised, is judgment no. 252 of the Constitutional Court, 17 July 2001.

which the court, in addition to evaluating the context in the country of origin and the person’s vulnerability, also took into account the applicant’s integration into the workforce and social integration in Italy: in these judgments it was underscored, for example, that the refusal to issue a permit on humanitarian grounds would have resulted in an abrupt interruption of a process of social integration and a working activity that was already ongoing³⁶, with severe repercussions on the person’s life, or else emphasis was laid on the risk of breaking emotional or social ties that had come to be created³⁷. In this regard, in its well-known judgment no. 4455/2018, the Court of Cassation clarified that though the social integration of the asylum seeker was an element warranting evaluation, it could not become an exclusive factor, as it was in any case necessary to take into account the

Cf. by way of example the Court of Bologna, 17 August 2017, (available at: <https://bit.ly/2T1uVfG>) which recognised the right to humanitarian protection pursuant to Art. 5, para. 6 because of the applicant’s health conditions, extremely precarious and duly certified, which could have been prejudiced in the event of an immediate return to the country of origin, due to the serious deficiencies of the health care system in the Ivory Coast. See also Court of Venice 29 April 2018, (<https://bit.ly/2RuWSQc>) which recognised the right of an applicant from Burkina Faso to humanitarian protection on the grounds of his serious health conditions (affected by TBC), which required health treatments to manage the tuberculosis affecting the lungs and bones, along with a radiological clinical follow-up for 24 months after the end of therapy in order to rule out relapses and prevent recurrence of the disease. Cf. Court of Bologna, 28 March 2019 (<https://bit.ly/2qebln6>).

³⁶ *Ex multis* cf. Court of Trieste, 22 December 2017 (<https://bit.ly/2Jy1UWf>). As highlighted by N. Zorzella *Rassegna asilo e protezione internazionale*, 1 Diritto, Immigrazione e Cittadinanza (2018); this decision is particularly interesting because, by referring expressly to Article 2 of the Constitution, it affirmed that a person’s right to work warranted protection because of the relationship existing between working activity and the state of health, considered not only in terms of the influence of work on the ability to procure the material resources needed to safeguard the state of health, but also from a psychological standpoint, as working activity was inextricably linked to personality development in the social context. In acknowledging the constitutional significance of the concept of integration (which has similarly been acknowledged in various other decisions), the Court also indicated the constitutional framework in which the right to work undoubtedly fits, work being an essential condition for personal dignity.

³⁷ C. Favilli, *La protezione umanitaria per motivi di integrazione sociale. Prime riflessioni a margine della sentenza della Corte di Cassazione n. 4455/2018*, 2 *Questione giustizia* (2018).

social, political or environment context in the country of origin in order to determine whether a significant, actual compromise of fundamental rights was involved. And this orientation was recently confirmed by the joint sections of the Cassation (13 November 2019, no. 29460).

Although the residence permit on humanitarian grounds was, in a large majority of cases, issued by the police commissioner on receipt of documents sent by the commissions responsible for assessing the requests for international protection (see above), it could also be issued, as mentioned earlier, on the basis of a request submitted directly to the police commissioner, where there were “serious grounds” irrespective of whether a request for asylum had been made previously and irrespective of the conditions connected to the asylum. In this regard, it may be interesting to look at a recent judgment of the Court of Appeal of Florence³⁸: despite affirming that social integration alone was not a sufficient reason for recognising a subjective right to a residence permit on humanitarian grounds – as it needed to be assessed in relation to the violation of fundamental personal rights, which the State was required to respect under its constitutional or international obligations – it qualified both the right to work and the right to education, as well as the right to maintain family unity, as fundamental rights of the applicants, and also emphasised their lengthy presence in Italian territory. The Court pointed out that in the specific case concerned, it was not a matter of “a mere environmental integration, but rather of a true, effective integration into the country, so that for all practical purposes there were grounds for arguing that the uprooting from the latter by denying the requested residence permit for humanitarian protection purposes represented a condition of objective vulnerability for the appellants, and thus compromised their fundamental rights, rather than a simple suffering due to the

³⁸ Court of Appeal of Florence, 17 September 2018, no. 2088 (<https://bit.ly/2JCMxf8>); the case regarded two Albanese citizens (mother and son), who had lived in Italy for more than 10 years, always legally, by virtue of a residence permit issued on serious grounds connected to the psychophysical development of a minor (Art. 31 of the Consolidation Act).

change in living conditions resulting from their return to the country of origin³⁹.

3. The abolition of humanitarian protection

Though this may have been the situation up to a year ago, Decree-Law no. 113 of 4 October 2018, converted with amendments into Law no. 132 of 1 December 2018, abolished the regime whereby resident permits could be granted on humanitarian grounds, since, as stated in the report accompanying the draft law converting the decree, the government deemed it necessary and urgent to intervene in order to combat the anomalous disproportion between the number of cases in which forms of international forms of protection were granted and the number residence permits issued on humanitarian grounds⁴⁰. This disproportion was allegedly due to the legislative definition of humanitarian protection, characterised by uncertainty, which left ample margins for an extensive interpretation that was in contrast with the aim of providing

³⁹ As was pointed out by N. Zorzella, *Rassegna asilo e protezione internazionale*, 3 Diritto, Immigrazione e Cittadinanza (2018), the ruling took on a particular significance, because the Court made an assessment of the consequences of repatriation in reference to the infringement of the fundamental rights acquired in Italy, namely, work, education and family unity.

⁴⁰ This unusual generosity of the Italian system, which supposedly reached a height with the granting of residence permits as a form of humanitarian protection, is in reality contradicted by the data published in the dossier on the “Decree-law on Immigration and Public Security” drawn up by the Senate Research Service, because though it may be true that our country has a high percentage of cases in which permits are granted on the grounds of humanitarian protection compared to more complete forms of protection, the data also reveal that the percentage of recognition of refugee status and the right to subsidiary protection, which offer much more solid guarantees and safeguards to the applicant, is on average much lower than in other European countries.

It should also be noted that a certain pressure on the applications for residence permits on humanitarian grounds may also derive from the fact that in recent years the decrees on immigration flows have precluded entry to non-EU workers (except for seasonal work), thus cutting off every legal channel for gaining entry to Italy and making requests for humanitarian protection the only possible means of obtaining a residence permit.

temporary protection⁴¹. And though many provisions of the Decree-Law reflect a policy aimed at strongly restricting the number of persons taken in and granted asylum in Italian territory, the abolition of the residence permit on humanitarian grounds represents its heart⁴².

In the report accompanying the draft version of the law converting the decree, it is also stated that in view of the abolition of the previous regime, the new provisions have introduced specific cases in which residence permits may be granted on humanitarian grounds, thus more strictly defining this form of protection, which until now had only been generically outlined by the legislator.

In actual fact, the Decree-Law confirms, on the one hand, the permits for victims of violence or severe exploitation, victims of domestic violence and labour exploitation (so-called “special cases”), and confirms the permit (now referred to as granted on “special protection” grounds) in cases in which *refoulement* is prohibited;⁴³ on the other hand it introduces new permits for persons fleeing disasters, those with serious health issues and those who have engaged in “acts of civic valour”.

In order to put the novelties introduced properly into focus and understand the reasoning behind them, we need to remember that the humanitarian protection regime referred to “serious grounds”, which could be connected to the situation of asylum seekers but could also regard conditions of vulnerability of individuals more in general. The affirmation made in the aforementioned report (accompanying the draft version of the law converting decree no. 113) that the residence permit on humanitarian grounds has been replaced by specific types of permits is mystifying in more than one respect. First of all, most of the “special temporary residence permits” already existed in our legal system, and the newly introduced permit on health grounds

⁴¹ Moreover, the portrayal of the residence permit on humanitarian grounds as serving merely purposes of temporary protection is undoubtedly open to criticism.

⁴² Cf. the circular issued by the Ministry of the Interior on 4 July 2018 (adopted shortly after the government took office), from which the intention of greatly reducing humanitarian protection emerged clearly.

⁴³ Cf. Articles 18, 18-*bis*, 22, par. 12-*quater* and 19 par.1 and 1.1 of the Consolidation Act.

does not add much, as the obligation to receive and prohibition against expelling foreign nationals in serious health conditions has long been established⁴⁴. The two only “new” permits, therefore, are the ones granted to persons fleeing disasters⁴⁵ and to reward outstanding acts of civic valour⁴⁶.

Secondly, although all these permits are designed to protect persons in situations of vulnerability, most of them do not necessarily or directly have anything to do with the constitutional right of asylum (though there may obviously be overlaps), because the specific cases envisaged are largely disconnected from the reasons for fleeing the countries of origin and the violations of fundamental human rights in those countries⁴⁷.

This means that the legislative intervention, in relation above all to the right of asylum, has had the effect of abolishing a provision that precisely by virtue of its general and residual character had been deemed capable of ensuring (together with international protection) the implementation of Article 10, paragraph 3 of the Constitution⁴⁸. This observation holds despite the reference now made by the amended Article 32, paragraph 3 of Legislative Decree no. 25/2008 to Article 19, paragraphs 1 and 1.1 of the Consolidation Act, which establishes that in cases in

⁴⁴ C. Corsi, *Il diritto alla salute alla prova delle migrazioni*, 1 Le Istituzioni del Federalismo (2019).

⁴⁵ When the country the foreigner is supposed to return to is affected by contingent and exceptional circumstances due to a disaster which precludes his or her return or stay there in conditions of safety, the police commissioner will issue a residence permit on the grounds of natural disaster.

However, a possible form of protection in the event of disasters was also provided for under the Consolidation Act. Article 20 establishes that, by decree of the President of the Council of Ministers, extraordinary reception measures may be adopted following exceptional events (conflicts, natural disasters or other events of particular severity). Involved in the latter case is a general measure taken by the government, whereas the decision of whether to issue the new permit is left up to the police commissioner.

⁴⁶ This permit is based on a different logic, as a form of reward: if a foreign national has performed exceptional acts of civic valour, the Ministry of the Interior, on a proposal from the competent provincial authority, will authorise the issue of a special residence permit.

⁴⁷ Cf. Court of Florence 24 October 2018 (<https://bit.ly/2ASA8zp>).

⁴⁸ A different point of view has been expressed by M. Benvenuti, *Il dito e la luna. La protezione delle esigenze di carattere umanitario degli stranieri prima e dopo il decreto Salvini*, 1 Diritto, Immigrazione e Cittadinanza (2019).

which the competent commission does not accept the application for international protection, but the conditions laid down in Article 19, paragraphs 1 and 1.1 are met⁴⁹, it will send the relevant documents to the police commissioner, who will issue a yearly residence permit with the heading “special protection” (unless it is possible to arrange for the individual to be removed to another country where analogous protection will be accorded). Article 19 merely reaffirms the *non-refoulement* principle⁵⁰ with reference to situations that would give rise to a right to refugee status or subsidiary protection, but cannot be granted due to the presence, for example, of legitimate grounds for exclusion⁵¹, in any event, such a provision already existed in the Consolidation Act.

It seems clear that the aim of this legislative measure was to knock down one of the pillars on which the implementation of the constitutional provision was founded: it was not a matter of replacing one set of rules with another, but of abolishing a fundamental part of an overall regime⁵². So much so that we

⁴⁹ Article 19, Consolidation Act: 1. In no case whatsoever may an alien be expelled or rejected towards a State in which he might be subjected to persecution due to race, gender, language, citizenship, religion, political opinions, or personal or social conditions, or may risk being sent to another State in which he is not protected against persecution. 1.1. Rejection, expulsion or extradition of a person to a State is not allowed when there are reasonable grounds to believe that that person is at risk of being subjected to torture. The assessment of reasonable grounds shall also take into account the existence, in that State, of serious and systematic human rights violations.

Paragraph 1.1. was introduced with Law no. 110/2017, “*Introduction of the crime of torture in the Italian legal system*”, which was intended to define an extreme situation.

⁵⁰ Cf. Art. 33 of the Geneva Convention and Art. 3 of the European Convention on Human Rights.

⁵¹ See Articles 10 and 16, Legislative Decree no. 251 of 19 November 2007. Cf. P. Papa, *L’esclusione per non meritevolezza, i motivi di sicurezza e di pericolo, il principio di non refoulement e il permesso di soggiorno per motivi umanitari*, in *Diritto, Immigrazione e Cittadinanza*, 2 (2018).

⁵² See also A. Algostino, *Il decreto sicurezza e immigrazione (decreto legge n. 113 del 2018): estinzione del diritto di asilo, repressione del dissenso e diseguaglianza*, 2 *Costituzionalismo.it* (2018), 176 ff. A different position has been expressed by S. Curreri, *Prime considerazioni sui profili d’incostituzionalità del decreto legge n. 113/2018 (c.d. “decreto sicurezza”)*, 22 *Federalismi* (2018), 7; by S. Pizzorno, *Considerazioni, anche di costituzionalità, su alcune delle principali novità introdotte dal decreto legge n. 113/2018 (c.d. decreto sicurezza) in tema di diritto d’asilo*, 4 *Forum*

might even venture to suggest that a constitutionally mandatory law has been abrogated. As the Constitutional Court has affirmed, such a law, once it has come into existence, may be amended by the legislator but not abrogated “with the aim of eliminating a protection previously granted, as this would be a direct violation of the very constitutional precept it was designed to implement”⁵³.

Moreover, Article 5, paragraph 6 provided for residence permits to be granted on humanitarian grounds in fulfilment, among other things, of constitutional or international obligations, and as underscored in the letter sent by the President of the Republic to the Prime Minister at the time the Decree-Law was enacted, “the constitutional and international obligations of the State continue to apply, even if not expressly mentioned in the legislative text, including, in particular, what is directly provided for in Article 10 of the Constitution and the obligations ensuing from the international commitments undertaken by Italy”. In the previously cited report accompanying the draft version of the law converting Decree no. 113 it is stated that “compliance with constitutional and international obligations shall continue”, which in certain respects appears contradictory, because on the one hand the provision that expressly made reference to such obligations has been eliminated and on the other hand an attempt is made to “reassure” by affirming that these obligations remain. In any case it is clear that an ordinary law cannot do away with such obligations or the duty to respect inviolable human rights. It should be concluded, therefore, that either the new provisions revoking humanitarian protection are unconstitutional or forms of protection (that go well beyond the special cases provided for) still remain in any case in compliance with constitutional obligations (including that of providing asylum) and international obligations⁵⁴.

di Quaderni costituzionali (2018) and by A. Masaracchia, *La protezione speciale sostituisce il permesso per motivi umanitari*, 45 Guida al diritto (2018), 21 ff.

⁵³ Constitutional Court, judgment no. 49/2000.

⁵⁴ Cf. Constitutional Court, judgment no. 194/2019, § 7.8 which affirms that the legislative provisions must be applied in compliance with constitutional obligations and international obligations.

4. If constitutional and international obligations remain...

As is well known, the European Convention on Human Rights does not contain a provision that explicitly deals with the right of asylum. However, interpretation given by the Strasbourg Court to several articles of the Convention has resulted in foreigners being granted protection in asylum-related situations. More specifically, it has recognised a right to *protection par ricochet* in the case of foreign nationals who have had a removal order issued against them or been denied a residence permit, if the measure taken prejudices the enjoyment of their rights under the Convention, in particular the rights enshrined in Articles 2, 3 and 8⁵⁵. Moreover, as previously mentioned, the reference to international obligations contained in Article 5, paragraph 6 of the Consolidation Act allowed the option of a residence permit being issued for humanitarian reasons also in cases where no explicit protection was provided for in Italian legislation, but where protection was warranted based on the European Convention and ECtHR case law⁵⁶.

Following the changes introduced by Decree-Law no. 113, it is worth asking whether the rights protected under Articles 2 and 3 of the European Convention are actually guaranteed by the regime of subsidiary protection as defined by Directive 2011/95/EU⁵⁷ and Article 14 of Legislative Decree no. 251/2007 or in any case Article 19 of the Consolidation Act.

There are cases (where serious offences have been committed by the asylum seeker) for which EU and Italian legislation rule out international protection⁵⁸; Article 19 of the Consolidation Act⁵⁹ also does not seem to be applicable in such

⁵⁵ A. Del Guercio, *La protezione dei richiedenti asilo nel diritto internazionale e europeo* (2016), 141. See the systematisation of the Court's case law by the author.

⁵⁶ E. Hamdan, *The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or degrading Treatment or Punishment* (2016).

⁵⁷ Directive 2011/95/EU replaced the previous "Qualification Directive" 2004/83/EC.

⁵⁸ See also the cases of revocation or termination of refugee status and subsidiary protection.

⁵⁹ See G. Conti, *Il criterio dell'integrazione sociale quale parametro rilevante per il riconoscimento della protezione umanitaria. (Nota a sentenza n. 4455 del 2018 della Corte di Cassazione)*, 4 *Federalismi* (2018); Article 19, para. 1 of the Consolidation

cases, as it makes reference to risks of persecution or torture, but not to the risk of inhuman and degrading treatment. As is well known, the Strasbourg Court has reaffirmed the absolute and essential character of the guarantees offered by Article 3 ECHR in a number of its judgments. Accordingly, whenever there is a risk of inhuman and degrading treatment, “the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration”⁶⁰. In such cases we might be talking about an international obligation that is not taken into account in any specific national legislative provisions⁶¹; nor can it any longer be considered to fall within the scope of a general provision such as Article 5, paragraph 6 of the Consolidation Act, as it has been abolished.

A further question might arise in the case of persons who have suffered persecution or risk suffering serious harm in the event that they are returned to the country of habitual residence, where the latter is not the country of citizenship (stateless persons obviously being an exception)⁶², as such persons will be ineligible for the status of international protection. Though in the case of the risk of persecution or torture, Article 19 of the Consolidation Act may come to their aid, in the second case there is no longer the anchor that humanitarian protection could offer.

In this regard, it should be pointed out that EU legislation is also rather lacking in transparency. This is true in particular for the “Qualification Directive”, which in cases where a person is excluded from international protection but cannot be removed in

Act does not thoroughly cover all the international obligations which Article 5, para. 6 refers to.

⁶⁰ *Chacal v. United Kingdom*, no. 22414/93, §80, ECtHR 1996. See also *Saadi v. Italy*, no. 37201/06, §127, ECtHR 2008: “as the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct..., the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3.” Cf. E. Guild, *Article 19*, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds), *The EU Charter of Fundamental Rights* (2014); M.T. Gil Bazo, *Refugee Protection under International Human Rights Law: From Non-refoulement to Residence and Citizenship*, 34 *Refugee Survey Quarterly* (2015), 16-24.

⁶¹ Article 20, Legislative Decree 251/2007, as amended in 2014, could help, as it refers to international obligations with regard to protection from expulsion.

⁶² P. Morozzo della Rocca, *Protezione umanitaria una e trina*, 2 *Questione giustizia* (2018), 113.

the light of international obligations (first and foremost respect for the principle of *non-refoulement*) leaves it up to the Member States to decide whether to issue a permit on purely compassionate or humanitarian grounds. As has been underscored, the Directive “is seriously misleading about the scope of the Member States’ international legal obligations, as it seems to suggest that all those outside the scope of application of the Directive are allowed to remain by Member States on purely compassionate or humanitarian grounds ..., rather than on the basis of their international obligation”⁶³.

Moreover, as was also clarified in Circular no. 3716 issued on 30 July 2015 by the National Commission for the Right of Asylum – which gave examples of some cases in which the right to humanitarian protection would be recognised – the authorities competent to assess requests for protection had to take into account the family situation of the asylum seeker. The assessment would be based on the provisions of Article 8 ECHR concerning the respect for private and family life and would determine whether a residence permit should be issued on humanitarian grounds⁶⁴. In these cases as well, an international obligation might come into play, which might not be fulfilled under the legislation now in force.

In addition, a residence permit on humanitarian grounds was formerly issued to foreign nationals whose extradition had been rejected by the Court of Appeal (political crimes and in the cases specified in Article 698, paragraph 1, and Article 705, paragraph 2 of the Code of Criminal Procedure concerning serious human rights violations). Now it is not clear what type of

⁶³ M.T. Gil-Bazo, *Refugee status, subsidiary protection, and the right to be granted asylum under EC law*, 136 UNHCR Research Paper (2006) 11-12. One might also pose the question as to whether the “Qualification Directive” is compatible with Article 19 of the Charter of Fundamental Rights of the European Union. Cf., however, the questionable judgment of the CJEU, *H.T. v. Land Baden-Württemberg* C 373/13, 24 June 2015, which confirmed the possibility of removing a refugee for security reasons, even if he risks being subjected to serious violations of his rights.

⁶⁴ If the control of the entry and residence of foreigners falls within the powers of the States, however, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.

residence permit can be granted, as only some of these cases are covered by the “special protection” regime pursuant to Article 19 of the Consolidation Act.

In this regard, it is worth mentioning a 2012 judgment⁶⁵ of the European Court of Human Rights, which found a violation of Article 6 of the Convention (right to a fair trial), since the UK government had manifested its intention to extradite a Jordanian national who had been convicted *in absentia* of terrorism-related offences by a court in his own country, but on the basis of statements obtained through the torture of two co-defendants. The Court ruled that there had been a “flagrant denial of justice” in this case and for the first time confirmed the responsibility of a Contracting State for a violation of Article 6 in relation to the repatriation of an alien.

In situations such as the one described, the abolition of a general provision such as the former Article 5, paragraph 6 of the Consolidation Act could make it difficult to obtain the issuance of a residence permit.

The problematic aspects highlighted here are meant to provide only an example – which obviously does not claim to be exhaustive – of the international obligations that might no longer be duly fulfilled under national legislation.

Also with regard to the serious grounds resulting from “constitutional obligations”, the picture is anything but clear; the reference has formally been eliminated, but an ordinary law clearly cannot do away with such obligations. And the first constitutional obligation that emerges is precisely the right of asylum under paragraph 3 of Article 10.

We should note first of all a point on which legal scholars are in full agreement and which is by now well-established in case law: what is involved here is a subjective right⁶⁶, whose justification lies in the denial of the effective exercise of the democratic liberties guaranteed by the Italian Constitution. This is

⁶⁵ *Othman (Abu Qatada) v. United Kingdom*, no. 8139/09, ECtHR 2012.

⁶⁶ The first orientation expressed in administrative case law, whereby Article 10 paragraph 3 was included among so-called “programmatic” provisions, is by now obsolete and the jurisdiction of ordinary courts is undisputed. See the important ruling no. 4674 of the Court of Cassation, joined sections, issued on 26 May 1997, which for the first time recognised that Article 10 directly attributes to aliens a subjective right to obtain asylum.

not the right place to go back over theoretic debate concerning the specific democratic liberties whose infringement gives a right of asylum, and in particular the diatribe concerning social rights. What is generally recognised, however, is the directly binding nature of the provision where constitutional freedoms are concerned, and the merely declarative and non-constitutive character of the measures adopted by the competent bodies.

By now, in fact, the orientation of the Council of State⁶⁷, which claimed jurisdiction based on the existence of a broad discretionary power of the administrative authorities in assessing the facts and their relevance for the recognition of refugee status⁶⁸, has clearly been abandoned, as has the first orientation of the Court of Cassation, which, given the broad scope of political-administrative discretion implied in Article 5 paragraph 6, had considered the administrative courts to have jurisdiction in disputes related to the issuance of a residence permit on humanitarian grounds (despite having previously affirmed the jurisdiction of ordinary courts in disputes related to international protection)⁶⁹. Indeed, following the transposition of the first Community Directives and the connection established by Legislative Decree no. 25/2008 between requests for international protection and the possibility of issuing a residence permit on humanitarian grounds (see above), the Court of Cassation changed its stance. It went on to clarify that such residence permits were intended to guarantee respect for inviolable human rights and underscored the connection with all the different forms of protection under Article 2 of the Constitution; this precluded

⁶⁷ Council of State, Section IV, no. 4336/2002 and Council of State, Section IV, no. 6710/2000.

⁶⁸ See Court of Cassation, no. 907 of 17 December 1999, which establishes that following the abrogation of the provision in the Martelli law, whereby appeals against denials of refugee status were brought before the administrative courts, jurisdiction must be determined based on the general principles of the legal system. The qualification as refugee constitutes a subjective right and all measures adopted by the competent authorities in this area have a declarative and not a constitutive nature. This interpretation is corroborated by the fact that the Consolidation Act of 1998 had attributed appeals against expulsion orders to the jurisdiction of the ordinary courts.

⁶⁹ Court of Cassation, joined sections, no. 7933/2008, and no. 8270/2008, according to which the administrative courts had jurisdiction in cases of denial by the police commissioner of residence permits as per Art. 5.

their being downgraded to legitimate interests based on the discretionary assessments entrusted to the administrative authorities, whose power was limited to ascertaining the facts that justified the humanitarian protection, i.e. a mere technical discretion, as the balancing of interests was to be left up to the legislator alone⁷⁰.

It is worth pointing out that an analysis of the evolution of the case law of the Supreme Court of Cassation clearly reveals the intent of the latter to combine the constitutional and international frameworks with the changes in domestic law in order to guarantee a solid basis for situations relating to asylum.

5. A “lame” legislation

If this is the overall picture that can be derived from the constitutional aspects, what now appears clear is that the provisions that remain after the recent legislative intervention do not seem to cover the possible cases falling within the scope of Article 10, paragraph 3; if we look at the situations protected by the regime of international protection (in both its forms), it is evident that Article 10 of Constitution is only partly implemented by Directive 2011/95/EU, Legislative Decree no. 251/2007 and Article 19 of the Consolidation Act⁷¹. Moreover, the “special temporary residence permits” do not appear to fill the gap; the majority of these permits regard situations of vulnerability, for example, cases of violence or severe exploitation committed in the context of certain crimes, but the rules governing these permits do not represent a definition of possible cases that may fall under Article 10, paragraph 3. Besides the difficulty of predetermining the different ways in which “the effective exercise of the democratic liberties” may be denied, it was not even the legislator’s intention to implement the constitutional right of asylum through these provisions.

⁷⁰ Court of Cassation, Joined Sections, 9 September 2009, no. 19393; the conclusions reached by the Court with reference to the right of asylum and recognition of refugee status were also extended to humanitarian protection, since the situations involved all regarded fundamental human rights. Cf. recently Court of Cassation, First Section, 19 February 2019, no 4890.

⁷¹ Cf. Court of Florence, 17 February 2018 (<https://bit.ly/2RuWSQc>).

There is no doubt that the regime of humanitarian protection has filled a gap (the non-implementation of Article 10, paragraph 3 through a specific law) over the years by offering the possibility of recognising situations in which fundamental rights were placed in jeopardy. Some recent judgments recognising the right to a residence permit on humanitarian grounds are explicative on this point: it has been affirmed, for example, that the obligation to safeguard the human rights enshrined in Article 2 of the Constitution means that an applicant cannot be repatriated in a context of danger⁷², and that situations precluding the possibility of exercising fundamental human rights in the country of origin plus the fact of having been exposed to torture in the period of residency in Libya gave the right to obtain a humanitarian permit⁷³, and, moreover, that situations of extreme poverty may be seen as causing severe prejudice to essential rights⁷⁴ (the Court of L'Aquila has spoken of freedom from hunger as an inviolable human right)⁷⁵. In accordance with Article 8 of the ECHR, the courts have accorded due recognition to certain family or personal ties⁷⁶; and, as synthesized by the Court of Florence⁷⁷, health, psychophysical integrity and personal dignity are aspects of the human dimension which, for the purpose of implementing Article 10, paragraph 3 of the Constitution, must be guaranteed coverage in the form of humanitarian protection even where they are threatened by phenomena other than those taken into consideration under the refugee protection and subsidiary protection regimes.

Many of the "serious grounds" that have until now enabled foreign nationals to obtain residence permits on humanitarian grounds were related to situations in which fundamental rights had been breached – thus situations giving rise to the constitutional right of asylum. And if the humanitarian residence

⁷² See Court of Bologna, 28 March 2017 (<https://bit.ly/2DeJd78>). Cf. Court of Appeal of Trento, 16 March 2018, no. 67 (<https://bit.ly/2qedPBW>): having regard to the social situation of the applicant's country of origin, he could run the risk of seeing the fundamental rights of the person harmed, being in spite of himself involved in the disorders that frequently afflict the area.

⁷³ Court of Bologna, 28 July 2018 (<https://bit.ly/34oTubx>).

⁷⁴ Court of Florence, 21 December 2017 (<https://bit.ly/2CpPwTZ>).

⁷⁵ Court of L'Aquila 16 February 2018 (<https://bit.ly/2RuWSQc>).

⁷⁶ Court of Trieste, 4 July 2017 (<https://bit.ly/2T6JdLS>).

⁷⁷ Court of Florence, 17 February 2018 (<https://bit.ly/2RuWSQc>).

permit served to fulfil these constitutional and international obligations, what roads can and must be taken now that it has been abolished?

The Constitutional Court will no doubt be called upon to pronounce itself and, as has already been highlighted, there are many problematic aspects. Furthermore, the ordinary courts may play a fundamental role⁷⁸, both by offering an extensive and constitutionally oriented interpretation of some instruments (for example the “special protection” permit or the permit granted to those fleeing disasters) and going back to the case law of the late 1990s, which, in the absence of legislation implementing Article 10, paragraph 3, had come to directly recognise the right of asylum where the constitutional conditions were met⁷⁹. An interpretation of the current legislation that ensures maximum consistency with the Constitution and international obligations should be adopted not only by the courts, but also by administrative authorities⁸⁰. We need only consider the need for an extensive interpretation of Article 19 of the Consolidation Act⁸¹ in order to fully align it, for example, with Article 3 of the ECHR⁸².

Finally, it would be desirable, more in general, that the practice of the territorial commissions be subjected to scrutiny: if we observe the data published in the dossier drawn up by the Senate Research Service, we note that the percentage of recognition of refugee status and the grant of subsidiary protection is on average much lower than in other European

⁷⁸ Cf. Court of Cassation, joined sections, no. 29460/2019 which confirmed the non-retroactivity of the provisions of Decree-Law no. 113 that repealed the humanitarian protection.

⁷⁹ E. Cavasino, *Diritti, sicurezza, solidarietà e responsabilità nella protezione della persona migrante*, 21 *Federalismi* (2018), 21.

⁸⁰ See Constitutional Court, judgment no. 194/2019, § 7.8 that enhances the administrative and jurisprudential practice precisely with regard to a normative interpretation that respects the Constitution and international obligations.

⁸¹ See Court of Cassation judgment no. 38041 of 26 May 2017, where the Court judged that a strict interpretation of the cases precluding expulsion, as laid down by the legislator in Art. 19, paragraphs 1 and 2 of the Consolidation Act, was incorrect, since the legislation should be read in a constitutionally oriented perspective, in the light of the principles affirmed by the ECtHR and the Constitutional Court.

⁸² Cf. M. Benvenuti, hearing before the Office of the Presidency of the 1st Commission (Constitutional Affairs) of the Italian Senate on 16 October 2018, 3 *Osservatorio AIC* (2018).

countries; it is true that this may depend on the countries of origin of the migrants received by different European States, but it could likewise be due to a more restrictive interpretation of European directives on the part of the Italian administrative authorities.

It is clear that the Constitutional Court may play a key role in restoring an acceptable level of implementation of Article 10, paragraph 3 of the Constitution, because the abolition, by Decree no. 113, of a general “humanitarian” provision has made it complicated to offer protection in situations that are difficult to categorise a priori⁸³, also taking into account that constitutional and international human rights law is by its very nature a living instrument, to be interpreted in the light of the present conditions⁸⁴. This does not mean to say that it is not possible for the legislator to guide the discretionary choices of the administrative authorities in relation to recognition of the right of asylum, or that only absolutely generic legislative formulas are compatible with Article 10, paragraph 3. It would have in fact been desirable to see a parliamentary initiative that was finally aimed at implementing Article 10, paragraph 3. What is worthy of censure is the continuing failure to implement the constitutional provision through a law specifically designed for this purpose. With the amendments introduced by Decree no. 113, this risks being a violation of the Constitution.

Once again, the courts will be called on to act as substitute, given the persistence of the conflict between politics (or a certain type of politics) and law which has also pervaded other areas of immigration law⁸⁵.

⁸³ A possible categorisation by the legislator of the cases in which humanitarian protection must be provided would not be censurable a priori (indeed, this solution has been adopted in other European countries); it all depends on how these cases are defined, taking into account that it is necessary to leave margins of flexibility. See European Commission EMN Ad-Hoc Query on ES Ad hoc Query on Humanitarian Protection, June 2017; ECRE, *Complementary protection in Europe*, July 2009.

⁸⁴ M. Balboni, *Abolizione della protezione umanitaria e tipizzazione dei casi di protezione: limiti e conseguenze*, in F. Curi (ed.), *Il Decreto Salvini. Immigrazione e sicurezza* (2019) 19 ff.; M. Savino, *Il diritto dell'immigrazione: quattro sfide*, 2 Riv. trim. dir. pubbl. (2019) 381 ff.

⁸⁵ A. Guariso, *Introduzione*, in A. Guariso (ed.), *Senza distinzioni. Quattro anni di contrasto alle discriminazioni istituzionali nel Nord Italia* (2012), 13.

URBAN LAW, EMERGENCY AND RECONSTRUCTION.
AN ESSAY FROM L' AQUILA EXPERIENCE

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Abstract

This paper discusses some issues related to urban law, emergency and reconstruction after a natural disaster, such as what an earthquake is, starting from the seismic event which affected L' Aquila in 2009, that has been considered a model that has influenced the next experiences and it is still central in the Italian debate about the normative instruments to manage the emergency and the consequential rebuilding phase.

It assumes the specific perspective of "land-use planning" (the Italian, *Governo del territorio*) as the Italian Constitution defines this matter.

The essay addresses the question of urban planning with a special attention to the reconstruction plans, comparing the last Italian earthquake experiences. These plans have a fundamental role to rebuild "where it was and how it was" but they are usually part of a more ambitious objective to promote the development of the affected areas. The article also analyses the discipline of the private re- building activity – which is the core of the actions managed to overcome the earthquake consequences – and the questions related to the chronic delays of the public reconstruction.

Finally, it expresses some final considerations about the Italian legislative trend to reduce the relationship between urban law, emergency and reconstruction to the prevalence of the emergency, which boundaries have been expanded up to include the activities necessary to the social, economical and physical rebuilding.

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1. The study object and its contents

Ten years ago, the 6th April 2009¹, a terrible earthquake destroyed L'Aquila, a city in the centre of Italy and regional capital city². The relevance of this earthquake is linked to two specific reasons: the first one, is the extension of the affected territory; the second one, is related to the choices made by the Italian legislator to face the emergency and later the re-building process.

Before L'Aquila, Italy had already experienced four different and relevant earthquakes: the Belice one (in 1968), the Friuli

¹ The seismic events started at the end of March 2009. These facts were underestimated by the special Commission based on the Department of Civil Protection (*Commissione Grandi Rischi*) who was accused of not having alerted local population, which was affected by the disastrous earthquake after only 7 days. This fact was the central event of an important penal trial which had great importance in the penal debate. About this issue, see A. Amato, A. Cerase, F. Galdini (eds.), *Terremoti, comunicazione, diritto. Riflessioni sul processo alla "Commissione grandi rischi"* (2015); C. Crispi, *Disastri naturali e responsabilità penale: criticità relative al c.d. processo "grandi rischi"*, 7-8 Giur. Penale web (2018).

² According to the official data reported by the Italian Civil, 308 people died and about 1600 were injured. The Italian Civil Protection assisted about 67500 people. Among 77426 buildings, only 49% of them were inhabitable, more of 25% of them were deeply damaged and 5% were completely condemned because of external risks. About these data, see G. J. Frisch, *L'Aquila. Il trionfo dell'urbanistica dell'emergenza*, 1 Democrazia e diritto 117 (2009).

one (in 1976), the Irpinia one (in 1980) and the Umbria – Marche one³, in 1997⁴. Despite their dramatic consequences, especially in the Southern Italy, all those events involved small and medium cities and an area less extended than L'Aquila. The earthquake of 2009 affected the city of L'Aquila and 56 other Municipalities: a territory of 2400 km sq with a population of 140.000 inhabitants (the so – called “crater”). The centre of the city was destroyed and one inhabitant out of three lost his/her house.

To face this emergency the Italian Government chose a centralized policy with one specific and preeminent goal: giving a house to the citizens before winter. To focus the world attention on the Italian disaster, the Group of Eight meeting (G8) was moved from Maddalena Island to L'Aquila.

For a long time, all those activities had only one direction: the central Government and the Head of the Department of the Italian Civil Protection. Local authorities and communities were excluded from the management of the initial emergency phase. The earthquake disrupted the lives of the local institutions; a part of the citizens lived in the camps set up in different areas of the “crater”; another part of them moved to the Adriatic Coast close by, hosted in hotels or private houses.

This brief initial picture of the situation is central for the aim of this paper, that deals with the answers given by urban law to the questions asked by the emergency and by the reconstruction, starting from L'Aquila earthquake, which has been considered a model that has influenced the next experiences and it is still central in the Italian debate about the normative instruments to manage the emergency and the consequent rebuilding phase.

This paper assumes the specific perspective of urban law or, *rectius*, of “land-use planning” (the Italian, *Governo del territorio*) as the Italian Constitution defines this matter⁵. Because of that,

³ For a detailed analysis of this earthquake, see F. Barberi (ed.), *1997-2007: dieci anni dal sisma: oltre la calamità: sviluppo e innovazione* (2007). About Marche Region, S. Catalino, V. Zenobi, *Marche 1997. La dispersione non è un bene, spostare le persone nemmeno*, 13 *Dialoghi internazionali – Città nel mondo* 76 (2010).

⁴ For a comparison between these different experiences, see M. Sartore, *Umbria 1997. Ricostruire “dov'era com'era”. Ma basta?*, 13 *Dialoghi internazionali – Città nel mondo* 61 (2010).

⁵ See art. 117 Const. The constitutional formulation is the synthesis of the evolution of the concept, according to the Italian Constitutional Court sentences. It started from the original idea of urbanism related to the “development of built-

it doesn't analyse deeply the Italian system of Civil Protection but it considers only the aspects related to the main topics of the essay, that are also useful to understand the context of L'Aquila's experience. To this aim, it opens with a brief introduction of the essential aspects of the post- earthquake situation and of its regulatory framework, describing the steps that led to overcome the initial emergency phase and the subsequent rebuilding process.

2. The post-earthquake framework: a brief description of L'Aquila situation

In 2009, the system of the Italian Civil Protection was ruled by l. 225/1992⁶, which established the "National Service of Civil Protection" with the aim "of protecting the integrity of the life, the goods, the settlements and the environment from the damages or from the risk of damages which follow natural calamities, catastrophes and other calamitous events". The Civil Protection Department has been grounded in the offices of the Presidency of the Council of Ministers, whose President made use of the Department to reach the above mentioned purposes. This law distinguished three different categories of events and the related competences (art. 2, par. 1, let. a, b, c). The letter c) dealt with the natural

up areas" (see Constitutional Court, July 24, 1972, no. 141) and arrived at an extended definition that includes "everything which is related to the land use" (see Constitutional Court, December 29, 1982, no. 239). See P. Stella Richter, *Diritto urbanistico, Manuale breve* (2016) who describes the evolution of the subject.

⁶ About this law, see C. Meoli, *Protezione civile, Digesto, discipline pubblicistiche*, 132 (1997), C. Meoli, *La protezione civile, Giorn.dir.amm.* 831 (1998); L. Giampaolino, *Il servizio nazionale di protezione civile (commento alla legge 24 febbraio 1992, n. 225)* (1993). For a general description of the Italian Civil Protection, see C. Meoli, *La protezione civile*, in S. Cassese (ed.) *Trattato di diritto amministrativo, parte speciale*, II (2003). See also A. Fioritto, *L'amministrazione dell'emergenza tra autorità e garanzie* (2008) who describes the evolution of the Civil Protection in Italy and also compares it with other foreign experiences. For some of the most important reformations, before 2018, see F. Di Lascio, *La protezione civile nella legislazione successiva alla riforma del titolo V*, *Giorn.dir. amm.* 385 (2004). The current system of the Civil protection is different than in 2009 and now it's ruled by Leg. D. 1/2018, the Civil protection code; for the new system of the Italian Civil protection, after its reformation, see A. Fioritto, *La riforma della protezione civile in Italia*, *Giorn.dir.amm.* 1059 (2012). For a more general analysis of the Italian civil protection in the European context of the civil security, F. Di Camillo *et alii*, *The Italian Civil Security System* (2014).

disasters, catastrophes or other events that, because of their intensity and extent, should be faced with extraordinary powers and means. The Department coordinated the response to those events of “C-type”, after the President of the Council of Ministers had declared the state of emergency.

To enact the actions necessary to face the C-type events the Head of the Department could issue ordinances “notwithstanding the whole current regulation”⁷. These ordinances could be issued to: organize and carry out the rescue and assistance services for people hurt by the event; reactivate public utilities and strategic infrastructures (in the limits of the available resources); carry out operations to reduce the residual risk, deeply related to the event, with the preeminent aim of protecting private and public safety; identify the needs to reactivate private and public facilities and infrastructure (damaged); check the damages occurred to economic and business activities, to cultural heritage, to building stock (on the basis of a procedure ruled by the ordinance itself or another one); to start to implement the first measures to face the urgent needs, related to let. D), in the limits of available resources and based on the directives of the Council of Ministers, also in agreement with the regional governments.

The President of the Council of Ministers issued the state of emergency with the decree of 6th April 2009 and he gave the powers of Commissioner – Delegate, ex art. 5, par. 4 l. 225/1992, to the Head of the Civil Protection Department, who was in force as Commissioner – Delegate until 29 January 2010, when the emergency management was transferred to the President of the Abruzzo Region (Mr. Chiodi). With the same ordinance (O.P.C.M. no. 3833, 22.12.2009) the President of the Council nominated the

⁷ The power of issuing ordinances has been exhaustively investigated by Italian scholars, because it involves the most important general principles of the administrative law. Although it could not be exhaustive, see G.U. Rescigno, *Ordinanza e ordinanze di necessità e di urgenza*, in Noviss. Dig. it. (1965); R. Cavallo Perin, *Potere di ordinanza e principio di legalità* (1990); R. Cavallo Perin, *Il diritto amministrativo e l'emergenza derivante da cause esterne all'amministrazione*, in AIPDA Annuario 2005. *Il diritto amministrativo dell'emergenza* (2006); C. Marzuoli, *Il diritto amministrativo dell'emergenza: fonti e poteri*, in AIPDA Annuario 2005. *Il diritto amministrativo dell'emergenza* (2006); V. Cerulli Irelli, *Principio di legalità e poteri straordinari dell'amministrazione*, Dir. Pubbl. (2007); A. Cardone, *La “normalizzazione” dell'emergenza: contributo allo studio del potere extra ordinem del governo* (2011).

Mayor of L'Aquila (Mr. Massimo Cialente) Deputy - Commissioner Delegate. President Chiodi worked with the powers and the derogations established by the ordinances adopted by the President of the Council to overcome the emergency⁸.

The Mayor of L'Aquila was nominated Deputy - Commissioner Delegate for the re-building and for the assistance to the population⁹. The ordinance gave him the task to draw up, in agreement with the President of the Province (in the limits of his competences), the re - planning of the Municipality, the strategies to ensure the social - economic recovery, the requalification of the built - up area and the harmonious rebuilding of the urban - housing - productive fabric for the re-building of the historic centre.

The other Mayors (the *crater* Mayors) had to draw up, in agreement with the Commissioner Delegate, the re - planning of the Municipalities and they had to define the guidelines for the re-building of the historic centres and the social - economic recovery of the municipalities.

The state of emergency lasted until 31st August 2012, for five and a half years from the earthquake, when the Decree Law no. 83/2012 - converted into law no. 134/2012 - in the art. 67^{bis} closed the emergency state. According to art. 67^{ter}, since 16th September 2012, the re-building and every intervention necessary to facilitate and to ensure the return to normal life conditions in the areas struck by the earthquake, should be managed according to the competences ruled by art. 114 of the Italian Constitution. The article established some specific aims in order to manage these competences, because they should guarantee: the complete homecoming to those who were entitled, the restoring of functions and of public utilities, the attractiveness and the social - economic development of the municipalities, with a special regard for the monumental historic centre of L'Aquila.

During the time which occurred to return to the ordinary administration, the extraordinary management of the Department of the Civil Protection laid the basis for the "L'Aquila model", that

⁸ The Head of the Civil Protection maintained the competence for the contracts related to the temporary houses (C.A.S.E., the Italian acronym for *Complessi Antisismici Sostenibili Ecocompatibili*), M.A.P. (the Italian acronym for *Moduli abitativi provvisori*) and for the temporary schools M.U.S.P. (the Italian acronym for *Moduli a Uso Scolastico Provvisori*).

⁹ According to the ordinance no. 3845/2010.

deeply influenced the urban choices and the “land-use planning” of the regional capital city and of the other municipalities.

Despite the complex regulatory framework, the reconstruction of L’Aquila can be divided in two phases: the phase after the L. no. 134/2012, the so – called “Barca’s Law”¹⁰ and the previous one, regulated by the Law Decree no. 39/2009 and the ordinances adopted by the Head of the Civil Protection, implementing that Decree. Barca’s Law, in the art. 67*quinquies* provided for the adoption of a consolidated text (the Italian *Testo Unico*) to collect the entire regulation about the earthquake of 2009. Currently, this law doesn’t exist. The only consolidated text of the regulation concerning the earthquake has been released by the Office for the rebuilding coordination, grounded in the offices of the Commissioner – Delegate Mr. Chiodi; this is not an official text, but it helped private citizens and public authorities to select the right rule for their needs and, unfortunately, it was updated at 7th June 2012.

3. The temporary – emergency housing: the “new towns” as an example of “urban planning upside – down”

The Italian law – specifically, the consolidated text about the construction activity, R.P.D. 380/2001 (the Italian *Testo Unico dell’edilizia*) – establishes a precise relationship between the construction activity and the urban planning: the first one cannot be in contrast with the second one¹¹; the urban planning must precede the building activity¹².

It’s not a formal relationship: a plan has the primary, despite non-exclusive, objective to govern the transformation of the cities and to discipline the growth areas. According to the Italian fundamental urban law¹³ (art. 1) it’s the main instrument to regu-

¹⁰ Mr. Barca was the Minister for territorial cohesion.

¹¹ This is not an autonomously expressed principle. Despite that, it can be seen from the articles that discipline the administrative procedures for the building activity. Art. 20, par. 1 (that disciplines the building permit) and art. 23, par. 1 (that disciplines the Italian *s.c.i.a.*, *segnalazione certificate di inizio attività*, starting activity notice) put the preliminary legal condition of their conformity to the urban plans (adopted and approved).

¹² This principle is implicitly expressed by art. 9, R.P.D. 380/2001, that disciplines the building activity in the absence of urban planning.

¹³ It is Law no. 1150/1942, the so called “*legge fondamentale urbanistica*”.

late “the spatial planning and the building increase of the populated areas and the general urban development of the territory”.

This statement, throughout the years, has received an extensive interpretation, different from its original meaning, that has given more value to the second part of the article, about the “general urban development of the territory”. Finally, it expresses the need that a city has the physical structures necessary to use a site and to manage a specific activity – the primary urbanization works – and what is necessary for its inhabitants’ social lives (public spaces, schools, churches, public offices, shops, recreational spaces, the secondary urbanization works). Moreover, it means that a plan shouldn’t serve only the public interest for the orderly development of the territories but it should guarantee several other public interests, mostly related to constitutional principles (art.3, 9, 32, 42 Const.). The plan should also reflect the expectations of its community, expressed not only by its political representatives but also by its direct participation in the urban planning procedure¹⁴. This should be the preliminary context for every activity, especially the building one.

This premise is particularly relevant to understand the consequences of the choices made by the Italian Government to manage the housing emergency after the earthquake and the role of urban law.

For the first time, along the history of the Italian earthquakes, the emergency was addressed by permanent houses where citizens were supposed to live temporarily. The political project to give a house to the homeless people immediately was realized by a “temporary city”. In less than 10 months, in different areas of the Municipality, 19 housing estates arose and about 15.000 accommodations were available. Before returning to their houses, people would have to move from the tents to the “new towns”, the “Progetto C.A.S.E.”, where C.A.S.E. in the Italian acronym for *Complessi Antisismici Sostenibili Ecocompatibili* (anti-seismic, sustainable and environmentally compatible estates).

At the root of this choice there was a wider idea of emergency, which included activities like the building of permanent houses, with the specific aim not to provide only the security of people affected by seismic events but to face the long-term incon-

¹⁴ Council of State, IV, May 10, 2012, no. 2710.

veniences that it had caused them. Some urgent measures (such as giving a temporary accommodation to citizens) became definitive, the relationship between urban planning and building activity was inverted and the emergency and ordinary management were confused.

According to the Italian Constitution¹⁵, Regions have the legislative power about the subject “civil protection”, except for the principles, which are fixed by the State¹⁶. Despite this State – Regions concurrent legislative powers, the Italian Constitutional Court¹⁷ has allowed the State intervention also at the regional level, in accordance with the principle of subsidiarity. When it is necessary to satisfy needs of a unique character, a State law can discipline also a regional subject; to avoid the risk of the ousting of the Regions, the constitutional judges had specified that this legislative power should respect the principles of reasonableness (it means that those needs of a unique character must really exist), of proportionality (the State intervention is absolutely necessary) and of loyal cooperation (State and Regions should conclude specific agreements)¹⁸. The subject of “civil protection” is one such case¹⁹ and it’s also a “cross – sectoral matter”: it means that it could intercept other linked issues, like environment or land-use planning²⁰. Therefore, a civil protection law could discipline some aspects related to the rebuilding activity, even more if the disaster event was an earthquake; likewise, the State could also intervene at the regional level, within the just mentioned limits dictated by the principle of subsidiarity.

The anomaly of L’Aquila situation wasn’t the non - compliance of the formal competences but the choice of transforming an activity that usually belongs to the ordinary authorities in an emergency intervention: the future city was drawn using extraordinary competences, without the complex interests’ assessments that are typical of the urban planning activity. A Law Decree and

¹⁵ Constitutional Court, March 24, 2017, no. 60; Constitutional Court, April 05, 2018, no. 68.

¹⁶ Constitutional Court, February 16, 2012, no. 22.

¹⁷ Constitutional Court, October 1, 2003, no. 303.

¹⁸ Constitutional Court, January 21, 2016, no. 8.

¹⁹ Constitutional Court, October 30, 2013, no. 327.

²⁰ Constitutional Court, December 2, 2019, no. 246.

the ordinances substituted²¹ the administrative activity that usually disciplines the “land-use planning”. Surely, the local authorities contributed to the decisions, but as the final (and not decisive) link in one strongly centralized chain and in front of a city, *de facto*, drawn by the Law Decree and ignoring the (still) existent urban plans.

L. D. 39/2009 shows the main contents of the “urban - planning upside -down”. Its art. 2 assigned to the Commissioner - Delegate (the Head of the Civil Protection Department) the design and the construction phase of those houses; for this purpose, he had to approve the interventions plan (in Italian, *Piano degli Interventi*), after a specific consultation with local authorities (in a conference of services), that acted by a majority of those present and voting²². According to art. 2, par. 4 the areas were chosen by the Commissioner - Delegate, in agreement with the President of the Region and consulting the Mayors of the involved municipalities. If the Interventions Plan was in contrast with the general city plan, it could change it. In summary, to localize the areas, the pre-existing city plan was not considered; the temporary buildings could be constructed in every place, also in derogation from the urban rules in force²³. The C.A.S.E. were built in areas for agriculture purposes, increasing the sprawl in those spaces, without considering other alternatives, like brownfield sites²⁴, the available housing stock or some municipality areas that were on sale²⁵. In a short period, thanks also to an anomalous expropriation proce-

²¹ More generally, for the relationship between emergency and substitutive powers, see M. Bombardelli, *Gli interventi sostitutivi nelle situazioni di emergenza*, in *AIPDA Annuario 2005. Il diritto amministrativo dell'emergenza* (2006).

²² This consultation wasn't ruled by l. 241/1990 (the general law about administrative procedure) but by a specific ordinance of the President of the Council, O.p.c.m. 30th april 2009, no. 3760. P. Properzi, *La questione urbanistica*, in P. Mantini (ed.), *Il diritto pubblico dell'emergenza e della ricostruzione in Abruzzo* (2010), gives an important report of the administrative procedure, where we can read (p. 63) that the technical offices (both Region and Province) had many doubts about the proposals of the Commissioner Delegate, that were balanced by the positive evaluation of the Municipality. As Properzi writes, politics prevailed on the technical rationality.

²³ See the resolution of the City Council, 25 April 2009, no. 58.

²⁴ A. Giusti, *La rigenerazione urbana. Temi, questioni e approcci nell'urbanistica di nuova generazione* (2018); M. Passalacqua, A. Fioritto, S. Rusci (eds.), *Ri-conoscere la rigenerazione. Strumenti giuridici e tecniche urbanistiche* (2018).

²⁵ See, P. Properzi, *La questione urbanistica*, cit. at 22, 62.

ture, a “none – city, without roads, public utilities and without a permanent population” was built²⁶.

4. Which plan for rebuilding?

The birth of the Progetto C.A.S.E. is deeply linked with another important choice, that had the aim of citizens’ safeguard but influenced the future asset of the city.

The O.P.C.M. no. 3753/2009 gave the task to the Mayors to adopt every measure that was necessary and urgent to avoid dangerous situations and to give assistance to affected citizens. According to that ordinance, the Mayor of L’Aquila closed the historical center and no – one, without authorization, could enter (it was the “red zone”, in Italian *zona rossa*). It means that every activity and house based on its perimeter should have been moved to another area: the city lost its center and new and sprawled centers were created. It was a sort of suspension of the city’s life, that moved to temporary places and that was supposed to be reactivated thanks to the “reconstruction plan”, ruled by 14, par. 5^{bis} of the mentioned L.D.

In the general context of an emergency regulation, the Parliament (when the Decree converted into Law) introduced a planning instrument, the reconstruction plan, to define the strategic lines to ensure the economic and social recovery, the redevelopment of the town and to facilitate the return of the displaced persons. It considered only the historic center, that should have been defined according to the M. D. 1444/1968²⁷, corresponding to the “A zone”. The Mayors (and not the City Councils) had the competence for their adoption, in agreement with the President of the Region. The Decree was too generic and it didn’t give sufficient details about the juridical nature of this plan, its relationship with the other plans, about the procedures and the deadline to adopt them.

At the same time, the Decree in the art. 2, par. 12^{bis} gave the task to the “Municipalities” (not to the Mayors), in agreement with

²⁶ Quoting again P. Properzi *La questione urbanistica*, cit. at 22, 62.

²⁷ It is one of the most important Italian urban disciplines. Briefly, it identifies the different areas included in a general urban plan (the Zones) and disciplines the limits that should be respected in each of them, to ensure the population a minimum equipment of urban standards.

the Deputy - Commissioner Delegate (the President of the Region), to set the re - town planning, defining the strategic lines to ensure the economic and social recovery, the redevelopment of the city, facilitating the return of the displaced persons and guaranteeing a harmonious reconstitution of the urban and productive fabric, also considering the C.A.S.E. estates.

This article could have different meanings: it could be interpreted as a formal (and not so necessary) statement of the ordinary competences about the land-use planning; it also could be interpreted as a special statement, that has the main purpose to bring the emergency choices (especially the *Progetto C.A.S.E.*) back to the ordinary planning instruments; finally, it could not be interpreted, but only read as a disharmonious presence of two uncoordinated rules, because it doesn't define the specific relationship between general and special re-building plans.

The L.D. didn't fix a term to start those re-building plans and, at the same time, put the re-planning activity (ex art. 2, par. 12) in an undefined future dimension. Finally, and above all, it didn't specify the juridical nature of the re-building plans, if they are special urban implementation plans or if they had the same value of a general town plan.

All those elements led to a first result: the city arose and got organized all about the choices linked to the reconstruction of the private houses, without the long-term vision that is necessary to plan and to really re-build a community and its territory. The severity of the damages and the localization in the historic centre were decisive for the allocation of the citizens, without considering the proximity to their houses or to the other places where they managed their daily activities before earthquake.

The town planning was "suspended", in favour of the priority of the temporary houses and private reconstruction and waiting for the re-building plans. Looking at this situation, the realization of those plans would have been the starting point for the return to an ordinary management: people could have left the temporary houses, the core of the city could have resumed its activity and the re-planning activity would have linked all those fragmented parts.

This sequence wasn't so linear as it has been described.

The bureaucracy delays and the slow launch of the reconstruction plans obstructed the hoped reorganization of the func-

tions and of the competences; add to this, the fact that those plans had the ambition, difficult to realize, to discipline the “physical” reconstruction and to restart the social and economic lives of the historic centers.

5. The reconstruction plans: how they could be a model for the emergency urban planning. On balance after L’Aquila’s experience

The reconstruction plans are not original urban instruments; they were introduced, for the first time, in 1951, after the second world war²⁸. Their main aim was “to make it quick”²⁹, beginning from the most urgent constructions but also trying to make them according to an idea of rational development of the cities. Because of that, those plans were less complex than an ordinary one, they had a short term (not more than ten years) and they allowed direct interventions by the State or by private individuals, thanks to a “concession” given them by the Public Works Ministry. The Municipalities that were in a specific list approved by that Ministry would have to adopt them; the law established faster land expropriation procedures. Those plans “suspended” the Italian fundamental urban law (many of them for a term longer than ten years) and they often introduced a punctual and fragmented discipline, without the rational and unitary vision that was necessary in such situations³⁰.

In the course of the time, they have been considered the most efficient instruments to face the emergency and to ensure a quick rebuilding. In fact, this choice has been repeated after the Irpinia earthquake and for the Friuli one. Also, the recent laws about the last earthquakes, in 2012 and 2016, have introduced those urbanistic instruments³¹.

²⁸ For a description of those plans, see E. Salzano, *Fondamenti di urbanistica* (2017); F. Salvia, F. Teresi, *Diritto urbanistico* (1992).

²⁹ Quoting E. Salzano, *Fondamenti di urbanistica*, cit. at 28, 110.

³⁰ See again, E. Salzano, *Fondamenti di urbanistica*, cit. at 28, 109.

³¹ About these last experiences, see T. Bonetti, *Diritto amministrativo dell'emergenza e governo del territorio: dalla "collera del drago" al piano della ricostruzione*, Riv. Giur. Ed. 127 (2014); F. Spanicciati, *Emergenza sisma e nuovi strumenti decisionali: la pianificazione delle zone colpite dai terremoti 2016 – 2017*, 3 Istit. Fed. 711 (2017).

The experience of L'Aquila could be a "case study" to analyse which role they could really have to be a useful emergency urban instrument.

To this specific aim, it's necessary to introduce their essential elements, comparing them with the "ordinary" discipline.

The first point concerns the law sources and the competences.

According to the Italian Constitution (art. 117), the urban matter is shared between State and Regions; those plans had only a state emergency discipline, the L.D. 39/2009 and the Decree of the Commissioner Delegate (D.C.D.) n.3/2010.

In accordance with the Italian consolidated text about local authorities (Legislative Decree no. 267/2000), the Municipalities should have the tasks concerning communal territories, land use and planning (art. 13) and the City Council should decide about urban plans. The just mentioned emergency laws stated a complicated and centralized procedure, where the Mayors and the Deputy Commissioner Delegate (the Region President) took every decision.

For those reasons, many Authors defined the Decree 39/2009 (and the subsequent ordinances) the typical expression of an "urban town planning under the Commissioner"³².

In fact, this is what emerges reading the procedures.

The first step³³ (art. 2, D.3/2010) of the procedure was the redrawing of the boundaries (the Italian *Perimetrazione*), necessary to develop the subsequent reconstruction plan. The boundaries were redrawn by the Mayor but they were approved with the partnership of the Commissioner Delegate; it couldn't innovate the pre-existence situation because the Decree expressly stated that it was a "mere highlight" of the parts of the territory, the structures, the urbanization projects and the areas where it was necessary to intervene (art. 3, D. 3/2010).

³² See G. J. Frisch, *An Inertial Reconstruction. The Challenges and Failures of Governance and Planning*, in A. Coppola, C. Fontana, V. Gingardi (eds.), *Envisaging L'Aquila. Strategies, spatialities and sociabilities of a recovering city* (2018).

³³ For this procedure, see also P. Mantini, *Lo ius publicum della ricostruzione in Abruzzo*, in P. Mantini (ed.), *Il diritto pubblico dell'emergenza e della ricostruzione in Abruzzo* (2010). About some concrete experiences of reconstruction plans, see L. Caravaggi, O. Carpenzano, A. Fioritto, C. Imbroglini, L. Sorrentino, *Ricostruzione e governo del rischio* (2013).

The technique was grounded on the preliminary definition of urban-building areas (in Italian, *ambiti urbanistico-edilizi*); the reconstruction would have been based on integrated actions and, concretely, it should proceed through one or more aggregate buildings (the Italian, *aggregati*) (art. 4, D. 3/2010).

The D.C.D. (art. 6) introduced an anomalous participative phase. The Mayor published a proposal concerning the areas of the reconstruction plans, by which he asked the interested owners to present a proposal for their properties, in 30 days from the public announcement. The proposals were evaluated by the Mayor and if the evaluation was positive, a second procedure started, divided in the two classical phases of adoption and approval. The Mayor adopted the plan (after informing the Delegate Commissioner) and it was filed at the Municipality secretariat; everyone who was interested could submit observations, for the next 15 days. Within ten days following the deadline to submit those observations, the Mayor should convene a conference of services, to receive opinions, go – head and every approval required by law and necessary to protect public interests, concerned by different authorities. The Municipality Council approved the plan; the D.C.D., only for the city of L'Aquila, gave special and substitutive powers to the Mayor, if the Council didn't provide after the conference of services. The approval was also valid as a declaration of public utility and urgency in order to realize public works included in those plans.

The plan could be implemented in different ways, ruled by art. 7. It was a complex discipline, which referred to the ordinances issued by the President of the Council to manage the reconstruction. The reconstruction plans could be implemented by single interventions, that involved one or more aggregate buildings. If the buildings were heavily damaged, they should be realized by integrated plans; in this case, the Mayor issued a public competition, to select a single implementing body, who had to project and build the public and private interventions. If some buildings had minor damages (because the level of the damages was A, B or C) they could have an autonomous reconstruction, according to the ordinance no. 3778 and 3779/2009; the article also referred to some other ordinances, *mutatis mutandis*.

According to L.D. 77/2009, the reconstruction plans should have also strategic contents, because they had to put the basis for

the social and economic recovery; both the law decree and the Commissioner decree didn't state anything else about this specific function. Furthermore, this activity should be combined with the more general re-planning function that the O.P.C.M. no. 3833/2009 gave to the Mayor, in partnership with the Province (in the limits of its competences).

With a literal overall reading of the rules, they could be, at the same time, strategic plans and urban implementation plans; despite they involved only specific areas (the historic centers), they had more extended objectives, that could intercept the finalities of the other general plans. It's significant that the committees of experts, appointed by the Minister of Territorial Cohesion, Mr Barca, gave two different interpretations of those plans. According to the juridical experts, they were urban implementation plans; the urban planning experts defined them strategic plans³⁴.

Those plans were considered emergency instruments but they should manage the situation following the earthquake; the result was an unclear distinction between emergency and ordinary phases, in a more general context where the emergency had a wider meaning, extended to the events not deeply related to unforeseen and unforeseeable situations³⁵. It's significant that the laws didn't fix a term, that was introduced only by law 134/2012, in the art. 67*quinquies*, that gave a deadline for their adoption, in two months (120 days) from its entry into force. At the end of this transitory period, the same purposes should be entrusted to ordinary plans.

The above-mentioned art. 67*quinquies* tried to "tidying up" the past situation.

It stated that the reconstruction plans are strategic plans; it means that they can establish the financial rebuilding needs, they

³⁴ About the juridical nature of these plans, see F. Oliva, G. Campos Venuti, C. Gasparrini, *L'Aquila, ripensare per ricostruire* (2012).

³⁵ It is important to remember that L.D. 343/2011 was already in force. According to this decree the Prime Minister could issue ordinances also for public events, not related to natural disasters but that could have unusual proportions. They are the "*grandi eventi*", like the world swimming championship in Rome, in 2008 or the Funeral of Pope Giovanni Paolo II, in 2005. This provision was abolished in 2012 (by L. D. 59/2012). See, A. Cardone, *La "normalizzazione" dell'emergenza: contributo allo studio del potere extra ordinem del governo*, cit. at 7,180; M. Capantini, *I grandi eventi* (2010).

can discipline how to implement themselves and the timeline of the interventions in the historic centre. They cannot substitute the general statements of the existent plans, if there isn't a law that gives them that specific power. It is what emerges from the art. 67*quinquies*, that states that they can have urban contents (and they can update, modify or substitute the plans in force) but, in those cases, it is necessary a specific agreement (a Programme agreement) with the competent Province.

It doesn't deny the role of "reboot" given them, but it implicitly states that it should be limited in a short period, without "mixing up" short term objectives, more related to the emergency phase, and long terms objectives, linked to the return to the ordinary life. The Commissioner urban planning cannot substitute the democratic framework of the competences and the complex evaluations that put the basis for the vision of the city.

The art. 67*quinquies* is an important end point, useful to define the boundaries of the reconstruction plans as a model for the emergency urban planning.

Firstly, it confirms that the reconstruction is a function that should belong to the ordinary authorities and that a plan, for its own nature, could not be a Commissioner act, depriving the procedure of the democratic control that the City council could guarantee. This aspect is moreover relevant if we consider that the procedure drawn by the emergency laws didn't really involve the citizens in such relevant choices, like those concerning the reconstruction are. Realistically, it disciplines a participative phase (the public proposal and the "traditional" debate between private submissions and public replies) that aimed at the protection of individual situations (especially the right of property) related to the *ius aedificandi* and it shows a model of participation far from the "anyone's participation" introduced by the fundamental urban law.

Those last considerations may be objected, because a large participation sometimes could slow down and it could be an obstacle to the reconstruction. At the same time, the parts concerning the economic and social recovery introduce the vision of the future city and those decisions couldn't not involve the citizens, who are the addressees of those statements.

A right balance between the needs of a quick and participative reconstruction of the territories could be found through a

clear distinction between the levels of action and plans, distinguishing the different role of privates in those administrative choices. This is what the European and Italian principles of subsidiarity, adequacy and differentiation suggest.

When the natural disaster is an earthquake, the emergency phase could be extended to the first actions necessary to start the physical reconstruction of the most affected cities and to return to the houses³⁶. Within these boundaries, the reconstruction plans could introduce a special regulation necessary to accelerate the procedures; in this process, the private rebuilding is central and it concerns especially the relationships between the owners and the administrative authorities and, if necessary, the third parties which could have related interests. However, if those plans have more ambitious objectives and they aspire to introduce a strategic vision of the future city, they exceed the emergency threshold and they cannot be reduced to a property issue. These plans should involve the different territorial levels, starting from the communities which live, work or study in those territories and they should gradually engage the different territorial authorities, according to their specific competences.

The different laws concerning the earthquake tried to find a solution that could combine both those requirements but they often overestimated the role of the reconstruction plans, they drew a scenario difficult to realize in front of the real situation of the affected lands or they didn't rule efficient procedures to manage a rapid rebuilding, that identified as a precondition for every consequent decision about the social and economic aspects.

The analysis of the reconstruction plans lays the attention on the binomial reconstruction – development, so essential but, at the same time, extremely difficult to realize, in front of the different demands to balance: a rapid physical reconstruction of the destroyed cities and towns, the social and economic recovery of the territories and an efficient and legal expending of public funds.

To consider that issue, it's necessary to widen the investigation, examining the essential elements of some other experiences and the role assumed by the reconstruction plans.

³⁶ See Constitutional Court, December 2, 2019, no. 246.

6. The difficult binomial reconstruction – development: a comparison between the last earthquake experiences

At an overall view of the last earthquake laws, the aim of the majority of the reconstruction plans is to rebuild “where it was and how it was”. They are also part of a more ambitious objective to boost the economy and to promote the development of the territories.

The first important example was in Friuli Venezia Giulia, that is still considered a positive model and a successful experience³⁷. In that period, the Civil Protection didn't exist and the Region was the main authority which managed the emergency phase and the subsequent reconstruction, that was included in a more general framework of economic development and land use planning. A State law (l. 544/1976) fixed the strategic lines and the intervention criteria for the subsequent regional laws and it took into consideration some strategic issues like industry, trade, craft, tourism (art. 2, par. 1), agriculture (art. 2, par. 2), public works and building activity (art. 2, par. 3).

The first and most important regional law (L. 63/1977) introduced different measures to reconstruct “where it was and how it was”; the reconstruction plans were one of them and they had a specific role, because they were implementation plans (in Italian, *piani particolareggiati di attuazione*) and the interventions were realized by single owners or grouped together in a consortium. Another part of the law disciplined the procedure to receive the public funding and the reconstruction methods; a third part concerned public and social houses and the last one the public works necessary to manage the cities (primary and secondary urbanization works) and the construction of new public works. The law no. 63/1977 didn't have specific rules about a more general urban planning, probably because the clear majority of the cities just had a town plan and a Regional Urban Plan was in force. At last, despite these laws didn't give much attention to the citizens' participation, it doesn't mean that it wasn't relevant. Local authorities, who had the responsibility for the reconstruction, worked closely with citizens and probably it was one of the first experience of an effective bottom up participation.

³⁷ See S. Fabbro, *Friuli 1976. La ricostruzione: exemplum paradigmatico o unicum irripetibile?* 13 *Dialoghi internazionali – Città nel mondo* 76 (2010).

In Friuli Venezia Giulia, the reconstruction plans dealt with private physical rebuilding and the local authorities had the competences. They hadn't a strategic economic content and those measures belonged to other instruments, the regional plans for the economic and social development, that should be divided into annual plans and district plans (art. 1, L. no. 546/1977).

Despite the laws had the same aim, the Irpinia experience³⁸ had less success and it is still considered one of the Italian failures; one of the causes were probably the choices made by the State law no. 219/1981. In spite of the premises of a reconstruction that should respect the local identities (art. 27), it tried to propose a different model of economic development that would have many difficulties to survive when the public funds finished³⁹. It also introduced a complex urban planning system, described by the art. 28 that made it difficult to reconstruct "where it was" in a short time. This article disciplined three different kinds of executive plans, that didn't effectively run the direction "where it was". Furthermore, many municipalities didn't have a general town planning, and it also obliged them to adopt it in addition to those implementation plans. The result was a chaotic situation that both the affected administrations and the Region couldn't address.

According to some scholars⁴⁰, the model of reconstruction and development proposed in that occasion failed because of the lack of differentiated actions. Long and short term objectives were confused, as art. 28 clearly shows about town planning; the measures to face the reconstruction were extended to a larger area, that included about 687 municipalities, instead of the 71 ones of the Provinces heavily destroyed.

The most affected areas (the "crater") that needed rapid and efficient actions didn't have an autonomous consideration, and the

³⁸ For a general picture of this event, see I. VITELLIO, *Irpinia 1980. Giocavano Inter e Juventus, ma non si sa come andò a finire*, 13 *Dialoghi internazionali - Città nel mondo* 76 (2010).

³⁹ See M. Sartore, *Umbria 1997. Ricostruire "dov'era com'era". Ma basta?* cit. at 4, 63 who describes these effects of the "disaster-economy".

⁴⁰ See A. Becchi, *La ricostruzione come prerequisito dello sviluppo, e i suoi possibili esiti: l'esperienza della Campania e Basilicata*, 34 *A.S.U.R.* 10 (1989); M. Sartore, *Umbria 1997. Ricostruire "dov'era com'era". Ma basta?* cit. at 4, 62 where he also refers the opinion of Mario Rossi Doria.

first aim to give people a house and to reconstruct what the earthquake had destroyed got away.

The earthquake of Irpinia, because of the delays in rescuing and the national indignation, accelerated the establishment of the Civil Protection Department and put the basis for the modern system of Civil protection. It was a significant event but, at the same time, it was the epigone of the Italian attitude to extend the emergency over its physiological boundaries, until it became the “pick-lock” to substitute the ordinary competences, to introduce a relevant deregulation and to give more powers to the Commissioners, even when they weren’t necessary.

This experience influenced the reconstruction after the earthquake that affected the Umbria Region in 1996⁴¹; the “Umbria model” tried to be different and it especially focused the attention to the physical reconstruction, distinguishing three categories, light reconstruction, heavy reconstruction and integrated reconstruction, using the Integrated Urban plans. Umbria didn’t adopt the reconstruction plans and the development of the most affected area was entrusted to the so-called P.I.A.T., that were Integrated Plans for the most affected areas (the Italian, *Piano Integrato per le Aree maggiormente colpite dal Terremoto*). Those plans highlighted three directions: tourism, environment and culture but they hadn’t a relevant influence: on a closer inspection, the reconstruction was the real development factor, despite it was specially addressed to the private rebuilding⁴².

The experiences that preceded the earthquake of L’Aquila show that the most affected area should receive a priority attention and that an efficient reconstruction is the necessary starting point for the related actions aimed to a general development of the involved territories.

A reconstruction plan should focus on the physical rebuilding. They can be efficient instruments if they are quickly adopted, the procedures are efficient, the financial resources are adequate and if they contain a global vision of their objectives and priorities⁴³. These plans involve a specific category of privates, the own-

⁴¹ For a general framework of this event, see F. Barberi (ed.) *Dall'emergenza alla ricostruzione* (2007); S. Sacchi (ed.) *Oltre la ricostruzione* (2007).

⁴² M. Sartore, *Umbria 1997. Ricostruire “dov’era com’era”. Ma basta?* cit. at 4, 73.

⁴³ That is also highlighted by P. Mantini, *Lo ius publicum della ricostruzione in Abruzzo*, cit. at 33, 53.

ers of the buildings and who has a right of property or another real right related to the good that should be reconstructed. The scheme could be the same of the recovery plans (in Italian, *Piani di recupero*, introduced in 1978) or of the integrated interventions plans (in Italian, *Piani integrati di intervento*, that our national system has experimented since 1992⁴⁴). They are implementation plans, that should respect the provisions of the general ones but that could derogate them, if the law specifically allows it. They are an example of “consensual urban planning”⁴⁵ that could guarantee a coordinated rebuilding process, avoiding conflicts between privates – and between privates and public administrations – where the relationship with the general plans are defined and the competence belong to the local authorities. The local authorities should define a program, the priorities and the related expense, to guarantee an ordinate and transparent procedure; private should implement them. Because of their exceptional role and the requirements of efficiency and transparency related to public funds they should have a limited term for their implementation and this rapid result could be guaranteed thanks to the provision of substitutive public powers, in case of owners’ inaction.

Those plans, for their own nature, could not substitute the general urban plans, that describe the vision of the city, its physical and invariable elements, its strategic development profiles, and describes how to implement them, regulating the urban market and its development. These objectives shouldn’t be achieved with a derogatory procedure or without involving the local authorities and the citizens, even if they haven’t autonomous juridical situations corresponding to the property one. The choices made during

⁴⁴ For a general description of those plans and their discipline, see S. Perongini, *I piani di recupero: aspetti procedimentali e sostanziali*, II Riv. Giur. Ed. 232 (1982); M. Antonioli, *Sui rapporti tra piani di recupero e piani urbanistici generali*, I Foro amm. 872 (1985); G. Leondini, *Sulla natura giuridica dei piani di recupero*, Riv. Giur. Urb. (1989); C. Vitale, *Piani di recupero del patrimonio edilizio esistente (artt. 27, 28, 30, L. 5.8.1978, n. 457)*, in S. Battini, L. Casini, G. Vesperini, C. Vitale (eds.), *Codice di edilizia e urbanistica* (2013); A. Perini, *I programmi integrati di intervento: dal modello statale alla disciplina regionale*, Riv. Giur. Urb. 449 (2001); C. Ferrazzi, *I programmi integrati di intervento*, in D. de Pretis (ed.), *La pianificazione urbanistica di attuazione. Dal piano particolareggiato al piano operativo* (2002).

⁴⁵ For this effective synthesis, see P. Urbani, *Urbanistica consensuale. La disciplina degli usi del territorio tra liberalizzazione, programmazione negoziata e tutele differenziate* (2000).

the reconstruction or, more before, during the emergency phase should be integrated in the larger process of re-planning, but they cannot substitute the contents of a general plan (as happened with the C.A.S.E. project) or they cannot be confused or mixed up as happened in Irpinia. More generally, it's very difficult to face both the situations with the same instruments, with an unclear overlap of different levels (general plans and implementation plans) and of different objectives. It creates a confused distinction between the competences that cannot be avoided giving them to an only authority, how the Commissioner is.

The subsequent experiences tried to make their own the lessons of the past, with the slogan “not another L'Aquila”. It is what happened in Emilia Romagna, in 2016, that introduced a model of reconstruction plans with the main objective to rebuild “where it was” and a comprehensive plan (in Italian, *piano organico*)⁴⁶ that wasn't compulsory and that should define the social and economic activities that were necessary to revitalize the areas included in the reconstruction plans, with a special attention to the historic center.

Despite that, in our Country the “temptation of the Commissioner” is still strong: the earthquake of 2016 was the occasion to introduce another authority, parallel to the emergency organization and that should manage the reconstruction phase⁴⁷. According to the L. D. 189/2016, the Extraordinary Commissioner works in partnership with the Head of the Civil Protection Department, to overcome the state of emergency and facilitate the reconstruction. He had several tasks linked to the physical and economic recovery and he could adopt the ordinances necessary to exercise those powers, following an understanding with the Presi-

⁴⁶ For a general description of these plans, see T. Bonetti, *Diritto amministrativo dell'emergenza e governo del territorio: dalla “collera del drago” al piano della ricostruzione*, cit. at 31. About the “desire of Italians” to rebuild “where it was and how it was” and its real difficulties, F. Bazalgette, ‘Where It Was – but Not How It Was’: How the Sicilian Earthquake divided a Town, *The Guardian* August 30, (2018).

⁴⁷ About this Commissioner, see F. Giglioni, *Amministrazione dell'emergenza*, in *Enc. Dir.* (2013); F. Giglioni, *Funzione di emergenza e modelli amministrativi alla prova dello stress test degli eventi sismici dell'Italia centrale*, in 2 *Dir. Ec.* 505 (2018); S. Spuntarelli, *Normatività ed efficienza del sistema delle ordinanze adottato in occasione della sequenza sismica di Amatrice, Norcia e Visso*, 3 *Costituzionalismo.it* 7 (2017).

dents of the Regions (as the parts of the cabin of coordination)⁴⁸. These Presidents were Deputy Commissioners, with specific competences and responsibilities in order to the procedures for the private rebuilding⁴⁹. As the doctrine has underlined⁵⁰, this choice has created a difficult overlap with the Civil Protection system, but it is the consequence of a general trend to consider the reconstruction a part of an extended concept of emergency and a part of the of its “normalization”, as has been defined the process that has led to the creation of a permanent establishment with specific competences and powers⁵¹, in addition to the general body for the emergency management.

The presence of both these authorities was read as an “agreement between bureaucracies”⁵², useful to a more efficient answer to the problems related to the emergency and the consequent reconstruction. It could be also read as a new and more specific interest of the State for the reconstruction, that should gradually become a new administrative function, that legitimates that special authority and its competences.

The autonomous relevance of this function could be positive because it could be the basis for specific and special rules,

⁴⁸ These ordinances should respect the European laws and the general principles of the Italian law system. They also should be sent to the President of the Council of the Ministers (at. 1, par.2).

⁴⁹ The “temptation of the Commissioner” became stronger when Genova decree (L.D.109/2018) converted into law (L.130/2018). The original text of art.2, par. 2, L.D.189/2016 was modified and the agreement with the Presidents of the Regions was eliminated. According to the new text, the Head of the Civil Protection Department should only hear their opinions. The Italian Constitutional Court has declared illegitimate this article, because of its contrast with art. 117 of the Constitution and the principle of loyal cooperation, which require a specific agreement and consider the opinions insufficient (Constitutional Court, December 2, 2019, no. 246).

⁵⁰ See F. Giglioni, *Funzione di emergenza e modelli amministrativi alla prova dello stress test degli eventi sismici dell'Italia centrale*, cit. at 47, 508.

⁵¹ The same expression is used with a negative meaning, as a criticism to the trend of Italian legislature to “stabilize” the emergency, which loses its original and authentic sense. See, A. Cardone, *La “normalizzazione” dell'emergenza: contributo allo studio del potere extra ordinem del governo*, cit. at. 7. For the different meanings given to this expression, see F. Giglioni, *Funzione di emergenza e modelli amministrativi alla prova dello stress test degli eventi sismici dell'Italia centrale*, cit. at 47, 501, note 4.

⁵² This is an expression of F. Giglioni, *Funzione di emergenza e modelli amministrativi alla prova dello stress test degli eventi sismici dell'Italia centrale*, cit. at 47, 519.

avoiding the contraposition between ordinary and extraordinary discipline that sometimes is not the right perspective to observe the actions necessary for such a complex phase, like the reconstruction is. At the same time, the choice for (another) extraordinary Commissioner could not be the best solution, because it could have the risk of uncoordinated actions with the regional and local authorities, that should not be involved (or totally excluded) in the main decisions (especially if they belong to different political parts). This risk is evident at a more general overview of the last choices of the Italian Government, who has “normalized” the Commissioner as a substitute of the ordinary administration, to remediate to the last disaster which affected the Liguria Region⁵³ or as a more general way to accelerate the realization of strategic public works⁵⁴. In front of these measures, the normalization of the emergency regains its negative meaning, as an expression that describes the general recourse to extraordinary powers and the simultaneous suspension of the ordinary competences and functions.

Reacting to a disaster wasn’t easy but the myth of the efficiency opposed to the ordinary bureaucracy – that was the *leitmotiv* of the L’Aquila events and that continues to be repeated – is a dualistic perspective that could not be accepted; if Voltaire wrote his *Candide*⁵⁵ in our time, it could be the topic of one of its chapters, describing Pangloss’ optimism before the efficient Commissioners’ actions.

The urbanism under Commissioner or managed under special powers was not an efficient answer. The delays of the reconstruction and its difficulties are the proof that to rebuild is an activity that could not be ruled only by an emergency discipline; that it needs a clear assignment of competences and responsibilities between State, Region and Municipalities; that it’s necessary to guarantee the representative function of the local Authorities and to involve citizens.

The reconstruction also needs the respect of the fundamental distinction between policy and administration that the emer-

⁵³ It is L. D. 28th September 2018, no. 109; about this decree, see F. Spanicciati, *Il “Decreto Genova” quale estremizzazione della deroga emergenziale*, 1 Giorn. Dir. Amm., 63 (2019).

⁵⁴ It is L.D. 18th April 2019, no. 32, known as “Sblocca Cantieri” decree.

⁵⁵ Voltaire, *Candide or optimism*, Italian edition (2006).

agency laws had confused and eliminated; at last, the bad quality of the normative acts demonstrated that managing such events needs technical and juridical expertise, really integrated and coordinated.

This last fact is particularly evident at the analysis of the administrative procedures that disciplined the private reconstruction.

7. The private rebuilding between special rules and general principles of the administrative activity

The private rebuilding was the core of the actions managed to overcome the earthquake consequences. It influenced the implementation of the rebuilding plans, the allocations of the temporary houses, the future re-planning; above all, it has really influenced the process of the city re-birth. According to the aim of this paper, this activity should be analysed in a general perspective, to investigate if the solutions adopted for L'Aquila could be the model to face the urban emergency, because the discipline of the building activity is a relevant part of the matter "land-use planning".

In the critical situation after earthquake, there were different needs: to quickly reach the objectives, to reduce the unnecessary bureaucracy, to control the legal use of the public funds.

To reach all those goals, the ordinary legislation (the Italian consolidated text about building activity, R.P.D. 380/2001 and the regional laws) was substituted by special rules, introduced by ordinances.

The above mentioned R.P.D. 380/2001 provides three categories of building activity and three different disciplines: the free building activity (for the minor interventions), the building activity that could be started with a starting activity notice (the Italian *segnalazione certificata inizio attività*, s.c.i.a.) for the interventions mentioned in art. 22, and the activity that should be allowed by an administrative act, the building permit (art. 20).

The ordinances adopted another criterion because they distinguished the procedures on the basis of the entity of damages, from the minor level ("A") to the highest ("E" and "F"); these pro-

cedures aimed to receive the funds, as the preliminary condition to start the activity⁵⁶.

For minor damages, ordinance no. 3778/2009 introduced a simplified scheme: owners should notify to the Mayor for starting of the activity, with all the elements necessary to identify the building to repair, the damages and a cost estimate; the works could be started immediately, but the owners received the funds when they finished, after the notification of their completion. The procedure was more complex when damages were of level B or C. In these cases, the ordinance no. 3779/2009 introduced an ordinary administrative procedure, managed by the "Municipality" and the Delegate Commissioner; if the intervention involved some structural parts of the building, the authorization of the Civil Engineering Office (in Italian, *Genio civile*) was necessary. Ordinance no. 3790/2009 disciplines the procedure for the "E" level damages.

This system caused many delays and it's one of the causes of the negative opinion about the L'Aquila experience and the reason to find other solutions, to satisfy different (and sometimes opposite) needs: an efficient control on expenditures, the prevention of illegal episodes and a rapid result.

For the "B" and "C" level damages, the original text of the ordinance fixed a term of thirty days for the admission to the contribution; once expired that term, the application could be considered accepted and the silence was considered a silence - absence. This term was extended by the ordinance 3803/2009, it became 60 days.

In case of E level damages, the original term was 60 days, without the provision of a silence-absence; in case of delay, the silence was considered a silence - denial and the owners should only stand an administrative court, to obtain a sentence which condemned public administration to adopt the act, ex art. 31, Lgs. D. 104/2010 (the Italian code of administrative process).

The action against the silence is considered the way to give an effective judicial protection against the administrative inac-

⁵⁶ See the analysis of the procedures also in A. Scaravaggi, *I procedimenti amministrativi per gli interventi edilizi sugli immobili danneggiati dal sisma*, in P. Mantini (ed.), *Il diritto pubblico dell'emergenza e della ricostruzione in Abruzzo* (2010). Also see F. Oliva, G. Campos Venuti, C. Gasparri, *L'Aquila, ripensare per ricostruire*, cit. at 34, 40.

tion⁵⁷. Briefly, when the Court admits the complaint filed by the applicant, it states a sentence of condemnation to adopt the administrative act. If the administrative authority continues to be inactive, the Court appoints a Commissioner *ad acta*, who substitutes the administration and adopts the act.

The great numbers of recourses against the administrative delays, created a judicial paralysis because the Commissioner *ad acta* didn't implement the sentences in time. For that reason, a State decree, so-called *Sblocca Italia* (L. D., 133/2014, art. 4, par. 8^{sexies}), introduced a term of 180 days to conclude the procedure; it also disciplined the Commissioner *ad acta*'s activity and it stated that he/she should respect the order of priority that the Municipality established. It means that if the Court admitted the complaint, the Commissioner should respect the order established by the administrative authority and the judicial remedy couldn't be a way to take precedence over the other applicants.

When the ordinances were adopted, they stated the general competence of the "Municipality", which had the support of three different authorities, for the specific needs of the preliminary activity. It was the so-called "supply chain" (in Italian, *filiere*) that managed the preliminary investigation: *Fintecna* gave its contribution for the administrative issues, *Releas* and *Cineas*, two academic consortia, carried out the technical preliminary investigation. Only when law 134/2012 was in force, a special department was created which managed the re-building files, thanks to an extraordinary public examination. That fact accelerated the administrative activity but it wasn't sufficient; for example, it didn't solve the coordination problems between this Department and the Civil engineering Office, that became of the relevant problem of private rebuilding.

The procedure delays showed that a special discipline couldn't be the only instrument for an efficient and effective rebuilding. The reconstruction process needed specific, competent and coordinated departments, to face the big number of files. That is what emerges from the sentences of the Italian administrative judges, when they decided the appeals against the inaction of the administrative authorities. In front of the complaints for the si-

⁵⁷A. Giusti, *Il contenuto conformativo della sentenza del giudice amministrativo* (2012).

lence-denial, the Municipality always opposed that it wasn't responsible for the delays and it hadn't the passive legitimation; according to its defence, the authorities which managed the preliminary investigation were responsible for the delays; the special rules allowed to not respect the terms, as the general law about administrative procedure usually demands. The Administrative Regional Tribunals always refused that thesis and they underlined the preeminent role of the Municipality, which was considered "*dominus*" of the preliminary investigation and it should do everything necessary to manage the procedure and to conclude it in time. More specifically they focus the attention on the inability to manage the "ordinary" instruments disciplined by the general law about the administrative procedure, that the special rules couldn't overcome⁵⁸. They also stated the administrative duty to give private citizens the information concerning their application, the status of the procedure and the reasons for the delays. The judges used severe words when they stated that the urgency and the extraordinary nature of the interventions couldn't be like an "allowance" for the administrations, thanks to which they couldn't respect the time to conclude the procedures; on the contrary, it required a strict observance of the timetable, to "normalize" the citizens' lives.

Another element that increased the bureaucracy was the introduction of competitive procedures, that private owners should promote to select the designers and the construction company. Despite a special Decree (P.C.M.D. 4th February) qualified the funds given to rebuild "private indemnities" and not "public sources", this selection was considered a solution to avoid and prevent corruption and mafia infiltrations; it was also considered a way to support local companies, in a such a critical economic situation.

At an overall view of the rules concerning private rebuilding, it seems that the negative elements cannot be found only in a system of special legislation that didn't simplify and didn't ensure the certainty of the rules; one of the most relevant cause of the delays was the inability to administrate and the little awareness that

⁵⁸ See Administrative Tribunal of Abruzzo - L'Aquila, April 11, 2013, no. 331; Administrative Tribunal of Abruzzo - L'Aquila, October 6, 2012, no. 636; Administrative Tribunal of Abruzzo - L'Aquila, September 12, 2012, no. 555 and no.556; Administrative Tribunal of Abruzzo - L'Aquila, January 18, 2011, no. 27.

the legislative solutions aren't enough to manage an emergency and its subsequent phase but a specific and competent administrative organization is necessary.

If we read the disciplines of private rebuilding adopted for the next experiences (Emilia Romagna, Marche and Umbria), we can find similar schemes and a gradual attempt to simplify the procedures, to arrive quickly to the result. They distinguish the interventions and their discipline on the basis of the damage level: minor interventions usually can be started when the Special reconstruction office has approved the application for the contribution. In case of severe damages, a specific authorization to start is necessary; the application for the contribution was considered or a starting activity notification (the Italian *s.c.i.a.*) or a request for a building permit, according to consolidated text about building activity. To avoid corruption and to give the same opportunity to all the companies, the enterprise should be chosen with a competition among three companies which are included in a special white list, the "Anti-mafia register" (in Italian, *Anagrafe anti-mafia*)⁵⁹.

Despite that, the chronicles about the reconstruction often report critical situations, because of the delays; it seems that the interest put on special legislation has made it prone to forget the culture of administrative decisions and that the emergency has allowed a minor attention on some fundamental rights and principles that characterize the administrative procedure⁶⁰.

From the sentences of the administrative regional tribunals emerges the necessity to respect, even in the circumstances of earthquake reconstruction, the principles of the due process of law⁶¹, in both the directions of the administrative activity and its organization. Surely, it should be adapted to the specific circumstances and coordinated with the special procedures; but it remains a fundamental guarantee in front of the public powers, especially in "a context that doesn't weaken, rather aggravates, the total inertia of public powers"⁶².

⁵⁹ See art. 30, L.D. 189/2016.

⁶⁰ M. Cammelli, *Rischio sismico, territorio e prevenzione*, 2 *Aedon* (2017) underlines the fundamental role of a "strict (and for this reason unusual) ordinariness" as an efficient policy of prevention. Also see, M. Cammelli, *Italia e Rischio Sismico. La sfida della gestione ordinaria* 2 *Il Mulino* 300 (2018).

⁶¹ See, G. della Cananea, *Due Process of Law beyond the State* (2016).

⁶² Administrative Tribunal of Abruzzo - L'Aquila, September 12, 2012, no. 556.

8. The difficulties of the public reconstruction. A brief analysis

There is a website, called *Opendata ricostruzione*⁶³, that shows the data of the reconstruction after the earthquake of 2009; a similar website monitors the reconstruction in Emilia Romagna⁶⁴; if we compare both the data about private and public reconstruction, the result is the same: despite the difficulties, private reconstruction is at one stage more advanced than the public one; if we read the singular data, we can discover that the percentages are not increasing and the funds effectively granted are less than which are allocated. It means that some fundamental infrastructures, like schools or other public offices, are still in temporary placements and their reconstruction hasn't started yet. Citizens are gradually returning to their houses but the public city, that is essential to rebuild the community and its life, is still missing.

The current system about public contracts, disciplined by the Italian contracts code (Legislative Decree no. 50/2016) is blamed for this *impasse*; the principle of public competition, the time necessary to award public contracts and the high risk of corruption are judged the main obstacles for the public reconstruction. In front of those difficulties, a derogatory system has been considered the easiest way to find a solution; more specifically, ordinary procedures are substituted by negotiated procedures, without publication of a contract notice, apparently without any contrast with the European rules.

According to Directive 2014/24 EU, in recital no. 50, those negotiated procedures “should be used only in very exceptional circumstances”, because of their “detrimental effects on competition”. This exception should be limited to cases where publication is either not possible, “for reasons of extreme urgency brought about by events unforeseeable for and not attributable to the contracting authority”. As a consequence of that prevision, art. 32 Dir. 2014/24 EU permits the use of the negotiated procedure without prior publication, “in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation

⁶³ See <http://opendataricostruzione.gssi.it/>

⁶⁴ See <https://openricostruzione.regione.emilia-romagna.it/>

cannot be complied with". It also states⁶⁵ that "the circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority".

These European provisions have been implemented by the Italian code, in art. 63. Thanks to this article, in front of extraordinary events, usually the Italian legislator qualifies those facts of "extreme urgency" (in Italian, *estrema urgenza*), to award the contract without an ordinary procedure. The Italian public contracts code has introduced another article to manage emergency situations. It's art. 163, for the "highest urgency" (in Italian, *somma urgenza*) and civil protection contracts.

The law which delegated the Government to adopt the contracts code⁶⁶, specified that the discipline of art. 63⁶⁷ has been introduced to guarantee the transparency also of these procedures, avoiding corruption and conflicts of interests. It doesn't aim to protect the juridical goods connected to emergency situations; in fact, this is the objective of art. 163⁶⁸, that should be a discipline for "singular situations, connected to particular needs related to emergency events".

This article should have filled the legislative gap that emerged after the disasters that affected our Country; it should introduce a discipline useful to face the events immediately related to emergency and it was the only exception admitted to the general prohibition of derogatory procedures. Implicitly, it confirmed that the ordinary instruments should be used for all the other affairs, stopping the praxis of special laws, for specific events or singular procurement.

Currently, art. 163 disciplines two different cases: the first one, the hypothesis of highest urgency works, that doesn't allow any delay, because it is necessary to protect private and public

⁶⁵ L. 28th January 2016, no. 11, art. 1, par. 1, let. Q), point 1.

⁶⁶ L. 28th January 2016, no. 11, art. 1, par. 1, let. I).

⁶⁷ See A. Musio, *Art. 63 – Uso della procedura negoziata senza previa pubblicazione di un bando di gara*, in G. Esposito (ed.), *Codice dei contratti pubblici* (2017); for another comment, R. Damonte, M. Bersi, in R. Garofoli, G. Ferrari (eds.), *Codice dei contratti pubblici* (2017).

⁶⁸ See G. Greco – C. Massa, *Art. 163 - Procedure in caso di somma urgenza e protezione civile*, in G. Esposito (ed.), *Codice dei contratti pubblici* (2017); see also, R. Ravasio, in R. Garofoli, G. Ferrari (eds.), *Codice dei contratti pubblici* (2017).

safety⁶⁹; the second one, for every contract (works, services and supplies) related to civil protection events, according to the list included in art. 7 of the Italian Civil Protection code. The original text of art. 163 didn't include the entire list of the civil protection events but only the events in art. 7, let. c); now instead, this procedure can be used also for events that should be faced in an ordinary way, if the interventions are urgently necessary.

This modification has deeply changed the original purpose of the article; for this reason, the State Council⁷⁰ has deeply criticized the current text, because it has extended the boundaries of the “highest urgency” and there is the risk that it becomes like a “parachute – article”, for interventions that could be scheduled but the actual circumstances made urgent, like an extraordinary event.

Currently – also because the relationship between art. 63 and art. 163 is not so clear – art. 63 and the “extreme urgency” is the most frequent legislative solution to accelerate the awarding of public works contracts.

Usually, the administrative authorities should evaluate if the requirements necessary to apply the rule exist. But sometimes, it's not easy to distinguish between the interventions that are an immediate answer to the emergency and those which are necessary to return to the ordinary life. The reconstruction offers many examples: shoring works are necessary to avoid other collapses but could be also considered the starting point of the rebuilding; preparing temporary houses could be a first aid measure but also the first phase of reconstruction⁷¹. More generally, when a big quantity of ordinary administrative activity should be managed, it could become an extraordinary event for the administration. In front of these situations, it's difficult to decide which is the correct procedure and the line between the blameless mistake and an illegitimate choice is not so clear; the fear of a future confrontation with the Courts of auditors, with the penal ordinary tribunals or with the Anti-corruption authority become serious obstacle for a rapid decision.

⁶⁹ There is another specific discipline in the art. art. 148 par. 7 for cultural heritage.

⁷⁰ See, Council of State, Special committee, March 22, 2017 no. 782.

⁷¹ See, F. Giglioni, *Funzione di emergenza e modelli amministrativi alla prova dello stress test degli eventi sismici dell'Italia centrale*, cit. at 47, 515.

To avoid the *impasse* and the over - deterrence effect, the legislator substitutes itself to the administration and it makes the evaluation of the requirements necessary to apply the code. We have many examples of this evaluation *ope legis*: L.D. 189/2016, in art.14, par. 3bis and 3bis1 disciplines the public reconstruction and states that the interventions disciplined by those articles are considered of “highest urgency”; the last decree adopted after the Genova disaster, which also contains some specific rules about the earthquake that affected some cities in Southern Italy in 2017, defines the public works of “highest urgency”.

This forcing of the rule shows that the risk of a contrast with the European discipline is high and that the synthesis of extreme urgency is not always adequate to balance the different interests involved in the reconstruction phases.

If the provisions of the public contracts code are not adequate⁷², the same judgment can be expressed about the specific discipline of the Civil protection code.

Law 30/2017 delegated the Government to adopt a decree which could guarantee certain and effective statements concerning the public procurement for the Civil Protection organization and for the emergency situations, also involving the local communities and supporting the economy of the affected areas. Leg. D. 1/2018 doesn't have a specific discipline about contracts. According to the Italian State Council, it isn't well connected with the Lgs. D. 50/2016 and, more generally, it has not implemented the part of l. 30/2017 which demanded to regulate the procurement procedures when the ordinary concrete situation permitted to respect the European principles and the public contracts code⁷³.

Probably, this code has been another missed opportunity to introduce a steady discipline, special but not derogatory, useful to manage all those situations that are not qualified as “extreme” or “highest” urgency but need a “moderate competition”, to aim the specific objectives related to an after-emergency event, when a

⁷² After the Genova disaster, the Department of Civil Protection issued an ordinance (20.08.2018) that introduced a specific and derogatory discipline about public contracts and that was considered a first step for a future model of emergency -public contracts. See, A. Arona, *Codice appalti, Protezione civile-Regioni: “Deroghe automatiche nelle emergenze”, Il sole 24 ore, edilizia e territorio* (2018).

⁷³ See the Council of State, Consultative Division for legislative acts, December 19, 2017, no. 2647 (par. 5).

critical situation still exists and it couldn't be managed with the general procedures.

This idea of “moderate competition” doesn't seem contrary to the European principles. In some matters the principle of competition is moderated by social, environmental and regional development factors or to protect the most vulnerable members of the society (it happens for the awarding of public road and rail passenger services⁷⁴); more generally, the European system admits a moderate competition when there are overriding reasons relating to the public interest. As we can read in the recital no. 40 of Bolkestein Directive, the Court of Justice has developed this concept⁷⁵, it covers many grounds⁷⁶ “and may continue to evolve”.

9. Final remarks

An earthquake or, more generally, a disaster event changes the life of a city and its community; in front of the emotional reaction of the entire Country, the State has a big responsibility, especially when the emergency ends and it's necessary to support all those activities that are necessary to return to a daily life. The different events happened in our Country have contributed to create an efficient system to manage the emergency phases but have also showed the inability to regulate and administrate the subsequent stages. The relationship between urban law, emergency and reconstruction has been translated in the prevalence of the emergency, whose boundaries have been expanded up to include the activities necessary to the social, economical and physical rebuilding. All those processes have been ruled by a derogatory discipline and the Commissioners have substituted a large part of the ordinary administration. This derogation system had many negative consequences: it doesn't give certainty about the law that should be applied⁷⁷, it multiplies the decisional centres and, as the administrative sentences about private reconstruction in L'Aquila showed, risks absolving the ordinary authorities from their re-

⁷⁴ Reg. (CE) no. 1370/2007.

⁷⁵ In its case law in relation to Articles 43 and 49 of the Treaty.

⁷⁶ A list is in the recital no. 40.

⁷⁷ For this paradox, of a derogatory discipline more complex than the ordinary one, see also S. Spuntarelli, *Normatività ed efficienza del sistema delle ordinanze adottato in occasione della sequenza sismica di Amatrice, Norcia e Visso*, cit. at 47.

sponsibilities. On the other side, the ordinary system is not able to reconcile the different reconstruction demands of efficiency, rapidity, competition and legality.

In a Country such as Italy, where the culture of prevention has been lacking for many years and still struggles to establish itself as a fundamental principle of the administrative activity⁷⁸, it is necessary to improve it⁷⁹ as the main solution against the “normalization” of the emergency. It will probably reduce the derogations or the frequent abuse of the provisions of “highest urgency” or “extreme urgency”.

The analysis carried out in this article shows two other elements that could be necessary to face the effects of emergency on the land use planning.

The first one is the urgency of a good and organized administration, with an efficient structure and able to carry out the procedures. It emerges comparing the different experiences of Friuli and Irpinia in the past but also observing the delays of the private reconstruction in L’Aquila, where the ordinary instruments of the administrative activity failed, as the Administrative Tribunals have denounced.

The second one is the possibility of identifying a different and “new” administrative function, related to the emergency or, *rectius* to the after-emergency events, that allows to introduce a special (but not derogatory) system, more appropriate than the general discipline to balance the different needs of those situations. The evolution of the model of the reconstruction plans could be an example; another one could be the solution of a “moderate competition”, for the awarding of public contracts, which could stop the abuse of negotiated procedure without prior publication, ex art. 63 or 163 of the Italian public contracts code.

⁷⁸ About this, see A. Fioritto, *Risk Government: Prevention as an Ordinary Function of Administration*, in L. Caravaggi, O. Carpenzano, A. Fioritto, C. Imbroglini, L. Sorrentino, *Ricostruzione e governo del rischio* (2013). Also see, A. Police, *L'emergenza come figura sintomatica di sviamento dalla funzione pubblica*, 30 *I Diritto e processo, quaderni*, 611 (2019).

⁷⁹ E. Zanchini, *La cura del territorio oltre l'emergenza*, 2 *Il Mulino* 322 (2018).

CHANGES IN THE LEGAL SPHERE: RETHINKING TRANSPARENCY

*Michele Cozzio**

Abstract

The development of digital technologies and networks is changing social and economic frameworks with repercussions that involve the entire legal sphere. The changes will affect whole systems of models and rules and will lead to processes of legal evolution. The effects of these transformations are viewed from the perspective of transparency with respect to relationships; be they interpersonal, contractual or with the public authority. There are instances where, due to their complexity, the mechanisms and workings of these new technologies are unknowable to the legal systems whose job it is to maintain the changing needs for protection, especially when these technologies affect the more important aspects of public life. In this new digital landscape, the need to guarantee fundamental rights and freedom (*in primis* the dignity and right to self-determination of the individual) gives transparency renewed importance, to the point that it may be necessary to reevaluate its role in the ambit of common goods. In this context, with the analysis of various approaches, we would like to offer some subjects for reflection and suggest some paths of research that could be followed using legal and other instruments.

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1. Digitalization of society and pervasiveness of the changes

The 1970s marked the end of the industrial society and the start of the *information society*¹. The latter of the two is characterized by the production non-material goods and the increasing ease with which they can be transferred.

Over the same period, innovation in information technology² together with the rapidity of its diffusion on a global scale started a second wave of changes. These changes quickly affected all social and economic aspects of society³. Today the convergence of three powerful technological trends is dictating

¹ The expression stems from the *post-industrial society*, concept developed (1973) by Daniel Bell, sociologist, professor at Harvard University (*The Coming of Post-Industrial Society: A Venture in Social Forecasting* (1973)). With the Information Society we refer to a vision of post-industrial society, in which the technological and information paradigm prevails, with the production of non-material services and the infrastructures for their distribution. See also N. Elkin-Koren, N. Weinstock Netanel (ed.), *The Commodification of Information* (2002); G. Sirilli, *Società dell'informazione*, in *Enciclopedia della Scienza e della Tecnica*, Vol. VIII, 422 (2008); V. Zeno-Zencovich, *Diritto di informazione e all'informazione*, in *Enciclopedia Italiana, XXI Secolo, Norme e idee*, 301 (2009), the Author shows the defining characteristics of the information age: the availability of information, its circulation the use made of it and the importance this has on society.

² This refers to the advent of the personal computer and later, with the development of the World Wide Web, to social networks, mobile devices (so-called web 2.0), the cloud, artificial intelligence and the emergence of the digital economy(cd. web 4.0). See IT Media Consulting, ASK Research Center by Bocconi University, *L'economia dei dati. Tendenze di mercato e prospettive di policy* (2018), available online; L. Floridi, *The Fourth Revolution. How the Infosphere is Reshaping Human Reality* (2014).

³ J. Tirole, *Économie du bien commun* (2016) highlights that the digitalization of society is governing the economic and social changes of the XXI century and reforming every aspect of human activity; R. Baldwin, *The Great Convergence. Information Technology and the New Globalization* (2016). See also European Commission, *A Digital Single Market Strategy for Europe*, COM/2015/192 and the accompanying Commission staff working document, *Analysis and Evidence*, SWD/2015/100, which contains the references for the factual information and more detail on the nature of the challenges addressed and evidence in support of the EU strategy. See, more in general, European Commission, *Towards a Thriving Data-Driven Economy*, COM/2014/442; Id., *Digitising European Industry Reaping the full benefits of a Digital Single Market*, COM/2016/180; Id., *Building a European Data Economy*, COM/2017/9; Id., *Towards a Common European Data Space*, COM/2018/232; IDC, Open Evidence, *European Data Market. Final Report* (2017). For a particular perspective see A. Baricco, *The Game* (2018).

how society develops: (i) internet and access to information, (ii) mobile devices with networks that offer permanent and ubiquitous connectivity, (iii) *cloud computing* with its computational power and dislocated distribution. Information, connectivity and computational power are showing themselves to be the principal sources of production of our times. As well as their convenience, access to them is becoming ever cheaper and they exist without territorial or physical limitations.

The after-shocks of these events are easily demonstrated: just in the European Union the digital transformation of manufacturing industry is expected to bring “benefits” worth euro 1.250bn by 2025⁴; in England business in the Sharing Economy is expected to grow by 60% by 2025 (euro 140bn. p.a.)⁵; already by 2020 90% of all jobs will require basic digital skills⁶. The biggest effects will be in the USA and even more so in South East Asia where the greatest use of digital technology is concentrated⁷.

⁴ Science and Technology Options Assessment (STOA), *Ethical Aspects of Cyber-Physical Systems. Scientific Foresight study* (2016), Annex 1, 36, and there the references, available online.

⁵ R. Vaughan, R. Daverio, *Assessing the size and presence of the collaborative economy in Europe* (2016), study for European Commission (DG GROW); IDC, Open Evidence, *European Data Market*, cit.; IT Media Consulting, ASK Research Center by Bocconi University, *L'economia dei dati*, cit. at 71-92; see also M. Naldi, *Prospettive economiche dell'Intelligenza Artificiale*, in F. Pizzetti (ed.), *Intelligenza artificiale, protezione dei dati personali e regolazione* (2018).

⁶ European Parliament resolution of 16 February 2017 with *recommendations to the Commission on Civil Law Rules on Robotics* (2015/2103)(INL); also EP resolution of 12 February 2019 on a *Comprehensive European Industrial Policy on Artificial Intelligence and Robotics* (2018/2088)(INI); McKinsey Global Institute, *Disruptive technologies: Advances that will transform life, business, and the global economy* (2013). See also the proposal for an European Regulation regarding the *Digital Europe Programme for the period 2021-2027*, COM/2018/434. The proposal aims to provide a spending instrument that is tailored to reinforcing Europe's capacity in high performance computing, artificial intelligence, cybersecurity, advanced digital skills, ensuring their wide use across the economy and society. The financial envelope for the implementation of the Programme shall be euro 9,194 billion (art. 4).

⁷ See the report *Digital in 2019. Essential Insights Into How People Around The World Use Internet, Mobile Devices, Social Media, and Ecommerce*, Jan. 2019. The data comes from 239 States and are based on information taken from the *GlobalWebIndex*, *GSMA Intelligence*, *Statista*, *Akamai*, *Google*, *StatCounter*, *Ericsson*, <https://www.slideshare.net/wearesocial/digital-in-2018-global-overview-86860338>; Accenture Institute for High Performance, Oxford Economics, *Digital Density Index. Guiding digital transformation* (2015).

The force and rate of change are overwhelming and it is difficult to grasp the scale, in its entirety, of the effects of these developments. It is not even easy to understand what social changes they have already brought⁸ both with respect to personal relations (especially those to do with privacy and the diffusion of personal information) and with respect to other established aspects of society.

Such dynamism will inevitably have repercussions on the whole legal system: where notions, taxonomy, and whole classifications that, although consolidated, will need to be rethought. New methods will have to be formulated to deal with new issues and new models developed to cover social and economic changes.

Furthermore, what characterizes these changes is the rapidity with which they occur.

The speeding up of social and economic life (and with it the need for new rules, "*donc le droit s'est mis à courir*")⁹ due to technology, is one of the defining factors of modern culture¹⁰. In the past, the evolution of legal systems was the result of slow processes with changes occurring over generations. Now, in the space of a few years, we see revolutionary systemic changes not just in systems and models but also in specific legal solutions.

They are processes that don't follow predefined patterns and schemes, and are not synchronized between them¹¹.

There are sectors where these changes happen sooner and with greater effect. Notably those with a higher level of

⁸ T. Hylland Eriksen, *Overheating. An Antropology of Accelerated Change* (2016); see also M. Hindman, *The Internet Trap. How the Digital Economy Builds Monopolies and Undermines Democracy* (2018).

⁹ F. Ost, *Le temps virtuel des lois postmodernes ou comment le droit se traite dans la société de l'information*, in J. Clam-G. Martin (ed.), *Les transformations de la regulation juridique* (1998); see also P. Gérard, F. Ost, M. Van De Kerchove (ed.), *L'accélération du temps juridique* (2000).

¹⁰ H. Rosa, *Alienation and Acceleration: Towards a Critical Theory of Late-Modern Temporality* (2010).

¹¹ With reference "alla complessità come dimensione normale della giuridicità contemporanea" (to "complexity being a normal feature of contemporary lawmaking") see A. Gambaro, *Le fonti del diritto inglese. Riflessioni a margine della rinnovata edizione di un classico della letteratura comparatistica italiana*, in *Annuario di diritto comparato e di studi legislativi* 2017, 881 (2017); *ibidem* P. Rossi, *Le ambivalenze della globalizzazione giuridica: diversificazioni giuridiche e pervasività dell'informazione*, 499.

technological input are more dynamic and are subject to models and rules which soon become obsolete. These therefore are the most interesting areas on which to experiment new legal models, rules and solutions.

To take a few examples, there is *Facebook*, accessible from most devices, it started at the beginning of the Millenium and after only a few years it had 2 billion users with over 45 billion messages being exchanged daily¹². Then there is Google, with all its services, (*Google, Android, YouTube, Gmail, Google Maps and other services*) which has grown, in fifteen years, to be the highest value company in the world. Just as impressive are the commerce platforms such as *eBay, Amazon* and *Alibaba* in Asia, which had the biggest ever share flotation at US \$ 25bn¹³. Finally, in general 90% of internet services supplied by search engines, social media, electronic commerce, *app store*, etc. have only been present since 2013¹⁴.

These impressive numbers, although significant, do not really illuminate us as to the capacity of these instruments to redefine the social, economic or legal aspects of society.

The possibilities that they offer to transmit and receive data and information in any place instantly have changed and continue to change behavior, habits and attitudes: a typical example is the way that the differentiation between peoples' public life and private life is disappearing.

The unpredictable and paradoxical results of this are succinctly described in the expression *vetrinizzazione sociale* (*social showcasing*)¹⁵. This reflects the way in which every aspect of the

¹² Facebook as with other social networks is a technological platform which allows people to show themselves, with names, and their photos, their tastes, their friends, the events they are involved in and the groups they are part of. In January 2007 Facebook and its subsidiaries *Instagram, WhatsApp* e *Messenger* registered a total of 4,37 billion users (report *Digital in 2017. Global Overview. A collection of Internet, Social Media, and Mobile Data from Around The World*), in January 2019 just the Facebook platform revealed that it had 2.271billion (report *Digital in 2019*, cit. at 9).

¹³ P. Erisman, *Alibaba's World* (2015). For a global overview of the e-commerce markets, see <https://www.remarkety.com/global-ecommerce-trends-2016>, published June 18, 2017.

¹⁴ European Commission, *A Digital Single Market Strategy for Europe*, cit. at 3.3.1.

¹⁵ V. Codeluppi, *La vetrinizzazione sociale. Il processo di spettacolarizzazione degli individui e della società* (2007).

life of a person (physical, mental, public, private etc.) is subjected to the need to be posted and shared¹⁶. So too with sexuality which has, in many cultures, always been the strongest most solid and reliable of human ties and which represents the area of secret intimacy and greatest discretion¹⁷.

No less is the shock wave that has overwhelmed the sector that controls, moves and uses the data regarding habits, behavior and personal tastes. This is due to the massive growth in the number of sources (tens of billions by 2020)¹⁸ not only generating but transmitting data through the digital world coupled with the increase in computing power needed to assimilate and elaborate it into usable information¹⁹.

The technological advances highlight the difficulties that regulatory models (and most in general, the legal formants) have in attaining the internationally²⁰ shared goal of ensuring that everyone has the right to control the flow of their own private data and information²¹.

¹⁶ J. Palfrey, U. Gasser, *Born Digital. Understanding the First generation of Digital Natives* (2008). See also Z. Bauman, D. Lyon, *Liquid Surveillance. A conversation* (2013), the Authors state that for the new generations social networks are the normal way to define their identity and their status; M. Aime, A. Cossetta, *Il dono al tempo di internet* (2010).

¹⁷ A. Giddens, *The Transformation of Intimacy. Sexuality, Love, and Eroticism in Modern Societies* (1992); P. Paul, *Pornified. How Pornography Is Damaging Our Lives, Our Relationships and Our Families* (2005); B. McNair, *Striptease Culture. Sex, Media and the Democratisation of Desire* (2002).

¹⁸ IT Media Consulting, ASK Research Center by Bocconi University, *L'economia dei dati*, cit., 47-48.

¹⁹ See V. Mayer-Schönberger, K.N. Kenneth, N. Cukier, *Big Data: A Revolution That Will Transform How We Live, Work, and Think* (2013).

²⁰ See *Fair Information Practice Principles* (FIPPs) elaborated in the U.S.; OCSE, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, published in 1980 and revised in 2013; Council of Europe, *Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data*, no. 108 in 1981. In the UE the protection of personal data is a fundamental right (art. 8, para. 1, *Charter of Fundamental Rights of the European Union*; art. 16, para. 1, *Treaty on the Functioning of the European Union*).

²¹ See G. Pascuzzi, F. Giovannella, *Dal diritto alla riservatezza alla computer privacy*, in G. Pascuzzi (ed.), *Il diritto dell'era digitale* (2016). The authors observe that the digital revolution has brought changes to the notion and content of the right to privacy: no longer the right to be left alone but the right to control ones own information. See also B. Schermer, *The Limits of Privacy in Automated Profiling*, 1 *Computer L. Sec. Rev.* 27, 45-52 (2011); L. Floridi (ed.), *Protection of*

In particular what emerges are the inadequacies of the solutions of the two main legal systems. The European system with its laws and decrees based on personal data protection and the US system with its greater emphasis on a free market with less rigorous legislation.

The inadequacies show themselves not just in specific solutions but in the whole architecture on which these two systems are built, which is centered around the definition of what is personal data and the protection of its owner²².

As already mentioned there is a tendency to share personal information (private or not) voluntarily on social media via mobile devices (smart... -phone, -watch, -car, -glasses, etc.) added to this is the *Internet of Things (IoT)*, machines with their own connections to the web. These all generate enormous and growing amounts of data (*Big Data*) that can be stored and processed. Using psychometric and re-identification techniques this data can then be used to gather information disseminated around the web in order to build a personal profile that can be used to predict and manipulate the behavior of individuals or groups. All this can be done in the space of milliseconds²³.

information and the right to privacy. A new equilibrium? (2014); A. Tamò-Larrieux, *Designing for Privacy and its Legal Framework. Data Protection by Design and Default for the Internet of Things* (2018); F. Pizzetti (ed.), *Intelligenza artificiale, protezione dei dati personali e regolazione* (2018).

²² One of the first academics to hypothesize the need to give up some types of definitions of personal data see P. Ohm, *Broken promises of privacy. Responding to the Surprising Failure of Anonymization*, 57 UCLA L. Rev. 1701 (2010). For some of the Italian authors on this subject, see A. Principato, *Verso nuovi approcci alla tutela della privacy: privacy by design e privacy by default settings*, 1 *Contratto e impresa / Europa* 197-229 (2015); A. Mantelero, *Riforma della direttiva comunitaria sulla data protection e privacy impact assessment, verso una maggiore responsabilità dell'autore del trattamento?*, 1 *Dir. inform.* 145-153 (2012); R. Ducato, *La crisi della definizione di dato personale nell'era del web 3.0*, in F. Cortese, M. Tomasi (eds.), *Le definizioni nel diritto* (2016); A. Mantelero, *Rilevanza e tutela della dimensione collettiva della protezione dei dati personali*, 1 *Contratto e impresa / Europa* 141 (2015); R. Caso, F. Giovanella (eds.), *Balancing Copyright Law in the Digital Age. Comp. Persp.* (2015).

²³ W. Christl, S. Spiekermann, *Networks of Control. A Report on Corporate Surveillance, Digital Tracking, Big Data & Privacy* (2016). See also A. Mantelero, G. Vaciago, *The "Dark Side" of Big Data: Private and Public Interaction in Social Surveillance*, 1 *Computer L. Rev. Int'l* 161-169 (2013); A. Greenfield, *Radical Technologies. The Design of Everyday Life* (2017); E. Pellecchia, *Profilazione e decisioni automatizzate al tempo della black box society: qualità dei dati e leggibilità*

In spite of warnings from academics (Lessig, Bauman, Lyon, Rodotà et al.), alarmist press articles on leaks (*Datagate* with Edward Snowden, Cambridge Analytica and Facebook) and cinema dramatics; the outlines of a consolidation, at juridic levels, is emerging, with Court decisions and orders from regulatory bodies being pronounced. (CJUE, C-362/14, *M. Schrems*; EC n. 39740/2017, *Google Search*; Commission Nationale de l'Informatique et des Libertés n. 1/2019 *Google LLC*; Supreme Court of Canada 34/2017, *Google Inc. v. Equustek Solutions Inc.*).

Most of the changes, moreover, do not have well defined boundaries and even established definitions are being overwhelmed. If we consider the subject of property law (goods & assets), which is one of the most important legal areas, we note that the impact of the new technologies is calling into question not just taxonomic classifications but whole areas of the complex and structured theory of property. The reasons can be traced to the emergence of economies based on intangible (digital) goods. This aspect - intangibility - has been recognized and valued even in the remotest of civilizations (e.g. *res incorporales*) but no one ever imagined that it could attain the potential value that it has today.

The consequences are many and nearly always more complicated than most discussions would lead us to believe. Just think of the property law models that cover “existing material goods that have been digitized (dematerialized)” as well as new models that cover “those (digital goods) that did not exist before”²⁴.

Other questions arise from the link between intangible goods and knowledge as a common good²⁵, especially when

dell'algoritmo nella cornice della responsabile research and innovation, 5 Le nuove leggi civili commentate 1209-1223 (2018); T. Cerquitelli, D. Quercia, F. Pasquale (eds.), *Transparent Data Mining for Big and Small Data* (2017); M. Moore, D. Tambini (eds.), *Digital Dominance. The Power of Google, Amazon, Facebook, and Apple* (2018). With a sociological approach, for all D. Lyon (eds.), *Surveillance as Social Sorting. Privacy, Risk, and Digital Discrimination* (2003); Id., *Surveillance Studies: An Overview* (2007), where the Author defines the concept of “surveillance in the digital age”.

²⁴ A. Gambaro, *I beni*, in A. Cicu, F. Messineo, L. Mengoni (eds.), *Trattato di diritto civile e commerciale* (2012).

²⁵ Knowledge meant as “la risorsa fondamentale ai fini delle produzioni più avanzate e quindi la risorsa sia individuale che collettiva più importante ai fini dello sviluppo”, A. Gambaro, *I beni*, cit. at 36-37.

trying to identify which property law frameworks apply (eg. copyright law or open source law). This may lead to an overhaul in the way we think about and how we discipline the subject of property²⁶.

The protection offered by the legal system for intellectual property is based on the need to encourage authorship and invention. This view, however, has been shaken by the processes of digitalization (dematerialization) which now allow for this new property to be copied and transmitted at practically no cost. This makes it difficult for any author or owner to enjoy the full rights to their ideas.

This has led to enormous²⁷ increases in the levels of legal protection through the widening of the categories to be protected as well as extensions to the scope and period of protection. The result is reduced societal benefits from work and this is hard to justify considering the whole point of protection is to incentivize intellectual creativity.

In spite of this increased protection it has become obvious that the traditional ideas of property are inadequate in dealing with knowledge whose creativity derives from processes with undefinable structure and incremental modifications and whose value increases every time it is shared²⁸. Knowledge, defined as the result of a continuous accumulation of knowhow, is a collective work (often funded by the collective) and defined as a *relational common*²⁹. From this perspective, the right to ownership in its traditional and protectionist form is more expropriative than

²⁶ A. Gambaro, *I beni*, cit. at 1-58; Id., *I beni immateriali nelle riflessioni della Commissione Rodotà*, in Mattei U., Reviglio E., Rodotà S. (eds.), *I beni pubblici. Dal governo democratico dell'economia alla riforma del codice civile* (2010).

²⁷ A. Pradi, *I beni comuni digitali nell'era della proprietà intellettuale*, in A. Pradi, A. Rossato (eds.), *I beni comuni digitali* (2014).

²⁸ U. Mattei, *voce Proprietà (nuove forme di)*, in *Enc. Dir.*, (2013). In Italy the subject was debated as part of the proposal to reform the Civil Code in 2017; see U. Mattei, E. Reviglio, S. Rodotà (eds.), *I beni pubblici*, cit., and also U. Mattei, E. Reviglio, S. Rodotà (eds.), *Invertire la rotta. Idee per una riforma della proprietà pubblica* (2007). See also D. Bollier, *Think Like a Commoner. A Short Introduction to the Life of the Commons* (2014).

²⁹ C. Hesse, E. Ostrom (eds.), *Understanding Knowledge As a Commons* (2007). See also Y. Benkler, *The Wealth of Networks. How Social Production Transforms Markets and Freedom* (2007); M. Nielsen, *Reinventing Discovery: The New Era of Network Science* (2012).

encouraging³⁰. With this in mind it is easy to foresee that, legal structures have to will evolve to recognize the value not just of exchange but of more inclusive behaviors such as sharing and the encouragement of social input.

Successful social practices have been developed in order to “give back” to knowledge its social value. Referring to *open* solutions (*open access, open sources, open data*) the tragedy of the commons is not sufficient to justify copyright based legal models: it is the open or shared models which, today, are more prevalent³¹.

It is not single innovations, but the entire digital environment, that affects the legal world especially with regards to transparency.

Any computer-generated work is a result of running programs (*software*) to which may be applied either traditional copyright models or open source models. We have already discussed the limitations of the former but the latter also have their problems when it comes to transparency.

Open source systems, which allow access to and the reuse of source codes, do not guarantee total transparency to all those involved in their use (how many of us are able to understand a source code or its workings and impact?)

So, *open source* is transparent to few but even for them, understanding the lines of code, of a program, does not necessarily help to understand the logic behind its applications or the derived results³². At least these processes should be rendered transparent, especially when they affect the lives of individuals or society.

Data analysis is becoming ever more automated with the use of machine learning. Programs are continuously acquiring not just data but knowledge giving them the capacity to make and act on decisions without human intervention. In this case it should be possible to have guarantees of continued transparency or at least to have a clear idea of the range of behavior or activity of any

³⁰ U. Mattei, *voce Proprietà (nuove forme di)*, in *Enc. Dir.*, cit.; Id., *Beni comuni. Un manifesto* (2011).

³¹ F. Capra, U. Mattei, *The Ecology of Law. Toward a Legal System in Tune with Nature and Community* (2015).

³² E. Pellecchia, *Profilazione e decisioni automatizzate*, cit. at 1218. See also J. A. Kroll, J. Huey, S. Barocas, E.W. Felten, J.R. Reidenberg, D.G. Robinson, H. Yu, *Accountable Algorithms*, 165 U. Pennsylvania L. Rev. 633 (2017).

program (starting with the limits on learning imposed, from the start, on the machines by the programmers)³³.

These programs run on servers (maybe thousands of servers all working in parallel, their distributed locations being based on network needs and not on specific geographical ties) so they are physical entities subject to traditional rules of ownership or profit. Moreover, the derived results are often based on methods and systems developed at Universities or other academic bodies and easily accessed from published work (an example is the theory of the Big Five personality traits)³⁴. Results are often obtained by programs using millions of bits of data which have been depersonalized, this makes it difficult to prove that the rights of the individual have been infringed.

In many cases the changing technology requires the legal world to adapt its approaches and its solutions but in other cases whole new practices are required: a few examples would be autonomous vehicles (including drones), production robots, machines used in medicine and social assistance, bioengineering, artificial intelligence and automated contracts (smart contracts and other blockchain based solutions).

All this, highlights a liquid environment for which the jurist will have to equip himself with the capacity to capture the trajectories and changes in direction necessary to develop new models, rules and solutions or adapt existing ones in ever shorter time frames.

2. Transparency as a key to understanding the changes

These technological changes will be analyzed from the perspective of transparency by evaluating the effects on the meanings, the contents and the significance of transparency,

³³ See E. Pellecchia, *Profilazione e decisioni automatizzate*, cit. at 1219; see also A. Greenfield, *Radical Technologies*, cit. at 214 ss.; M. Laukyte, *An interdisciplinary Approach to Multi-Agent Systems: Bridging the Gap Between Law and Computer Science*, 1 Informatica Dir. 223-241 (2013); P. Domingos, *The Master Algorithm. How the Quest for the Ultimate Learning Machine Will Remake Our World* (2015).

³⁴ R.R. McCrae, O.P. John, *An introduction to the five-factor model and its Applications*, 60 J. Personality 175-215 (1992); R. McCrae, P.T. Costa, *Personality in Adulthood, A Five-Factor Theory Perspective* (2002).

especially when dealing with interpersonal relationships, contractual matters and with public authorities.

The choice of this perspective is based on the fact that, for the most part, these changes produce effects that do not show the mechanisms by which they work, the logic used to guide their function nor the people who operate them (public or private) and stand to profit from them³⁵.

This is a good reason and an opportunity to study the changes in the light of transparency.

Transparency meant as the *condition to know*. It allows one to know that which is not visible or that which is not wished to be visible. We can associate transparency with that which surrounds or goes into a product, object, fact or event and determines how knowable or unknowable (secret) that object is.

2.1. (Follows) in interpersonal relation

In the area of interpersonal relations, the changes brought about by technological evolution have a particularly significant impact on the cession, distribution, manipulation and production of personal information.

These activities have been totally interconnected thanks to the internet. Data is ceded by users to websites to use the service (socially or commercially), they are immediately distributed to intermediaries where they are collected, processed and eventually put on the market. All this happens continuously and in the space of a few milliseconds, with revolutionary effects on the value chain of the traditional economies. However, this brings critical issues to the legal world that need careful evaluation.

The legal framework of reference here, is that on the control and protection of personal data.

The solutions, adopted in the principal models, makes the distinction between two types of data. The first are directly about individuals, their activities and their identities. The second are not about individuals but are linked to events, statistics, economics,

³⁵ F. Pasquale, *The Black Box Society. The Secret Algorithms That Control Money and Information* (2015); A. Greenfield, *Radical Technologies*, cit. at 214-264; A. Tabarrok, *The Rise of Opaque Intelligence*, *Marginal Revolution* at February 20, 2015; E. Parisier, *The Filter Bubble. What The Internet Is Hiding From You* (2012); M. Hindman, *The Internet Trap*, cit. (2018); S. Rodotà, *Il mondo nella rete. Quali i diritti, quali i vincoli* (2014).

metrics etc. On the first people can claim title and treat them as extensions of their personality/character, a condition that usually allows them to control, cede and oppose any action on them by third parties.

The protection given by the principal legal systems is based on the classification of data (eg. are they in the public domain, quasi personal or personal) and according to this measure there are different levels of consent that individuals must give before data can be ceded, distributed or processed.

At the moment of giving consent, transparency is considered to be instrumental in the protection of an individual's data. This transparency is guaranteed by rules that govern the formats and modes used when giving consent and is usually done at the first cession. The solutions used by the main legal systems (UE, US, Canada, etc.) tend to be the same as those used in contractual matters (*infra* § 2.2.) which assure informed consent from those who give their data. Transparency should therefore be guaranteed by the knowledge that a person acquires, on the use that will be made of their data.

The new EU rules - Regulation (EU) 2016/679, General Data Protection Regulation (GDPR)³⁶ - use this model based on disclosure regulation and on consent. In the initial recitals, it is clear that the way in which personal data is collected, processed and used should be transparent.

The principle of transparency also requires the subject to be informed as to who is processing their data and to what ends. It also requires that information and any communication pertaining to its processing "shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language"³⁷. The choice is

³⁶ Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data - General Data Protection Regulation (in O.J.E.U. n. L 119 del May 4, 2016) enter in force on May 28, 2016. It shall apply from 25 May 2018. See G. Finocchiaro, *Introduzione al Regolamento Europeo sulla protezione dati*, 1 Le nuove leggi civili commentate 1 (2017); F. Piraino, *Il regolamento generale sulla protezione dei dati personali e i diritti dell'interessato*, 1 Le nuove leggi civili commentate 369 (2017); I. Kroener, D. Wright, *A Strategy for Operationalizing Privacy by Design*, 5 Info. Soc'y 355-365 (2014); E. Tosi (ed.), *Privacy digitale. Riservatezza e protezione dei dati personali tra GDPR e nuovo Codice Privacy* (2019).

³⁷ Recital n. 39, artt. 12, 13 e 14, Regulation (EU) 2016/679.

rigorous: consent must come from an unequivocal and affirmative action, expressed as a truly free, specific and informed choice. There must also be no possibility of using inactivity, silence or solutions such as prefilled information fields as a way to gain consent³⁸.

When the duty to inform is neglected the protection afforded by the law is also very rigorous.

In fact, in the case of harm or damage, whether material or intangible, the controller or the processor for the data processing are held responsible, unless they can demonstrate that the damaging event was in no way attributable to them³⁹.

The criteria used to evaluate this responsibility refer to, on the one hand, the duty, for those who process data, to set up appropriate and effective measures of protection and validate their effectiveness and on the other hand (more generally) to demonstrate that their processing activities conform to the objectives of the regulation⁴⁰.

Other criteria are used, case by case, where the scope of the application, the context, the end use and the risk to personal liberty and rights must all be taken into account⁴¹. In this way, the burden of installing effective measures and carrying out risk analyses lies with the data processors etc. This burden can be seen as an expression of the principle of *good faith* in an objective sense.

This choice of responsibility offers high levels of protection. Furthermore, by including it in legislation (with an EU Regulation),

³⁸ The legal model used by the European regulation is based on the informed consent by the data subject: having received the necessary information the responsibility for the choices made falls to the data subject, a bit like saying that with the information you have, you are in a condition to make a responsible and informed decision; see different opinion by B. Goodman, S. Flaxman, *European Union regulations on algorithmic decision-making and a "right to explanation"*, 3 I Magazine (2017).

³⁹ Art. 82, par. 1 e 2, Regulation (EU) 2016/679.

⁴⁰ Recital n. 74, Regulation (EU) 2016/679.

⁴¹ Recital n. 75 lists, by way of example, some of the risks that need to be evaluated. Such examples may refer to analysing or predicting aspects concerning performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or movements, in order to create or use personal profiles or where processing involves a large amount of personal data and affects a large number of data subjects. See also A. Mantelero, *Responsabilità e rischio nel Reg. UE 2016/679*, 1 Le nuove leggi civili commentate 144 (2017).

it shows the will to ensure the same level of protection in all the EU member States⁴² and beyond⁴³.

When it comes to regulatory models of informed consent there are at least two critical issues with the transparency that derive from the technology.

(I) The first issue is to do with the level of knowledge that can be guaranteed after the first cession of personal data.

Consider a recent case at the European Court of Justice (15 Mar. 2017, C 536/15) where it was established that the phone companies who assign subscribers numbers cannot refuse to give them to businesses from other member states when requested.

The consent to publish data, given at the *first cession*, allows other transfers of data without the need for further consent⁴⁴.

The case, in itself, is not a complex one but it demonstrates a little-known aspect of informed consent; that the longer the chain of transfers is the more difficult it is to know, and thus to guarantee, where, what, and how the data will be used. In other words, the knowledge guaranteed at the first cession diminishes as the number of transfers increases. Added to this is the time

⁴² See recitals from 10 to 13, Regulation (EU) 2016/679.

⁴³ European Regulation (EU) 2016/679 also applies to data processing carried out by companies outside the EU, when it concerns the supply of goods or services to residents in the Union, as well as the monitoring and control of their behavior. The European levels of protection in the processing of personal data therefore apply irrespective of the geographical location of the data controller. See S. Ricciardi, *Il nuovo regolamento europeo sulla protezione dei dati personali: il punto di vista di Microsoft*, 3 Contratto e Impresa / Europa 4 (2013).

⁴⁴ Judgment of the Court, Second Chamber, of 15 March 2017, C-536/15, *Tele2 (Netherlands) BV and others*, ECLI:EU:C:2017:214. See E. Adobati, *Reti e servizi di comunicazione elettronica : il consenso prestato dagli abbonati per l'inserimento in un elenco nazionale vale per l'inserimento in elenchi in tutta l'Unione europea*, 1 Dir. com. scambi internaz., 358 (2017). See also the judgment of the Court, Grand Chamber, of 6 October 2015, C-362/14, *M. Schrems*, ECLI:EU:C:2015:650, with many notes on academic writings, e.g. A. Mantelero, *L'ECJ invalida l'accordo per il trasferimento dei dati personali fra EU ed USA. Quali scenari per i cittadini ed imprese?*, 2 Contratto e impresa / Europa 719-733 (2015); R. Ferrario, *Lo EU-U.S. Privacy Shield. Una risposta insufficiente alle richieste della Corte di giustizia dell'Unione europea nella sentenza Safe Harbour?*, 3 Dir. Comm. Internaz. 635-650 (2017); G. Scarchillo, *Dal Safe Harbor al Privacy Shield. Il trasferimento di dati personali verso gli Stati Uniti dopo la sentenza Schrems*, 4 Dir. Comm. Internaz., 901-941 (2016); S. Carrera, E. Guild, *The End of Safe Harbor: What Future for EU-US Data Transfers?*, 22 Maastricht J.Eur. Comp. L. 651-655 (2015).

dimension, in that the transfers and processing practically happen in real time.

The duty to communicate, to the original data subject, further transfers of their information to third parties seems not to be the full solution⁴⁵, given the rapidity, frequency and number of parties involved.

Researchers in Germany found that of over 21 million websites pages visited 95 % of them monitored and transferred information to third parties⁴⁶; another study of a million web sites found that there were 80 thousand “third parties” to whom information, relative to the visit, was transferred⁴⁷. It is estimated that, on average, every time a subject visits a website or uses an application the information is transferred not only to the publishers of the software but to 30 third parties. This is discussed in detail in a report by W. Christl and S. Spiekermann *Networks of Control*⁴⁸ where they highlight that “users are often not aware of how many companies receive information about their everyday lives, and that our knowledge about how apps collect data and transfer it to third parties is limited, incomplete, and often outdated” (p. 52). In other words, “as data brokers often share data with others, it is virtually impossible for a consumer to determine how a data broker obtained their data (...) most consumers have no way of knowing that data brokers may be collecting their data” (p. 121-122).

We can add that if the amount of data that an individual releases online, with consent, is immense then the quantity of data or meta-data that is released unknowingly is just as impressive.

An example is the movement sensor in smartphones. This shows where we go, with what frequency and how fast we travel... all information that allows organizations to build a

⁴⁵ European Regulation (EU) 2016/679 establishes certain information obligations in case of transfer of personal data to third parties (artt. 3, 12-14, 44-50).

⁴⁶ Y. Zhonghao, S. Macbeth, K. Modi, J.M. Pujol, *Tracking the Trackers*, in *proceedings of the 25th International Conference on World Wide Web (IW3C2)*, 11-15 aprile 2016 at Montreal, 121-132.

⁴⁷ N. Arvind, D. Reisman, *The Princeton Web Transparency and Accountability Project*, in T. Cerquitelli, D. Quercia, F. Pasquale (eds.), *Transparent Data Mining for Big and Small Data*, cit. at 45-57.

⁴⁸ W. Christl, S. Spiekermann, *Networks of Control*, cit. at 45-52.

personal profile (emotional stability/instability) of every one of us.

(II) The second issue has to do with the level of knowledge that can actually be guaranteed to the data subjects about the data processing, the results that can be obtained and on the possible repercussions of these activities.

The actions, on data, of these technologies is characteristically “continuous”, “ubiquitous”, “invisible” and “pervasive”⁴⁹ and it is no surprise that this processing is done unbeknownst to the subjects. It is untraceable and without any transparency.

As an example, the data given to social media platforms (name, address, postcode email, etc.) are processed to the point where they can identify the devices (phone, computer, appliances and anything connected to the web or held in digital memories or databases) linked to that information, allowing an intimate knowledge of the people who use them⁵⁰. From then on, the “digital” life of that data is constantly monitored. This example is one of many but the results are always the same: use the data to measure, group, predict and advertise to the individual whose data it is. These operations allow this to be done continuously and instantaneously (e.g. *real time bidding*).

During the processing stage, information and data can flow in separate packages, they are then aggregated to other information and processed by algorithms able to conduct sophisticated analyses of behavior, preferences and opinions of individuals or groups.

These effects are well summarized in the widely cited academic paper *Computer-based personality judgments are more*

⁴⁹ W. Christl, S. Spiekermann, *Networks of Control*, cit. at 118. The authors highlight that “Consumers are often neither aware of what personal information about them and their behavior is collected, nor how this data is processed, with whom it is shared or sold, which conclusions can be drawn from it, and which decisions are then based on such conclusions. Both dominant platforms and smaller providers of websites, services, apps and platforms - generally speaking - act in a largely non-transparent way when it comes to the storage, processing and the utilization of personal data” (at 122).

⁵⁰ W. Christl, S. Spiekermann, *Networks of Control*, cit. at 94-116, describe the monitoring techniques carried out by companies such as: Oracle, Acxiom, Experian, MasterCard, LexisNexis, etc.

*accurate than those made by humans*⁵¹. In 2012 the Author demonstrated that with on average of 68 “likes” on Facebook it is possible to deduce the skin colour (with 95% accuracy), sexual inclination (with 88% accuracy) and political preference between Democratic or Republican party (with 85% accuracy) of a user. Other attributes that can be deduced are IQ, religious faith, use of alcohol, cigarettes and drugs etc. In 2015 the author showed that with 150-300 clics it is possible to know a person better than their friends, partners or parents know them. Advances in psychology, neuroscience and psychometry combined with computational power all lead to results that are cause for reflection

Personal profiles, shopping habits and opinions are all reconstructed by the “lords of data”⁵² making it possible to predict and orientate the choices of individuals, groups, companies and public authorities⁵³. The applications are many with socio-economic implications which, in the absence of adequate regulation and effective protection, can lead to discrimination⁵⁴

⁵¹ W. Youyou, M. Kosinski, D. Stillwell, *Computer-based personality judgments are more accurate than those made by humans*, 4 proceedings of the National Academy of Sciences 1036-1040 (2015); see also M. Kosinski, Y. Wang, H. Lakkaraju, J. Leskovec, *Mining Big Data to Extract Patterns and Predict Real-Life Outcomes*, 4 Psychological Methods 493-506 (2016); R. Lambiotte, M. Kosinski, *Tracking the Digital Footprints of Personality*, 12 proceedings of the Institute of Electrical and Electronics Engineers 1934-1939 (2014).

⁵² A. Mantelero, *Big Data: i rischi della concentrazione del potere informativo digitale e gli strumenti di controllo*, 1 Dir. Inform. 135 (2012) highlights the fact that the power to control this data is in the hands of a small group of people who wield such power over information that they evoke the idea of being the “lords of data”. See also I. Graef, *When Data Evolves into Market Power. Data Concentration and Data Abuse under Competition Law*, in M. Moore, D. Tambini (eds.), *Digital Dominance*, cit. at 71-97; L.S. Morais, *Competition in Digital Markets and Innovation. Dominant Platforms and Competition Law Remedies*, in G. Colangelo, V. Falce (eds.), *Concorrenza e comportamenti escludenti nei mercati dell’innovazione* (2017); M. Andrejevic, *The Big Data Divide*, 8 Int’l J. Comm. 1673-1689 (2014); M. Hindman, *The Internet Trap*, cit. at 203.

⁵³ These are operations of mass personalization including instant personalization, predictive marketing, personalized pricing, dynamic pricing and election campaigns, etc.; W. Christl, *Corporate Surveillance in Everyday Life. How Companies Collect, Combine, Analyze, Trade, and Use Personal Data on Billions* (2017).

⁵⁴ Amongst the most relevant : differences in price and scope, limits to access to insurance, health, financial and career services, presenting things out of context; see D.J. Solove, *The Digital Person: Technology and Privacy in the Information Age* (2004). See also O. Lynskey, *The Power of Providence: The Role of Platforms in*

and manipulation with subsequent risks to security, secrecy, independence of thought, and market manipulation.

These issues have not escaped the attention of Institutions and Authorities at an international level⁵⁵ but the regulatory answers in spite of being strengthened (eg *privacy by design*, *privacy by default*, international cooperation, giving authorities greater powers, etc.), are finding it hard to cope⁵⁶.

More generally, the data circulation and processing phases seem to have remained on the margins of regulatory activity. Yet these are the areas of greatest impact and where transparency (and its guarantee) is practically absent. What is emerging, in particular, is a need to consider new levels of protection of personal information but at a “*collective level*”⁵⁷ where the powers

Leveraging the Legibility of Users to Accentuate Inequality, in M. Moore, D. Tambini (eds.), *Digital Dominance*, cit. at 176-201; J. Lerman, *Big Data and Its Exclusions*, Stan. L. Rev. Online (2013); E. Pellecchia, *Profilazione e decisioni automatizzate*, cit. at 1211.

⁵⁵ Consider the European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics *sub lett. O* “whereas the developments in robotics and AI can and should be designed in such a way that they preserve the dignity, autonomy and self-determination of the individual” and *sub lett. Q* “whereas further development and increased use of automated and algorithmic decision-making undoubtedly has an impact on the choices that a private person (such as a business or an internet user) and an administrative, judicial or other public authority take in rendering their final decision of a consumer, business or authoritative nature”; consider also the recitals 6 and 8 of the Regulation (EU) 2016/679; and finally consider the European Commission decision of 27 June 2017 concluding that the total fine imposed on Alphabet Inc. and Google Inc. should be euro 2,42bl. for the manipulation by its own comparison shopping service, Case AT. 39740 - Google Search.

⁵⁶ On the topic see G. Ziccardi, *Internet, controllo e libertà. Trasparenza, sorveglianza e segreto nell'era tecnologica* (2015); see a partially different opinion G. Malgieri, G. Comandé, *Why a Right to Legibility of Automated Decision-Making Exists in the General Data Protection Regulation*, 4 International Data Privacy Law 249 (2017).

⁵⁷ See too A. Mantelero, *Rilevanza e tutela della dimensione collettiva*, cit. at 141; D. Tambini, *Social Media Power and Election Legitimacy*, in M. Moore, D. Tambini (edited by), *Digital Dominance*, cit. at 265-293; F. Bouhon, *Le droit à des élections libres et Internet*, in Q. Van Enis, C. De Terwangne (eds.), *L'Europe des droits de l'homme à l'heure d'Internet* (2019); B. Grofman, A.H. Trechsel, M. Franklin (eds.), *The Internet and Democracy in Global Perspective. Voters, Candidates, Parties, and Social Movements* (2014); see also B. Caravita, *Social network, formazione del*

of prediction and manipulation can affect things like voters' choices in elections⁵⁸.

The need is made more urgent by the natural market (data market) tendency to concentrate information, computational and economic power⁵⁹.

A balance has to be found between the economic benefits, generated by the free flow of information / data, and the personal and collective interests necessary to uphold the tenets of privacy and self-determination. This need to balance has been solved in some systems by using control and censorship (China) or by setting territorial restrictions (Russia). In the case of the Russian Federation the law was amended, in 2014⁶⁰, such that any company that wishes to hold information on Russian citizens must save and process that information on Russian soil in data centers also on Russian soil. The legislation does not prohibit foreign access to these data centers nor does it prohibit the copying of this information but it states that the gathering of this information must happen exclusively on Russian soil. As of yet there is not

consenso, istituzioni politiche: quale regolamentazione possibile?, Federalismi.it (2019); M. Calise, F. Musella, *Il principe digitale* (2019).

⁵⁸ There is no shortage of practical applications: in the 2016 US presidential elections the winners campaign was based on the behavioural knowledge, Big Data analysis and targeted advertising; see H. Grasseger, M. Krogerus, *La politica ai tempi di Facebook*, 1186 *Internazionale* 40-47 (2017). See also W. Christl, S. Spiekermann, *Networks of Control*, cit. at 26-27, "Scholars in communication studies have long challenged the idea of plain top-down manipulation as inappropriate and too simplistic, insisting that humans are able to use different individual appropriation of communication strategies. The shift to completely personalized interactions based on extensive individual profiles possibly creates new and unknown degrees of manipulation". See too R. Epstein, *Manipulating Minds: The Power of search Enginee to Influence Votes and Opinions*, in M. Moore, D. Tambini (ed.), *Digital Dominance*, cit. at 294-319; R. Davis, C. Holtz-Bacha, M.R. Just (eds.), *Twitter and Elections Around the World. Campaigning in 140 Characters or Less* (2016); in Italy, see M. Mezza, *Algoritmi di libertà. La Potenza del calcolo tra dominio e conflitto* (2018).

⁵⁹ With reference to the situation in Italy see the decision n. 146/15/CONS (Autorità per le Garanzie nelle Comunicazioni) regarding *Indagine conoscitiva sul settore dei servizi internet e sulla pubblicità online*, in particular Annex A (available online at <https://www.agcom.it/indagine-conoscitiva-informazione-e-internet-in-italia.-modelli-di-business-consumi-professionisti>).

⁶⁰ Federal Law No. 242-FZ on Amendments to Certain Legislative Acts of the Russian Federation for Clarification of Personal Data Processing in Information and Telecommunication Networks (New Data Protection Law) del 2014.

enough evidence to understand what effect this solution has had (in force since 2016) even although it seems to be at odds with the need, of the digital market, for the free flow of data (globally)⁶¹.

What emerges in the end is a variety of situations where we can state that: (i) there is a lack of transparency on the circulation, the content and on the results during the processing of all this data; (ii) there is a lack of transparency on the processing of data especially when it affects the individual in the collective sphere; (iii) that it is difficult to attribute responsibility and liability for activities that are carried out across the globe.

2.2. (Follows) contractual dealings

In the area of contractual relationships, issues of transparency have to be considered during the initial formulation of the contract where, in the name of fairness, both parties are obliged to fully inform the other.

The right to information is especially important in European consumer contract law⁶². European Union legislation describes in detail the nature of the information that must be given to the consumer so that they can make a pondered evaluation of the contract (type and characteristics of goods,

⁶¹ Consider the different solution adopted by recent European Regulation (EU) 2018/1807, *on a framework for the free flow of non-personal data in the European Union* (in O.J.E.U. L 303, November 28, 2018) that will be apply from June 2019 (art. 9). This Regulation aims to ensure the free movement of data other than personal data within the Union by laying: - data localisation requirements shall be prohibited, unless they are justified on grounds of public security in compliance with the principle of proportionality (art. 4); - the powers of authorities to access to data for the performance of their official duties in accordance with Union or national law, in particular the access to data may not be refused on the basis that the data are processed in another Member State (art. 5); - the Commission shall encourage and facilitate the development of self-regulatory codes of conduct at Union level ('codes of conduct'), in order to contribute to a competitive data economy, based on the principles of transparency and interoperability and taking due account of open standards (art. 6).

⁶² See Directive 2011/83/EU of 25 October 2011, on consumer rights (in O.J.E.U. L 304, of 22 November 2011) and the duty of Member States to adopt and publish, by 13 December 2013, the laws, regulations and administrative provisions necessary to comply with this Directive. On this topic, see C. Twigg-Flesner (eds.), *Research Handbook on EU Consumer and Contract Law* (2016); also G. Straetmans (ed.), *Information Obligations and Disinformation of Consumers* (2019).

identity of the trader, the economic aspects, arrangements for performance, conditions, time limit and procedures for exercising the measures of protection). This information must be given before any contract is signed so that the consumer can compare various offers.

What can be seen is that European consumer legislation has a two sided approach: one side is there to protect the consumer's economic interests while at the same time the other side is there to ensure that market competition continues to thrive⁶³. There are also two sides to transparency. By being informed, the consumer is not only better able to select goods from a range of commercial offers but acts as a distributed monitoring system on the behavior of companies. This generates or at least encourages a system of trust that in turn encourages more commerce.

Still in the European model, the requirement for information comes with conditions regarding the way in which it is given. In fact, the information given must be exhaustive, clear, intelligible, in good faith (in line with the ideas of good faith, truth, transparency and fairness even in the pre-contractual phase) and accessible. With these parameters, the duties of honesty and behavior of traders are important and there are defined forms of pre-contractual responsibility and liability based on good faith and the guarantee of transparency.

In this context, the impact of technology on transparency has been minimal, being, in this case, tied to the informative model.

In other words, transparency and the duty to inform continue to represent the way to guarantee, *informed contracts*, *qualified consent* and *a knowledgeable consumer*.

Legal solutions do not go beyond the *click* with which the consumer confirms that (i) they have read the information relative to the contract (even although it is never certain that the rights and duties that tied to the contract have been understood); (ii) they have understood that they will have to pay; (iii) they have accepted the conditions under which their information/data will be used to fulfil the contract.

⁶³ Judgment of the CJUE, Grand Chambre, of 16 December 2008, C-205/07, *Lodewijk Gysbrechts*, ECLI:EU:C:2008:730, pt. 53.

For example, European legislation on distance contracts concluded with electronic means (web sites, e-mail, etc.), has imposed on the trader to make the principal elements of the contract visible to the consumer in the immediate vicinity of the point of confirmation of the order⁶⁴ showing, unequivocally, at what moment one accepts the duty to pay⁶⁵. If the vendor does not respect these duties the consumer is completely free of any contractual obligations.

There are more significant changes in the growing market of online sharing and circular economies⁶⁶ where some of the biggest operators are *Amazon, Airbnb, eBay, Lyft, Uber, Friendsurance*, etc. These companies work simply by offering a platform where consumers and traders can carry out a transaction. The owners profit by (i) taking a commission on each transaction, (ii) by selling the data collected on the users, and (iii) promoting relevant products (personalized advertising). The users profit by having the convenience of finding products in one place and optimized way of selling their products⁶⁷.

Other more traditional (but no less important) forms of digital economy are those of on-line commerce. Where goods and services are often attached to systems that compare the specifications and prices from a wide range of offers. The fields of application are many and include, insurance, travel, holidays, phones, utilities and consumer goods.

⁶⁴ Recital 39, Directive 2011/83/EU.

⁶⁵ Art. 8, par. 2, Directive 2011/83/EU.

⁶⁶ The *collaborative economy* is a complex ecosystem of on-demand services and temporary use of assets based on exchanges via online platforms; this system is changing rapidly and is developing at a fast pace. See European Commission, *Upgrading the Single Market: more opportunities for people and business*, COM/2015/550 of 28 October 2015, pt. 2.1, where "according to a recent study, the five main collaborative economy sectors (peer-to-peer finance, online staffing, peer-to-peer accommodation, car sharing and music video streaming) have the potential to increase global revenues from around euro 13 billion now to euro 300 billion by 2025. See also European Commission, *A European agenda for the collaborative economy*, COM/2016/356 of 2 June 2016; European Parliament Resolution of 15 June 2017 on *A European Agenda for the collaborative economy* (2017/2003/INI).

⁶⁷ G. Smorto, *Economia della condivisione e antropologia dello scambio*, 1 Diritto pubblico comparato ed europeo 119-138 (2017); Id., *Reputazione, fiducia e mercati*, 1 Europa e diritto privato 199 (2016); Id., *La tutela del contraente debole nella platform economy*, 2 Giorn. dir. lav. rel. indust. 424 (2018).

Both the collaborative economy and on-line commerce are made possible by the digital platforms and their associated infrastructure which exploit applications on mobile devices, social networks and geolocation services⁶⁸.

When we look at the impact of the new technologies on these market with respect to transparency there are two critical issues.

(I) The first issue regards the lack of clarity (i.e. transparency) on the way in which these platforms use information that they have acquired during the course of a transaction or mediation.

When dealing with these platforms the web sites or mobile applications through which these activities are executed purport to have information privacy policies (rarely read and almost never understood) they also declare that they will install cookies in the computer and, more generally, guarantee maximum transparency.

In reality users do not pay particular attention to how they are giving up their data or how that data will be processed. With a few *clics* (if that), they go ahead and formalize their consent on how their data will be used and processed just to be able to proceed with the transaction.

Users show that they have neither the time nor the competence to understand the consequences of the terms of data protection that they have just agreed to and what complex implications these will have (often at a much later date). In other words, we have gone from *informed consent* to *informatics* or *digitalized consent* without adequate adjustments⁶⁹. So as in the

⁶⁸ In recent years some platforms have become so large as to control access to the markets influencing the activities to the financial operators; see I. Graef, *When Data Evolves into Market Power -Data Concentration and Data Abuse under Competition Law*, in M. Moore, D. Tambini (eds.), *Digital Dominance*, cit. at 71-97; L.S. Morais, *Competition in Digital Markets and Innovation. Dominant Platforms and Competition Law Remedies*, cit. at 27-44; Italian Competition Authority, *Annual Report*, March 2017, 54 ff.

⁶⁹ G.A. Benacchio, *Information et transparence dans la protection des consommateurs: une réalisation difficile*, in *Annuario di diritto comparato e studi legislativi*, special edition with Italian National Reports of International Academy of Comparative Law, XX° International Congress in Fukuoka (2018), argues that “*le contrat liant les usagers aux plateformes du web est, selon la terminologie des économistes, un contrat incomplet puisque les usagers ne sont pas en mesure de connaître exactement le*

area of personal relationships where it is possible to know, predict and manipulate the behavior of individuals, there is a need for regulations that can guarantee adequate transparency and information to the users.

The counterpart, especially if a consumer, should be able to have access to their personal profiles or “virtual doubles”⁷⁰ that result from the activities of the data mining algorithms and which are stored by many digital platforms and market / data operators.

At the present, there is no public or private place where a counterpart can access their virtual double.

This means that there is no possibility to correct the information to give, what they feel is, a truer representation of themselves. Nor are they able to ask for corrections, updates or comment on mistakes. Errors made by processing algorithms are all but intangible in that they can have serious effects on real life events like credit ratings, insurance premiums, healthcare and almost all consumer goods. Not only are these affected, but depending on the available data, so too are offers (or refusals) for work, loans, healthcare, love, etc.⁷¹

(II) The other critical issue is the lack of transparency with regards to the ways the reputation of the operators on the various platforms is measured and calculated.

In on-line trade one of the determining factors for doing business is trust. The most common system is to use the reputations of operators as a gauge of trustworthiness. In fact, reputation is one of the most effective tools for a consumer to

risque auquel ils s'exposent (...) Les clauses qui interdisent la revente à des tiers ou le partage des données restant presque toujours nébuleuses, la manière dont les plateformes utilisent les informations que communiquent les vendeurs et les consommateurs pour la réalisation de l'opération commerciale pêche pour le manque de claret". Exemplary is the case of Facebook's CEO Mark Zuckerberg who in April 2018 was called by the United States Senate Committee on Commerce, Science, and Transportation and in May 2018 by the European Parliament in relation to the Facebook-Cambridge Analytica data breach.

⁷⁰ S. Turkle, *Reclaiming Conversation. The Power of Talk in a Digital Age* (2015); see also C. O'Neil, *Weapons of Math Destruction. How Big Data Increases Inequality and Threatens democracy* (2016).

⁷¹ See A. Greenfield, *Radical Technologies*, cit. at 250; also C. Busch, *The future of pre-contractual information duties: from behavioural insights to big data*, in C. Twigg-Flesner (ed.), *Research Handbook on EU Consumer*, cit. at 231-239.

choose a vendor. In many cases this reputation is *quantified* using reviews left by other consumers who give points or leave other indicators of positive or negative feedback⁷².

However, there is nothing to guarantee the “genuine or true nature” of the feedback on which depends the reputation, so important for business, of an operator⁷³.

The way in which these scores (for reputation) are arrived at are rarely publicized and when they are (by stating that the average of all the reviews is taken) there is no guarantee of provenance, the number of reviews or their contents.

Yet again there is an “information asymmetry” for the consumer which is overcome by using reviews or ratings to assess a vendor⁷⁴. All this trust with no way to prove it. This solution gives insufficient guarantees for an online commerce environment and suggests that there is a need for new regulations⁷⁵, standards

⁷² See *Behavioural Study on the Transparency of Online Platforms. Final Report*, produced by European Commission, 2018; the study found that when consumers are informed that the ranking is based on a specific criterion such as popularity, the probability of selecting the product is 115% higher; furthermore, providing the additional information compared to having no user reviews or ratings, a review in a prominent position on the website leads to a 200% increase in the probability of choosing the product.

⁷³ See the case on the false reviews by online companies TripAdvisor LLC and TripAdvisor Italy S.r.l. fined by the Italian Competition Authority for eur 500.000, with decision n. 25237 of 19 December 2014 and then canceled by administrative Court. See also G. Smorto, *Reputazione, fiducia e mercati*, cit. at 423 ss.; L. Carota, *Diffusione di informazioni in rete e affidamento sulla reputazione digitale dell'impresa*, 4 Giur. comm. 624 (2017); M. Colangelo, *Le piattaforme del settore alberghiero online: parity clauses, modelli di business e concorrenza*, in G. Colangelo, V. Falce (a cura di), *Concorrenza e comportamenti escludenti*, cit. at 111-138; S. Ranchordás, *Online Reputation and the Regulation of Information Asymmetries in the Platform Economy*, 1 Critical Analysis L. 127-147 (2018).

⁷⁴ See European Commission, *A New Deal for Consumers*, COM/2018/183. See also J.E. Cohen, *Law for the Platform Economy*, in 51 UC Davis L. Rev. 135 (2017); G. Resta, *Digital platforms and the law: contested issues*, 1 Media Laws 232 (2018).

⁷⁵ See, for example, the proposal for a new EU Directive *regards better enforcement and modernisation of EU consumer protection rules*, COM(2018) 185 final; the proposal introduces additional information required to online marketplaces to clearly inform consumers about: (i) the main parameters determining ranking of the different offers, (ii) whether the contract is concluded with a trader or an individual, (iii) whether consumer protection legislation applies and (iv) which trader is responsible for ensuring consumer rights related to the contract. Furthermore, these provisions should clarify

and certification, maybe using the same models as is used for the companies that offer credit card payment services.

2.3. (Follows) dealings with public authority

When it comes to relations with public authorities, transparency is “one of the socio-political myths of our times”⁷⁶, being presented as the basis on which radical changes have been made in the views and workings of authorities and their behavior towards the population⁷⁷.

What has changed is the bipolar view that many Public administration models have where the authority is in a position of supremacy over its citizens and is thus the only guardian of the public interest. The authority and the individual represent opposite poles in an asymmetric, and conflictual relationship with divergent interests that legitimize secrecy in public affairs⁷⁸.

The recognition of transparency as “the essence”⁷⁹ of the authorities is the culmination of a process that has, in a short time, redefined the terms transparency/secrecy when considering authorities and their behavior⁸⁰.

when online platforms must indicate search results that contain “paid placements” or “paid inclusion”.

⁷⁶ See G. Quadri, *Riservatezza e trasparenza nell'esperienza costituzionale*, in AA.VV., *L'amministrazione pubblica tra riservatezza e trasparenza* (1991).

⁷⁷ See a global overview and statutory goal on access to information laws at <http://www.right2info.org/access-to-information-laws>; see also M. Savino, *The Right to Open Public Administrations in Europe: Emerging Legal Standards* (2010); M. Savino, *La nuova disciplina della trasparenza amministrativa*, 8-9 *Giorn. dir. amm.* (2013); D.-U. Galetta, *La trasparenza, per un nuovo rapporto tra cittadino e pubblica amministrazione: un'analisi storico-evolutiva, in una prospettiva di diritto comparato ed europeo*, 5 *Riv. it. dir. pubbl. com.* 1019-1065 (2016).

⁷⁸ S. Cassese, *L'arena pubblica. Nuovi paradigmi per lo Stato*, 1 *Riv. trim. dir. pubbl.* 601 (2001); G. Arena, *Trasparenza amministrativa*, in S. Cassese (ed.), *Dizionario di diritto pubblico* (2006); G. Lentini, *Il segreto e la trasparenza: dall'amministrazione chiusa all'amministrazione aperta. Le tappe dell'evoluzione dei rapporti tra i pubblici poteri ed i cittadini*, 1-2 *Amministrativ@mente* 3-36 (2017).

⁷⁹ See G. Arena, *Trasparenza amministrativa*, cit. at 5946.

⁸⁰ See N. Bobbio, *La democrazia e il potere invisibile*, in 2 *Riv. it. scienza pol.* 181 (1980), yet also in *Il futuro della democrazia* (2014); furthermore M. Catanzariti, *Segreto e potere. I limiti della democrazia* (2014).

In Italy for example the general idea publicizing the workings of the administration was only introduced in 1990⁸¹, after a century and a half of enforcing, on departments and employees, a generalized and rigid “segreto d’ufficio” duty of official secrecy⁸².

Without going through a detailed study of the theories of transparency in the regulation of public administrations⁸³ we can study it in three key situations.

The first situation is to do with the knowledge of decision making processes.

Transparency is ensured by the authority’s duty to publish documents⁸⁴. This duty, depending on the legal model chosen, may cover the publication of regulations as well as information to do with: (a) the organization of a body (offices, personnel, deliberations of council groups, winning contracts, interests in companies) personnel information (councilors, executives, bonuses, performance reviews); (b) budget management (balances, tenders, grants, economic beneficiaries); (c) the way the services work and simplification (charter of services, the supply of services, payment terms and forms and paperwork). Working this way means that authorities are being asked to work in the ‘glass house’.

In the Italian system, a breach of this duty brings with it penalties against the authority in the form of public employee responsibility and other liabilities for damage to the reputation of the public administration.

The second situation is to do with access to public documents⁸⁵.

⁸¹ With reference to the Italian legal system see Legge 7 agosto 1990 n. 241, *Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi* (in O.J. n. 192 of 18 August 1990).

⁸² See G. Arena, *Il segreto amministrativo. Profili teorici* (1983).

⁸³ About the Italian legal system see F. Merloni, G. Arena, G. Corso, G. Gardini, C. Marzuoli (eds.), *La trasparenza amministrativa* (2008).

⁸⁴ M. Bombardelli, *La trasparenza e gli obblighi di pubblicazione*, in R. Garofoli, T. Treu (eds.), *Treccani. Il libro dell’anno del diritto 2014* (2014); F. Di Donato, *Lo stato trasparente. Linked open data e cittadinanza attiva* (2010).

⁸⁵ See H. Kranenborg, W. Voermans, *Access to Information in the European Union. A Comparative Analysis of EC and Member State Legislation* (2005); D.C. Dragos, P. Kovač, A.T. Marseille (eds.), *The Laws of Transparency in Action: A European*

Transparency assumes different levels of importance depending on the values and policy choices of each legal system. The possible levels go from restricted access (for individuals who need to defend their rights e.g. legal evidence), to open access to all documents subject to publication and on to total access (as with the US FOIA) where anyone can access any document held by public administrations, so-called civic access, except for specific limitations, e.g., personal privacy, State secrecy, etc.⁸⁶ In this way, it is easier to have a form of distributed surveillance on the behavior of authorities and in the end to prevent malpractices and maladministration.

The third situation is in the participation of decision making processes.

The first to experiment this were Sweden and Finland⁸⁷. The entrance of these countries into the EU in 1995 coincided with initiative to bring more openness to EU institutions. This was by encouraging forms of participation and consultation in the formative stages of policy and legislation.

Dialogue and participation have since become key words in the European governance reform program launched in 2001⁸⁸ which is based on five principles (openness, participation, accountability, effectiveness and coherence). From this moment, in Europe, ordinary people, who were once very much on the

Perspective (2019); S. Foà, *La nuova trasparenza amministrativa*, 1 Dir. amm. 65 (2017).

⁸⁶ See P. Savona, A. Simonati, *Transparency in Action in Italy: The Triple Right of access and Its Complicated Life*, in D.C. Dragos, P. Kovač, A.T. Marseille (eds.), *The Laws of Transparency in Action: A European Perspective*, cit. at 255-294; E. Carloni, *Se questo è un FOIA. Il diritto a conoscere tra modelli e tradimenti*, 4 rassegna Astrid 1-12 (2016); A. Marchetti, *Le nuove disposizioni in tema di pubblicità e trasparenza amministrativa dopo la riforma "Madia": anche l'Italia ha adottato il proprio "Foia"? Una comparazione con il modello statunitense*, 10 Federalismi.it 1-33 (2017); A. Moliterni, *La via italiana al FOIA: bilancio e prospettive*, 1 Giorn. dir. amm. 23-34 (2019).

⁸⁷ Sul tema A. Santini, *Il principio di trasparenza nell'ordinamento dell'Unione europea* (2004); M.C. Statella, *Trasparenza, informazione e apertura. Il Trattato di Amsterdam e i diritti degli individui nel procedimento di formazione degli atti comunitari*, in U. Draetta, N. Parisi (eds.), *Trasparenza, Riservatezza. Impresa. Studi su democrazia rappresentativa, diritti dell'uomo e attività economica nell'Unione europea* (2001).

⁸⁸ European Commission, *European governance - A white paper*, COM/2001/428, of 5 August 2001.

margins of the decision-making processes, start to become involved in it.

The technological innovations have significant effects on all three of the above situations: (i) they make the requirement of publishing the documents cheaper, traceable and faster, (ii) they facilitate access to documents and information and, more generally, they help speed up the process towards providing to total access, (iii) encouraging public consultation in a wider and more traceable way.

These are processes that stem from the digitalization of the administrations⁸⁹ which was set at a European level and described in specific initiatives (first *eGovernment*, then *Open Government*)⁹⁰. On this point, it is worth noting that use of technology has led to a growth in some automated administration, with certification and official documents, as a prelude to automating some juridic functions⁹¹.

Another important innovation in this field is in public contract systems using e-procurement methods (where goods and services can be acquired using a digital platform) and the use of data mining to monitor and ensure fairness and legality⁹².

⁸⁹ See F. Faini, *Data society. Governo dei dati e tutela dei diritti nell'era digitale* (2019); G. Carullo, *Gestione, fruizione e diffusione dei dati dell'amministrazione digitale e funzione amministrativa* (2017); L. Sartori, *Open Government: what else?*, 3-4 *Le istituzioni del federalismo* 753-776 (2013); F. Costantino, *Open Government*, in *Digesto discipline pubblicistiche* (2015).

⁹⁰ See European Commission Final Report, *Towards faster implementation and uptake of open government*, 2016, available online at http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=40861; see also European Commission, *Open data. An engine for innovation, growth and transparent governance*, COM/2011/882 of 12 December 2011 and *eGovernment Action Plan 2016-2020. Accelerating the digital transformation of government*, COM/2016/179, of 19 April 2016; *eGovernment Benchmark 2019. Empowering Europeans through trusted digital public services*, study prepared for the European Commission, October 2019.

⁹¹ See P. Otranto, *Decisione amministrativa e digitalizzazione della p.a.*, 2 *Federalismi.it* 15-25 (2018); also U. Morera, *Behavioural economics e valutazione giudiziale del rapporto contrattuale regolato* (2017); F. Patroni Griffi, *La decisione robotica e il giudice amministrativo*, conference at "Leibniz Seminars 2018", 5 July 2018, Accademia dei Lincei - Roma; S. Lepidi, *Algoritmi nelle procedure amministrative, i principi da rispettare e le prospettive future*, *AgendaDigitale.eu* 27 December 2019.

⁹² See European Commission, *Making Public Procurement work in and for Europe*, COM/2017/572, 3 October 2017; also European Commission, *End-to-end e-*

3. Conclusions

Transparency is one important key for understanding the social, economic and cultural transformations that the technology is introducing.

These transformations are shaking established patterns with tensions that run deep even in the legal sphere, with changes emerging at system, model and regulatory level.

In the framework of a global economy based on the production of intangible goods, where the main resources are information and knowledge and where these resources are exchanged rapidly and frequently, there is a special emphasis on the value of transparency. It must be the starting point for new rules. There will be more of these than in the past and many of them are yet to be defined.

We can see this in the field of AI (artificial intelligence) driven automation where programs can make decisions without external guidance by learning continuously from huge quantities of data. This brings economic benefits but it also has worrying consequences for individuals and for society. Thus, there is a growing number of calls for greater transparency and guarantees to respect fundamental rights and liberty.

At a higher level, the declaration of principle, shared by States, Authorities, big corporations and social movements, “it should always be possible to supply the rationale behind any decision taken with the aid of AI that can have a substantive impact on one or more persons’ lives”, “it should always be possible to reduce the AI system’s computations to a form comprehensible by humans”.

At a lower level transparency is being woven into, more or less consolidated, codes / rules of conduct and duties of honesty which are forming the base of forms of responsibility and liability based on good faith in an objective sense. Some of these forms of responsibility are innovative like algorithmic responsibility.

The idea of transparency as a value woven into codes of conduct along with responsibility and forms of protection and remedy exemplifies the steps that have so far been taken in the

procurement to modernise public administration, COM/2013/453, 26 June 2013. See also M. Cozzio, *La nuova strategia europea in materia di appalti pubblici*, 1 Giorn. dir. amm. 53-62 (2019).

principal legal systems. The new technologies and emerging interests have necessitated a search for new equilibria which has led to changes in rules, in their interpretation and in their application.

Many of the technological innovations are governable by existing values of transparency and codes of conduct as has already been mentioned. We have seen this in the three situations already analyzed.

Other, more profound, innovations escape this possibility, and will require so much change that it will be necessary to build new legal frameworks to deal with them. Just modifying the rules in existing frameworks will not be enough.

We have already seen these premises in the section on the movement and processing of data and information. The knowledge that can be gained from the enormous collections of data allows for a network that monitors every aspect of our lives. This network exists without any guarantee of us knowing the logic behind its workings or who controls it.

The reaction to this situation has led to the introduction of new rules and technical standards, such as *privacy by default*, *privacy by design*.

They are useful solutions but they do not offer sufficient guarantees of protection, especially when the effects have implications at the *collective level*. In other words, it is all very well to have brand new rules but without protection there remain questions such as: "what is the point in having elections if the algorithms not only know how each person will vote but also what that person's underlying neurological reasons are for their choice"⁹³.

There are circumstances where the role, meaning and functions of transparency could be redefined to fit a new world reality where our data (source of knowledge and wealth) could be the new atoms, generating a global asset available to all but controlled by no one.

In such a framework where all data (both personal and not) is accessible, the right of the individual to know and control his data loses its importance. What does become important is the absence of transparency on the way in which the technology (and

⁹³ Y.N. Harari, *Homo Deus. A Brief History of Tomorrow* (2016).

its managers) are able to extract information which reveals things about our lives. This information can be used not just for marketing but for the manipulation of public affairs such as elections, judicial processes and administrative processes.

There emerges a need to have a coherent classification of transparency- special guarantees of knowability about the programs, the workings and the results that process this mass of data- to protect fundamental individual rights. So, transparency becomes a new *common good* which, as such, will influence the system of property rights applied to these technologies, making their internal workings and ends knowable not just their owners but to all.

GUARANTEED MINIMUM INCOME AND MIGRANTS' INCLUSION: THE CASES OF ITALY AND CANADA

*Luca Galli**

Abstract

In a context of economic crisis, the fulfilment of social rights becomes more and more difficult, considering the lack of public resources necessary to support the members of the society hit by poverty. Among these members, newcomers might represent a significant amount, especially if economic and migration crises happen simultaneously. This essay is focused on non-citizens' access to a specific social security tool, the guaranteed minimum income, reflecting on the reasons behind stricter or more extensive criteria and their rationale. To do so, a comparative study is carried out between the Italian and the Canadian legal systems, showing two different approaches on migrants' management and so opening to a broader analysis about the rationality of the securitarian and exclusive pattern characterizing the Italian way to migrants' integration.

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1. Public administration, poverty and migrations

Since 2008, the word “crisis” has become a daily presence in our life, referring to the economic and financial recession which has affected (and still affects) our existences, to varying degrees. However, the economic recession is not the only crisis that shocked Western countries in the last decade: a global humanitarian crisis has evolved, resulting in dramatically increased immigration to developed countries.

Poverty and immigration are two firmly connected elements: poverty, indeed, often constitutes the social condition from which migrants are trying to escape, perceiving the country of destination as a place of opportunities¹. Nevertheless, poverty risks to be a static feature in migration dynamics: social exclusion, cultural and linguistic barriers, difficult access to the job market, etc. may relegate newcomers to a condition of poverty also in the host countries, giving rise to social concern and doubts about the role of the public administration in addressing this issue². Indeed, public administrations are generally conceived as the subjects in charge to deal with both the migration and the economic crisis, being considered as the best-fitted institutions to provide effective solutions to phenomena characterized by elements such as market failures, need for considerable resources and for systematic planning, direct involvement of human rights and dignity, etc.. In this way, the public administration re-earned areas of responsibility previously transferred to the private sector³.

¹ According to World Bank, *Migration and Remittances Factbook* (Washington D.C: The World Bank, 2016) at 21, online: <https://openknowledge.worldbank.org/bitstream/handle/10986/23743/9781464803192.pdf>, the number of refugees constitutes approximately 7.9% of migrants, implicitly suggesting that the majority of migrants migrate for economic reasons.

² According to the Italian National Institute of Statistic (ISTAT), on the 2017, the 34,5% of the foreigners legally residing in Italy lived under the poverty line, with peaks of 59,6% in some areas of the country. Also in Canada, rates of low income among immigrants continue to be higher than among the Canadian-born population; see G. Picot, Y. Lu, *Chronic Low Income Among Immigrants in Canada and its Communities*, 2017, online: <https://www150.statcan.gc.ca/n1/pub/11f0019m/11f0019m2017397-eng.htm>

³ M. Ramajoli, *Quale cultura per l'amministrazione pubblica?*, 2 Giorn. dir. amm. 188 (2017).

The aim of this paper is to analyse the tools at the disposal of public authorities in addressing poverty, particularly under the point of view of their accessibility by the non-citizens. More precisely, this reflection will focus on the guaranteed minimum income systems, which recently have gained significance as modern tools capable to drastically reform the national welfare mechanisms, and universally prevent and eradicate poverty from our societies. Thus, being the guaranteed minimum income directed to fight poverty, a first general question will guide this article: does poverty matter only for citizens? (And, if not, which are the reasons justifying the newcomers' inclusion in a guaranteed minimum income scheme?).

A comparison between two legal systems, furthermore, will help us to better understand how different realities may respond in different ways to similar problems, helping us define the reasons and the rationality (or irrationality) existing behind different choices. The comparison will take place between Italy and Canada: notwithstanding the diversity of the two nations, looking at a country which has a history of successful migration management and multiculturalism would probably help to identify useful suggestion for the Italian context, which is at the heart of the recent migration phenomenon and whose mentality towards newcomers should probably undergo to a substantial change. Indeed, even if the guaranteed minimum income has found limited implementations in the Canadian system, these hypotheses will be capable to show the diverse cultural approach existing behind the migration management in the north-American country.

The present essay, as a consequence, starts with a broad reflection on the intersections between economic and migration crises, highlighting how the lack of public resources has negatively affected social rights, especially for non-citizens. Subsequently, the third section describes the rationale and the main features of the guaranteed minimum income, and the two following subsections are focused on the analysis of the different actualisations the guaranteed minimum income has had in Italy and Canada, naturally underlining the diverse access criteria for newcomers. Finally, the two conclusive parts of this essay try to draw some conclusions, answering to the questions raised in this section (and specified in the next one), showing how a cultural

change becomes the prerequisite to ensure a broad access for migrants to the guaranteed minimum income; a broad access which represents not only a fair but also a rational solution in order to ensure that this instrument of social security is able to efficiently pursue its objectives.

2. Social security, social rights and rights of newcomers

Before starting any reasoning on the guaranteed minimum income, it is useful to highlight the two kinds of poverty that have traditionally interested the public actions, resulting in two different kinds of solutions: the widespread poverty, as a pathology affecting an entire society, and the individual poverty. The first is faced by public authorities through general policies of wealth creation and redistribution; the second generates the right for individuals to public assistance, which can take the form of tax reduction, service and goods supply, or monetary support⁴.

Looking at its general dimension, it is immediately clear that poverty is a problem of public interest, not circumscribed only to its direct victims: except from the moral issue, it can generate widespread negative consequences. Poverty may often mean poor living conditions (malnutrition, lack of hygiene, etc.), and poor living conditions can cause an increase in public healthcare costs⁵. Moreover, poverty is generally a consequence of unemployment, and this lack of job opportunities pushes the individual towards different forms of sustenance. Criminality is one of them, which clearly has negative effects on society at large. Therefore, the significance of the above-mentioned policies of economic growth, industrial development and job creation appears crystal clear, as a general wealth increase can produce positive effects also on the weaker social classes⁶.

Nevertheless, this paper will focus on a tool primarily directed to address individual poverty, whose application can

⁴ B.G. Mattarella, *Il problema della povertà nel diritto amministrativo*, 2 Riv. trim. dir. pubbl. 359 (2012).

⁵ On this topic, E.L. Forget, *The Town with No Poverty: The Health Effects of a Canadian Guaranteed Annual Income Field Experiment*, 37:3 Can. Public Policy 283 (2011).

⁶ N. Amendola et al., *Povert *, in G. Vecchi (ed), *In ricchezza e povert . Il benessere degli italiani dall'unit  ad oggi* 302 (2011).

efficiently combat also poverty as a social issue. The guaranteed minimum income, like all the other social security programs, is not just a means to satisfy the basic needs of a person, but it must be a tool of equity and social integration, able to ensure satisfactory human development and to preserve the right to life and human dignity of the individuals⁷. In this sense, social security programs (or social services) can be qualified as the services provided (first of all) by the public administrations and designed to give assistance to overcome the hardships that may characterize life in modern societies⁸. As already mentioned, they can be provided in the form of monetary income support (for instance, old-age pensions or unemployment insurance, housing/children benefits and, naturally, guaranteed minimum income), tax reduction or provision of goods and services (for example, provision of vocational training courses or food and clothing supply)⁹. Since all these interventions have a cost, they must be financed through taxation, becoming a means of equity and wealth redistribution.

From the point of view of administrative law, on the one hand, the social assistance programs can be seen as a particular kind of public service, therefore bound to principles of efficiency, economy and non-discrimination, but characterized by a specific purpose: promoting the physical and mental health of the individual according to the above-mentioned principles of equality, social integration and human development¹⁰. On the other hand – in consonance with laws and constitutions of modern welfare states – the individuals are entitled to specific rights to

⁷ In general, about this role of the social services, see V. Cerulli-Irelli (2005), *La lotta alla povertà come politica pubblica*, 4 Dem. dir. 83.

⁸ For a definition of “social services”, V. Caputi Jambrenghi, *I servizi sociali*, in L. Mazzaroli et al. (eds), *Diritto amministrativo* 1023 (2001); E. Ferrari, *I servizi sociali*, in S. Cassese (ed), *Trattato di diritto amministrativo* 891 (2003).

⁹ The choice between one form or the others should be taken considering the aim of the public assistance and its beneficiaries. Moreover, the choice can be the result of political and cultural beliefs: for instance, poor people may be considered less responsible and less capable in the management of their economic resources, thus suggesting that social assistance through provision of goods and services can be more effective than monetary support. On this topic, C. Saraceno, *Il welfare* 44 (2013).

¹⁰ M. Delsignore, *I servizi sociali nella crisi economica*, 3 Dir. amm. 607 (2018).

receive the social services offered by public administrations, the so-called “social (security) rights”¹¹.

Looking at the current situation of the “social rights-public assistance” system, it is undeniable that the economic crisis has affected it significantly¹². From the point of view of public authorities, public expenditure cuts and policies directed to achieve a balanced budget become of primary consideration, forcing strict evaluations on the economic viability of the introduction, or even the conservation, of social programs¹³. If the economic recession may be seen as an unavoidable turning point, pushing the administration to act more efficiently (“doing more with less”¹⁴), in any case, the crisis has produced a new equilibrium between public resources and social rights¹⁵. From the point of view of the individuals, this new equilibrium has often implied a sacrifice of their social rights for the sake of avoiding a national economic crisis¹⁶. In times of economic recession, the idea of social rights not as “immediately payable” but as “financially conditioned” rights becomes stronger and stronger¹⁷. As already seen, social rights have evident costs and involve the redistribution of wealth: if the crisis has direct negative effects both on the private and on the public economy, it should become harder and harder to find resources to redistribute, and so funds

¹¹ For a definition of “social rights”, see M. Mazziotti di Celso, *Diritti sociali*, in *Enc. dir.* 802 (1964); A. Baldassarre, *Diritti sociali*, in *Enc. giur.* (1989).

¹² On this topic, see M. Delsignore, *I servizi sociali nella crisi economica*, cit. at 10, 587; S. Civitarese Matteucci, S. Halliday (eds), *Social Rights in Europe in an Age of Austerity* (2018); D. Tega, *Welfare Rights and Economic Crisis before the Italian Constitutional Court*, 1-2 EJSJL 63 (2014).

¹³ Italy, during the economic crisis and in accordance with new European regulations, introduced the principle of balanced budget in its Constitution (art. 81).

¹⁴ G. Pitruzzella, *Crisi economica e decisioni del governo*, 1 Quad. cost. 29 (2014).

¹⁵ M. Delsignore, *I servizi sociali nella crisi economica*, cit. at 10, 592.

¹⁶ For a short overview on the negative effects of the austerity policies upon public social services provision in the European countries, see the report of European Social Network (ESN), *Public social services in crisis: challenges and responses*, June 2015, available at the following website: https://www.esn-eu.org/sites/default/files/publications/2015_Public_Social_Services_in_Crisis_report_-_FINAL.pdf

¹⁷ M. Cinelli, *L'effettività delle tutele sociali tra utopia e prassi*, 1 *Riv. dir. sic. soc.* 25 (2016).

to finance public assistance interventions¹⁸. As we will further discuss in the conclusion, this idea has been deeply criticized by those who think that social rights, being an expression of social justice, cannot be sacrificed in the name of economic viability. This should be true especially in times of crisis, when the need for support of individuals is stronger, and so is the need for public interventions¹⁹.

However, the crisis produced further consequences upon the criteria for identifying the holders of social security rights. Besides the traditional qualitative criteria (as age, diseases or disability, level of incomes, etc.), new quantitative criteria have been introduced. In other words, the need to strictly quantify *ex ante* the funds at disposal for a social service can force the public authorities to fix a quantitative limit to public spending, and so to the number of their recipients²⁰. Thus, “first come, first served” has become a rule applicable to the supply of social security programs²¹.

This was the context where the migratory crisis took place. The intrinsically problematic nature of this phenomenon comes from the addition of further situations of needs in a context of lack of resources, barely sufficient to face the needs of the “native society”. Under this point of view, the migration crisis became not only a challenge for the economy of the receiving states but also a test case for the effectiveness of the principles of equity, human dignity and protection of human rights affirmed by the national, supranational and international fundamental norms²². On the one

¹⁸ A. Mangia, *I diritti sociali tra esigibilità e provvista finanziaria*, (2012) online: https://www.gruppodipisa.it/images/rivista/pdf/Alessandro_Mangia_-_Relazione_di_sintesi_della_III_sessione.pdf

¹⁹ L. Carlassare, *Diritti di prestazione e vincoli di bilancio*, 3 *Costituzionalismo.it* 137 (2015).

²⁰ In this sense, see the art. 15, legislative decree n. 22, March 3, 2015. This article introduces an unemployment allowance for a specific category of workers, strictly limiting its recipients: only workers who lost their job between January 1 and December 31, 2015 can receive this support. For the following years, the article explicitly refers to “future” laws, which will evaluate the availability of funds.

²¹ M. Cinelli, *L'effettività delle tutele sociali tra utopia e prassi*, 1 *Riv. dir. sic. soc.* 25 (2016).

²² For instance, we can recall the Universal Declaration of Human Rights or the Charter of Fundamental Rights of the European Union, where

hand, if the “first come, first served” rule works also for social services, it seems that for the “newcomers” the access to these public interventions should be limited, since they always arrive after citizens, as the word “newcomers” suggests. On the other hand, the negative effects of the economic crisis (fewer public resources, but more individuals in vulnerable conditions) make more difficult for states to justify, in the eyes of public opinion, the use of public funds to enhance the quality of life of the foreigners, before supporting their own citizens.

In conclusion, the initial question “does poverty matter only for citizens?” can be further articulated in three more specific questions, clearly expressing the concerns related to the interaction between the migration and the economic crises²³: 1) which is the rationale of the social security rights extension to individuals not effectively bound to a state? In other words, why do the foreigners deserve social security rights when they may not have the same amount of duties of the citizens towards the state?; 2) How can a sort of “social security tourism” be avoided? In other words, how can we avoid “opportunistic migrations”, directed only to take advantage of the social assistance programs of a state²⁴?; 3) Is it mandatory, or even feasible, to ensure social security rights to the foreigners, also in a situation of economic recession?

3. The guaranteed minimum income

The guaranteed minimum income represents a privileged field of analysis to search answers to these questions, providing the opportunity to open a reflection about newcomers' access to this mechanism that can lead us to broader conclusions on migrants' inclusion in social security systems.

Moreover, several reasons support the choice to focus on guaranteed minimum income. First of all, the strong topicality of the subject cannot be ignored: this kind of social assistance, whose

human/fundamental rights, equity and human dignity are included since their title and preamble.

²³ S. Cassese, *I diritti sociali degli altri*, 4 Riv. dir. sic. soc. 683 (2015).

²⁴ P. Van Parijs and Y. Vanderboghht name “welfare magnets” the countries with more generous benefit systems. See P. Van Parijs, Y. Vanderboghht, *Basic Income. A radical proposal for a free society and a sane economy* 218-219 (2017).

idea is actually several centuries old²⁵, has recently regained the attention both of politicians and scholars²⁶. Indeed, the inadequacy of the existing social security schemes – showed during the economic recession – has stimulated the search for alternative ways to assist the population²⁷. In addition, the guaranteed minimum income can be conceived as the core of a social security net, able to replace several other social assistance schemes (for instance, unemployment and housing benefit or minimum pensions)²⁸, having for this reason a deep impact on the national

²⁵ A first idea of a universal minimum income can be found in T. Paine, *Agrarian justice*, a pamphlet of 1795. Moreover, other intellectuals dealt with this concept, as T. Spence (1848), in *Principles of political economy*, or B. Russel (1918), in *Roads to freedom*. More recently, J. Tobin (1966), *The Case for an Income Guaranteed*, 4 *The Public Interest* 31 (1966) and F. Von Hayek, *Law, legislation and liberty* Vol. III 54 (1982). Today, Philippe Van Parijs is one of the most famous supporters of basic income; see P. Van Parijs, *Why Surfers should be fed: The Liberal Case for an Unconditional Basic Income*, 20:2 *Philosophy and Public Affairs* 101 (1991); P. Van Parijs (ed), *Arguing for Basic Income. Ethical Foundations for a Radical Reform* (1992); P. Van Parijs, *Real Freedom for All. What (if anything) Can Justify Capitalism?* (1995); P. Van Parijs, Y. Vanderborght, *Basic Income. A radical proposal for a free society and a sane economy* cit. at 24. See also F. Blais, *Ending poverty. A Basic Income for All Canadians* (2002); M. Walker, *Free Money for All. A Basic Income Guarantee Solution for the Twenty-First Century* (2016); A. Lowrey, *Give people money. How universal basic income would end poverty, revolutionize work and remake the world* (2018).

²⁶ See, above all, the Basic Income Earth Network, online at: www.basicincome.org/, which is a network of academics and activists interested in the idea of a Basic Income. For a schematic portrayal of the social security schemes comparable with a guarantee minimum income system implemented in different nations (Italy, France, Spain, Germany, Scandinavian countries, UK, Canada, etc.), see Vv.Aa., *Nuove (e vecchie) povertà: quale risposta?* (2018) and K. Widerquist, *A critical analysis of basic income experiments for researchers, policymakers, and citizens* (2018). Previously, see also M.C. Murray, C. Pateman (eds), *Basic Income Worldwide: horizons of reform* (2012) and R. van der Veen, L.F.M. Groot, *Basic income on the agenda: policy objectives and political chances* (2000).

²⁷ T. Treu, *Sustainable social security. Past and future challenges in social security*, 4 *Riv. dir. sic. soc.* 649 (2018).

²⁸ For instance, the participation to the Ontario Basic Income Pilot (see the following section 3.2.) imposed the withdrawal from other social assistance programs, as Ontario Works or the Ontario Disability Support Program (ODSP). The same happened in Italy with the “Inclusion Income” (“Reddito di Inclusione” – see the following section 3.1.), which substituted other social assistance programs [for instance, the ASDI (Assegno Sociale di

budget. Finally, as we shall see, it has the clear goal to prevent and eliminate both the individual and the widespread poverty from a community, providing the needy people not only with monetary support but also with other services directed towards their social inclusion.

A clarification is mandatory before proceeding with the analysis of how the guaranteed minimum income has been applied in Italy and Canada. There is a common misunderstanding about the extent of this social assistance scheme, which descends from a confusion about its correct “nomenclature”. Indeed, the guaranteed basic income must be distinguished from other similar (but different) social security measures²⁹.

The guaranteed minimum income is a system that offers a guarantee of minimum monetary resources for all people living under the poverty line, regularly distributed (for instance, monthly). The guaranteed minimum income is, at the same time, a universal and selective tool. Selective, because it is directed only to the individuals whose resources are under a minimum threshold, independently of their working status. Universal because it is directed to all the people under the poverty line, in order to provide them with enough money to overcome (or get close to) this line, in any case improving their living conditions. Thanks to this feature, the minimum income also becomes a tool to prevent and combat poverty as a widespread phenomenon. Another characteristic of the guaranteed minimum income is conditionality: the access to the monetary support is conditional to the effort of the beneficiaries at least to maintain their job or, if unemployed, to search for a new job or improve their professionalism through school education and vocational training. Indeed, job placement and vocational training are services jointly provided with income integration. Therefore, the purpose of the guaranteed minimum income is clear: it aims not only to treat

Disoccupazione), one of the unemployment allowances previously provided by the national legislation].

²⁹ About this distinction, see E. Granaglia (2018), *Premesse concettuali e nodi critici*, in Vv.Aa., *Nuove (e vecchie) povertà: quale risposta?*, cit. at 26; M. Martone, *Il reddito di cittadinanza. Una grande utopia*, Riv. it. dir. lav. 409 (2017); S. Toso, *Reddito di cittadinanza o reddito minimo* (2016); C. Del Bò, *Il reddito di cittadinanza fra mito e realtà*, il Mulino 790 (2013).

poverty, but also to prevent it, supporting its beneficiaries in their effort towards full inclusion in society and limiting their permanence under the poverty line through their integration in the labour market.

Different from the guaranteed minimum income are the minimum wage and, first of all, the basic income. In a few words, the minimum wage is the lowest remuneration, fixed by law, that employers can legally pay their workers. In contrast, the basic income is an income unconditionally granted to all, without means-test or work requirements³⁰. Therefore, this tool is fully universal (at least among the citizens) and unconditional. In other words, everyone has the rights to benefit of this public monetary support, regardless of the level of their income and their commitment to keep/find a job and improve their professionalism. Since both the rich and the poor can obtain this benefit, the basic income is not properly a tool to hinder poverty, but more generally a public intervention to enhance the wealth of the entire population. As a consequence, a parameter other than poverty must be used to determine its beneficiaries. Thus, citizenship becomes one of the generally chosen criteria, because it is able to ensure an effective connection between the recipients and the country investing its resources³¹. For this reason, the basic income is also known as citizen's income or citizen's basic income.

3.1. Guaranteed minimum income and citizenship requirements in Italy

Starting with the Italian context³², the first concrete attempt to implement a social assistance system similar to a guaranteed minimum income scheme came with the "Minimum Income for the Inclusion" ("*Reddito Minimo di Inserimento*" – RMI), introduced by the legislative decree n. 237 of June 18, 1998. The RMI was part of a national pilot project to verify the viability of a guaranteed

³⁰ This is the definition provided by the Basic Income Earth Network; see the following website: <https://basicincome.org/basic-income/>.

³¹ See P. Van Parijs, Y. Vanderborght, *Basic Income. A radical proposal for a free society and a sane economy*, cit. at 24, 220-224. According to the authors, the other criterion is "waiting period".

³² For a short portrayal, S. Toso, *Una ricostruzione storico-analitica*, in Vv.Aa., *Nuove (e vecchie) povertà: quale risposta?*, cit. at 29, 223; M. Martone, *Il reddito di cittadinanza. Una grande utopia*, cit. at 29, 409.

minimum income scheme in the Italian system and it lasted four years (1999-2002), involving at its final stage 267 municipalities. Principally financed by the State (only 10% of the funds came from the municipalities), it was directed to supply an income integration to the working-age individuals, employed or not, whose incomes were lower than a fixed threshold. Consequently, the RMI was characterised by the fundamental features of the guaranteed minimum income: first of all, it respected the “selective universalism” principle, being granted to everybody who lived under a poverty line. Secondly, its supply was conditioned on an active job search or to the attendance in vocational training courses and, in any case, to the participation at personalised social integration programs crafted by the municipalities for every recipient. As clearly affirmed in the art. 1 of the decree n. 237/1998, the aim of the RMI was to pursue social inclusion and economic independence of its recipients. Looking at the non-economic access criteria, the RMI was directed to Italian/EU citizens legally residing in the interested municipalities at least for one year, or to non-EU migrants legally residing in the interested municipalities for at least three years. The lack of resources to extend the RMI to the whole country forced the interruption of the project, which was not substituted by any other guaranteed minimum income schemes till 2017.

Indeed, the so-called “Social card” (*“Carta acquisti”*, introduced by the decree-law n. 112, June 25, 2008) and the so-called “Support for Active Inclusion” (*“Sostegno per l’Inclusione Attiva”* – SIA, introduced by the decree-law n. 5, February 5, 2012) did not share the basic features of a guaranteed minimum income system. The first consisted of a limited monetary transfer (€ 40/month), charged on an electronic prepaid card, usable (only in the stores involved in the project) basically to buy food, medicines and to pay energy bills, and granted to people living beneath a poverty line. The second was a monetary support not cumulable with the Social card (€ 231/month, proportionally increasing in accordance with the number of the family members), introduced as a pilot project and then gradually extended to the whole of Italy, directed to families living under a poverty line. In any case, these two social assistance actions cannot be considered as expressions of a guaranteed minimum income because they did not respect the “selective universalism” or the conditionality

principles. The beneficiaries of the social card were only families with a child less than three years old and individuals older than 65 years old, while the beneficiaries of the SIA were only families with at least one under-age child and with all the working-age members unemployed³³. Considering the target of the Social card (individuals younger than three years old and older than 65 years old), this benefit looks naturally unconditional and, in any case, no efforts towards employment were required to the working-age family members of the beneficiary. As for access criteria related to nationality, the Social Card was initially limited to Italian citizens, and only from 2014 it has been extended to EU citizens and non-EU citizens holder of an EU long-term residence permit³⁴. Instead, the SIA was from its inception available to Italian and EU citizens, and to non-EU citizens holding an EU long-term residence permit; in addition, all of them must have been legally residing in Italy for two years at the time of the SIA application³⁵.

The turning point came from the creation, by law n. 208, December 28, 2015, of a national “Fund to combat poverty” (*“Fondo per la lotta alla povertà”*, art. 1, comma 308), assigned to the Ministry of Employment and Social Affairs for the purpose of financing a new “National Plan to Combat Poverty”. Therefore, part of these resources was used to implement a new social security scheme – the so-called “Inclusion Income” (*“Reddito di Inclusione”* – REI) – which represented a concrete step towards the realisation of a guaranteed minimum income system also in the Italian context³⁶. According to art. 2 of the legislative-decree n. 147,

³³ In 2016, the SIA was extended to families with a member with disabilities or with a pregnant woman; furtherly, the unemployment requisite was eliminated. See the Interministerial Decree, May 26, 2016 (art. 4), online: https://www.lavoro.gov.it/temi-e-priorita/poverta-ed-esclusione-sociale/focus-on/Sostegno-per-inclusione-attiva-SIA/Documents/Decreto%20interministeriale%2026%20maggio%202016_SIA.pdf

³⁴ This extension was disposed by the law n. 147, December 27, 2013.

³⁵ At its inception, when the SIA was a pilot project extended only to some municipalities, the residence criteria was limited to one year of residence in the interested municipality; see Interministerial Decree, January 10, 2013 (art. 4), available at this web address: https://www.lavoro.gov.it/documenti-e-norme/normative/Documents/2013/Decreto_interministeriale_10_gennaio_2013.pdf.

³⁶ Italy and Greece were the last countries, among the EU member states, to concretely implement this kind of social policy. On this topic, see the already mentioned Vv.Aa. (2018), *Nuove (e vecchie) povertà: quale risposta?*, cit. at 29.

September 15, 2017, the Inclusion Income was a universal tool of family income integration, means-conditioned and subject to the acceptance by its beneficiary of a personalised social inclusion program, aiming to liberate individuals from poverty. It must be highlighted that this legislative-decree was the first, among the already-mentioned laws and decrees, to contain a normative definition of poverty as “the economic condition that does not let a family access goods and services needed for a fair quality of life” (art. 1, comma 1, lett. a). Except for this qualitative description, the economic eligibility of a family was determined in accordance with a mathematic index of their economic conditions compared to a poverty threshold. Nevertheless, in its first version, the REI could not be considered a proper guaranteed minimum income system, because it was not universal, being limited to families with at least an under-age child, a member with a disability, a pregnant woman or an unemployed member older than 55 years old. All these requirements were later removed, in accordance with the policy of enlargement of social support that characterised this tool³⁷. Looking at the further contents of the legislative-decree, deep attention was dedicated to the personalised social inclusion plan and to the social services provided to concretely foster the social inclusion of the individuals and prevent future situations of need (artt. 6 and 7). Though education, vocational training and job placement programmes still played a central role, other services were listed in the decree. Among these, there are also the cultural mediation services, clearly directed towards foreigners. Indeed, considering the non-economic access criteria, the REI was accessible to Italian and EU citizens. As for non-EU citizens, access was explicitly guaranteed for holders of an EU long-term residence permit, but implicitly also to those entitled to international protection (refugees and hypothesis of subsidiary protection) and to stateless persons³⁸. All of them (Italian, EU and

³⁷ For instance, the poverty line of the REI was higher than the poverty line of the “Support for Active Inclusion” (SIA), allowing the assistance of more families in marginal conditions.

³⁸ This interpretation was held both by the Italian National Institute of Social Security (INPS) and the Ministry of Employment and Social Affairs; see INPS circular n. 172 of November 17, 2017, available at the following web address: <https://www.inps.it/bussola/VisualizzaDoc.aspx?sVirtualURL=%2FCircolari%2FCircolare%20numero%20172%20del%2022-11-2017.htm>; and the Ministry of

non-EU) must have been legally residing in Italy for two years at the time of the REI application.

Before proceeding to analyse the latest form of guaranteed minimum income, it is appropriate to carry out a global thought on the foreigners' access conditions to the above-described assistance tools. Focusing on non-EU citizens, the generic trend has been to switch from requiring just a minimum period of legal residence in Italy (a period, it must be highlighted, longer than the one required to Italian/EU citizens), to the need for the EU long-term residence permit, combined with a minimum period of residence (equal for Italian/EU citizens and non-EU citizens). This had negative consequences on the foreigners' eligibility, considering the criteria required to obtain the EU long-term residence permit. To obtain this permit it is necessary to: 1) have been legally residing in Italy for 5 years³⁹; 2) pass an Italian language exam; 3) prove to have an annual income superior to a specific threshold; 4) prove to have even an adequate lodging, in case the request is not only for an individual but for an individual and his/her family members. First of all, it is clear that the first requirement for the long-term permit nullifies the illusory uniformity of the "minimum period of residence" required by the REI. According to the legislative-decree n. 147/2017, everybody (Italian, EU, non-EU citizens) must have been legally and continuously residing in Italy for two years but, in reality, non-EU citizens must have been resident at least for five years to obtain the long-term residence permit (excluding the time of the administrative procedure for the permit release)⁴⁰. If this may be

Employment and Social Affairs note of May 2, 2018, available at the following web address: https://www.cittalia.it/images/nota_prot._n._5070_del_2-5-2018.pdf. Moreover, according to the note of May 2, 2018 the foreigners holding a "humanitarian residence permit" cannot directly access to the REI, but as any other non-EU citizens, they must previously obtain the EU long-term residence permit. (The "humanitarian residence permit" was a permit – now abrogated – originally provided by the Italian legal system in order to allow the stay of foreigners who did not meet the requirements for international protection, but who would have been in serious danger if they had returned in their countries of origin).

³⁹ During these 5 years, the foreigner cannot leave Italy for more than six consecutive months and for more than ten months on the whole.

⁴⁰ According to art. 17, President of the Republic Decree n. 394 August 31, 1999, the administrative proceeding for the emission of a residence permit must last

an equal differentiation, in order to ensure an effective bond between the foreigner and the country, requirements number 3 and 4 should raise more doubts of legitimacy, indirectly demanding for an income and a housing solution in order to obtain a social assistance measure primarily directed to needy people.

Leaving these thoughts to the conclusion, we can notice that the described trend also corresponds to the general tendency that characterizes the access criteria to public social assistance in Italy. Starting from the Italian immigration law (1998)⁴¹, which ensured access to social services for any foreigner holding a residence permit valid for a minimum of one year, the Italian legislator kept on raising the bar of requirements, first of all introducing the need for the EU long-term residence permit⁴². Moreover, both national and regional legislators added minimum terms of residence to allow (only) newcomers’ access to numerous specific assistance interventions⁴³. This legislative trend was several times held unconstitutional by the Italian Constitutional Court, which denied the legitimacy both of the long-term permit⁴⁴ and the differentiated minimum residence⁴⁵ criteria. The Court

no longer than 90 days, but it can actually be longer as a consequence of the high number of requests and inefficiencies of public administrations.

⁴¹ Art. 41, legislative-decree n. 286, July 25, 1998.

⁴² Art. 80, law n. 388, December 23, 2000.

⁴³ For instance, art. 11, law-decree n. 112, June 25, 2008 required ten years of legal residence in Italy for the access to housing benefits.

⁴⁴ For instance, Italian Constitutional Court, decision n. 306, July 30, 2008, about the access of a foreigner with serious disability to an incapacity benefit. In the same sense, Italian Constitutional Court, decision n. 187, May 28, 2010; Id., decision n. 40, March 15, 2013; Id., decision n. 22, February 27, 2015; Id., decision n. 230, November 11, 2015 (all about the access of foreigners to different kinds of incapacity benefits); Id., decision n. 329, December 16, 2011 (about the access to education benefit for foreign students with disabilities). On this jurisprudence, S. Cassese, *I diritti sociali degli altri*, cit. at 23, 683.

⁴⁵ For instance, Italian Constitutional Court, decision n. 166, July 20, 2018 about the above-mentioned art. 11 law-decree n. 112/2008 (ten years of legal residence in Italy for the access to housing benefits). In the same sense, Italian Constitutional Court, decision n. 40, February 9, 2011 (36 months of legal residence for the access to additional social services offered by a region); Id., decision n. 168, June 11, 2014 and Id., decision n. 106, May 24, 2018 (respectively 8 and 10 years of legal residence for the access to public housing services offered by a region). On this jurisprudence, V. Ferrante, *È incostituzionale*

expressed this principle: the scarcity of economic resources may legitimate the legislator to circumscribe the number of social services beneficiaries, but this distinction cannot be unreasonably discriminatory and liable to harm the fundamental rights of the individual. In other words, access criteria directed to ensure the physical and legal presence of the foreigner in the country may be constitutional, but they cannot be irrational, and any further discriminatory requirement must be considered unacceptable. Thus, indirectly requiring a minimum income for the access to social security was considered unconstitutional, as well as asking for an irrationally long residence on the national soil.

Nevertheless, the Italian legislator did not change its mind, as it is clearly showed by the newly introduced "Citizenship Income" (*"Reddito di Cittadinanza"*, disciplined by the law-decree n. 4, January 28, 2019). Despite its name, suggesting a basic income scheme, the 2019 Citizenship Income is a further guaranteed minimum income system. Looking at its features, the Citizenship Income proves to be an extension of the 2017 Inclusion Income. It is still a universal tool of family income integration, means-conditioned and subject to acceptance by its beneficiary of a personalised social inclusion program, aiming to liberate the individuals from poverty. On the one hand, the law-decree n. 4/2019 directly recalled the personalised social inclusion plan and the social services of the 2017 Inclusion income, extending the job research requirements for all the unemployed family members. On the other hand, the effective expansion operated by this new measure concerns the amount of economic support (from the basic € 3.000/year of the REI to the basic € 6.000/year of the Citizenship Income, combined with further housing benefits) and the amount of the possible beneficiaries, consequently to the rise of the poverty line (basically, from a poverty index of € 6.000/year of the REI to € 9.360/year of the Citizenship Income).

Unfortunately, this policy of beneficiaries' extension did not affect the newcomers, whose access criteria became even stricter. Indeed, the access to the Citizenship Income for the non-EU citizens now requires both an EU long-term residence permit⁴⁶ as

l'esclusione dei cittadini extra-UE dai benefici sociali: si apre la via dell'eguaglianza sostanziale? 4 Riv. dir. sic. soc. 739 (2018).

⁴⁶ No explicit exceptions have been introduced, even this time, in case of international protection.

well as official documentation from the authorities of the states of origin, in order to fully prove the economic conditions of the foreigner. However, the law-decree n. 4/2019 explicitly admits that the last requirement does not work for refugees and for countries of origin where it is objectively impossible to obtain the above-mentioned documents (these states will be listed, according to the law-decree, in a specific decree of the Ministry of Employment and Social Affairs). Finally, the residency criterion – equal for Italian, EU and non-EU citizens – is now increased to ten years, with two years of uninterrupted presence before the application submittal.

The restrictions (and the inequality) seem obvious, even ignoring the already mentioned criticalities related to the economic requirement for the long-term permit. Only a foreigner – and not an Italian/EU citizen who may have lived most of its life abroad – is required to produce the additional documentation⁴⁷. Furthermore, the request of this documentation seems hardly compatible with a ten years residence criterion, which should be enough to ensure limited connections between foreigners and their states of origin. Thirdly, obtaining this documentation could be impossible not only for refugees, but also for other humanitarian and economic migrants. Nevertheless, according to the law-decree, the impossibility cannot be demonstrated in relation to the single case, because it will be predetermined by the Ministry of Employment and Social Affairs through a list of countries.

Finally, whereas the two years residence criterion of the REI was basically absorbed by the five years of residence required for the EU long-term residence permit, the newly introduced ten years requirement doubles the term of residence for the foreigners. Furthermore, ten years is the term of residence needed to obtain the Italian citizenship: in other words, the foreigners eligible for the Citizenship Income are the ones also eligible for Italian citizenship. Probably, this is the justification of the 2019 measure's name – Citizenship Income – even if it is still a guaranteed minimum income system, and not a proper basic income scheme.

⁴⁷ A similar requirement has already been judged discriminatory in relation to other social services. See the decision of the Court of Milan, March 27, 2019, *Capelli, ASGI, NAGA vs Comune di Vigevano*.

As admitted by art. 1 of the law decree n. 4/2019, poverty and needs for social inclusion should be the only access criteria, not citizenship, since this tool is not directed to all citizens (regardless of their economic conditions), but only to people in a state of need.

Therefore, this policy on migrants' access to public support is clearly an expression of the restrictive model that is nowadays characterizing migrants' management in Italy. Reflecting a cultural approach toward migration existing in a substantial portion of our society, the denial of access to guaranteed minimum income is justified by the need to reserve the scarce public resources only to Italians, producing implicitly a sense of separation and contrast between citizens and non-citizens, excluding newcomers from the community of individuals deserving a full recognition of their (fundamental) rights.

3.2. Guaranteed minimum income and citizenship requirements in Italy

Moving now to the Canadian context, here the idea of a universal minimum level of income has been debated since the first decades of the 20th century⁴⁸. While the early political manifestations arose during the Great Depression⁴⁹, a broad discussion was conducted during the late 1960s and 1970s. After noting an unexpectedly high level of poverty in the country, the Economic Council of Canada, a federally-funded crown corporation whose role was to assess the economic condition of the country, formulate the idea of a guaranteed income as an effective solution to help the high number of poor people (1968)⁵⁰. Moreover, in 1971, the Special Committee on Poverty of the Senate of Canada recommended to introduce a guaranteed minimum

⁴⁸ For a schematic portrayal, see D. Hum, W. Simpson, *A Guaranteed Annual Income? From Mincome to the Millennium*, Jan.-Feb. *Policy options* 78 (2001); E.L. Forget, *The Case for Basic Income in Canada*, in M.C. Murray, C. Pateman (eds), *Basic Income Worldwide: horizons of reform*, cit. at. 26, 81; P. Mulvale, S. Frankel, *Next Steps on the Road to Basic Income in Canada*, 43:3 *J. Soc. & Soc. Welfare* 27 (2016); A. Carli et al., *Canada*, in Vv.Aa., *Nuove (e vecchie) povertà: quale risposta?*, cit. at 29, 1999.

⁴⁹ Above all, we can recall the proposal to pay a "social credit" to all citizens expressed by the Social Credit Party, elected at the government of the province of Alberta in 1935.

⁵⁰ Economic Council of Canada, *The problem of poverty*, Fifth Annual Review: The Challenge of Growth and Change (1968).

income capable to support the Canadian citizens in state of need (excluding those who were single, unattached, and under 40 years old), fixing the basic features of the proposed tool in: being adequate, capable to preserve the incentive to work and fiscally possible⁵¹. These and other proposals pushed the Canadian government to sign an agreement with the Province of Manitoba (1973) to begin a minimum income experiment. Therefore, in 1974, the Manitoba Basic Guaranteed Annual Income Experiment (so-called “Mincome”) was launched, in order to verify the feasibility of a guaranteed minimum income system at a national level and study its economic, administrative, and social aspects (the amount of resources needed, the kind of structures and organisation required to implement this system, and the consequences of a basic income on the willingness of the recipients to search for a job). Political reasons and lack of resources forced to close the Mincome experiment in 1979, but the guaranteed minimum income came back to political attention in the mid-1980s, thanks to a report of the government-appointed Royal Commission on the Economic Union and Development Prospects for Canada⁵². The Commission purposed the implementation of a Universal Income Security Program (UISP), designed to replace some existing social programs (as Family Allowance, Child Tax Credits, federal social housing programs, etc.) in order to provide people in need with an income integration related to the number of family members and to the age of beneficiaries. The UISP proposals were ignored by the government but, after 20 years of stillness, serious policy discussions about the possibility of a guaranteed income took place in the last decade. Among these, two cases are undoubtedly of interest: the studies carried out in Québec – which resulted in the 2009 advisory opinion of the *Comité consultatif de lutte contre la pauvreté et l'exclusion social*⁵³ and in the 2017 final report of the

⁵¹ Senate of Canada, Report of the Special Senate Committee on Poverty (Croll Report) (1971), available at the following website: <http://www.albertasenator.ca/flashblocks/data/BT%20Poverty/Croll%20Report%201971.pdf>.

⁵² Royal Commission on the Economic Union and Development Prospect for Canada (Macdonald Commission), *Report* vol. II (1985), online: <http://publications.gc.ca/site/eng/472256/publication.html>.

⁵³ Comité consultatif de lutte contre la pauvreté et l'exclusion social, *Individual and family income improvement targets. On optimal means for achieving them, and on baseline financial support (advisory opinion)* (2009), online:

*Expert Committee on guaranteed minimum income*⁵⁴ – and the 2016 Ontario Basic Income Pilot (OBIP), a concrete minimum income experiment directed to 4.000 residents of the Province of Ontario.

In accordance with our goals, the two field experiments (1974 Mincome and 2017 Ontario Basic Income Pilot) and the recent Québec studies will be further analysed.

Beginning with the Mincome, as already said, it was a research project, mainly financed by the Federal government, which took place in the Province of Manitoba⁵⁵. The experiment involved families from two sites: Winnipeg, the capital and the largest city of the Province, and the rural community of Dauphin. The economic eligibility requirement was earning less than a poverty threshold, while – in accordance with the principle of selective universalism – being employed (or unemployed) was not relevant for the access, but only for the amount of the support. However, the income integration was not conditioned to the attendance in education, social inclusion or job placement programs: indeed, the aim of the experiment was to verify the free conduct of the recipients (in terms of job research, children school dropouts, demand of public services, etc.). In Winnipeg, the families were selected from a population of over 500.000 inhabitants and paired with other families from the same community not receiving the income support, in order to study the concrete consequences of the program. In this site, the main

https://www.bibliotheque.assnat.qc.ca/DepotNumerique_v2/AffichageFichier.aspx?idf=97213. For a study on its feasibility, see N.J. Clavet, J.Y. Duclos, G. Lacoix, *Fighting Poverty: Assessing the Effect of Guaranteed Minimum Income Proposal in Québec*, IZA Discussion Paper n. 7283 (2013), online: <http://ftp.iza.org/dp7283.pdf>.

⁵⁴ Expert Committee on guaranteed minimum income, *Guaranteed Minimum Income Québec: A Utopia? An Inspiration For Québec (final report)* (2017) online: https://www.mtess.gouv.qc.ca/grands-dossiers/revenu_min_garanti_en.asp.

⁵⁵ On this topic, see E.L. Forget, *The Town with No Poverty: The health Effects of Canadian Guaranteed Annual Income Field Experiment*, cit. at 5, 283 ss.; S. Frankel, J.P. Mulvale, *Support and Inclusion for All Manitobans: Steps towards a Basic Income Scheme*, 37:2 *Man. L.J.* 425 (2014). See also W. Simpson, G. Mason and R. Godwin, *The Manitoba Basic Annual Income Experiment: Lesson Learned 40 Years Later*, 43:1 *Can. Public Policy* 85 (2017) and the vast scientific bibliography cited. Finally, for a complete overview on the Mincome experiment, see the reports of the Manitoba Basic Annual Income Experiment available online at the University of Manitoba Libraries Dataverse at: http://dataverse.lib.umanitoba.ca/dataverse/TechDocs_

goal was to gauge work response, and therefore the disabled, the institutionalised and the retired were excluded. In contrast, Dauphin and its rural municipality, with a population of around 12,500 inhabitants, constituted a “saturation” site: all the families meeting the economic requirements were eligible to participate in the Mincome experiment. In this site, the aim was to recreate a scale model of a hypothetical national minimum income system.

Nevertheless, the Mincome had access criteria based on citizenship and residence: eligibility was restricted to people who were Canadian citizens or permanent residents. In addition, for the Dauphin site, to be eligible a person must have been residing there as of July 1, 1974, as well as when s/he applied for enrolment in the program⁵⁶. However, those criteria were not able to concretely affect the experiment, especially in relation to the Dauphin saturation site. Indeed, looking at the Dauphin population, the percentage of migrants in 1974 was very limited and it did not hinder the creation of a “Town with No Poverty”⁵⁷.

Coming now to the most recent experiences, the Ontario Basic Income Pilot (OBIP) was a guaranteed minimum income field experiment that took place in the Province of Ontario for about one year (April 2018 – March 2019)⁵⁸. The idea was launched by the Ontario government in 2016, to test the sustainability of this kind of assistance program, and the design of the project passed through a phase of public discussion (from November 2016 to January 2017) where a first OBIP discussion paper⁵⁹ was submitted to the population of the province⁶⁰. The

⁵⁶ The citizenship and residence criteria are explicitly indicated in *Mincome User Manual Version 1*, available at: <http://dataverse.lib.umanitoba.ca/dataset.xhtml?persistentId=doi:10.5203/FK2/XLOXQF>.

⁵⁷ The quote is referred to the already mentioned E.L. Forget, *The Town with No Poverty: The Health Effects of Canadian Guaranteed Annual Income Field Experiment*, cit. at 5, 283. For the statistical data on Dauphin population, see: <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/details/page.cfm?Lang=E&Geo1=CSD&Code1=4617048&Geo2=PR&Code2=01&Data=Count&SearchText=North&SearchType=Begins&SearchPR=01&B1=Immigration%20and%20citizenship&TABID=1>. Again, on the composition of Dauphine population, see the above cited E.L. Forget, *The Case for Basic Income in Canada*, cit. at 48, 9.

⁵⁸ Full information on the experiment are available at: <https://www.ontario.ca/page/ontario-basic-income-pilot>.

⁵⁹ The Basic Income Pilot in-person discussion summaries are available at: www.ontario.ca/page/basic-income-pilot-person-discussion-summaries.

result was an income supplement paid to the eligible couples or individuals, to ensure they enjoyed a minimum income level regardless of their employment status. In other words, in accordance with the “selective universalism” principle, everyone from 18 to 64 years old, living in one of the selected areas and having an income lower than a specific poverty line, could apply to participate at the project. The money support was unconditional, so recipients could go to school to further their education, be unemployed or continue to work. In the last situation, as said, the basic income would still have been supplied, but its amount would have decreased by \$0,50 for every dollar earned, in order to keep employment attractive⁶¹. The project involved over 4.000 people, plus a comparison group of other 2.000 people who did not receive the money supplement, necessary to evaluate the potential differences in terms of life quality generated by the OBIP.

As for citizenship and residency criteria, the program did not have any requirement based on nationality, being available to everybody legally residing in the selected site for the 12 months (or longer) prior to the application, and who still lived there at the time of the application. This represented a further extension in terms of foreigners’ accessibility, compared to the eligibility criteria required by the existing Ontarian social assistance programs (similar to the criteria requested by the other Canadian provinces and territories), which generally are: being a citizen, a permanent resident or a refugee residing in Ontario⁶².

Before proceeding further, one aspect deserves to be highlighted: the permanent resident status in Canada is different from the EU long-term residence permit. Permanent residence is

⁶⁰ H.D. Segal, *Finding a Better Way: A Basic Income Pilot Project for Ontario* (2016), online: <https://www.ontario.ca/page/finding-better-way-basic-income-pilot-project-ontario>.

⁶¹ An employed person, whose earning was lower than the poverty threshold, would have in any case took benefit from the OBIP, and the combination of job income and OBIP would have guaranteed him a higher total income than the income of an unemployed person receiving only the OBIP.

⁶² Above all, see the requirements for Ontario Works, a program which provides people with basic financial assistance (to cover food and shelter costs) while helping them prepare for, find and maintain employment. See the Ontario Works Act (1997) and its Regulations governing the Ontario Works program. About the citizenship criterion, see art. 6 Regulation n. 138/1998.

granted to foreigners who are (generally) outside Canada and want to permanently immigrate: in order to qualify, they must meet economic or non-economic criteria and succeed in a selection procedure. Therefore, a long period of residence is not a mandatory requirement to be eligible for public support. Yet, previous temporary work experience (or study period in a Canadian institution) can be very useful in obtaining Canadian permanent residence, because Canadian work experiences/study periods are positively evaluated in the permanent residence awarding procedure⁶³. However, temporary residents (as said, temporary workers and students) remain excluded from this system of social security.

The broader OBIP access criteria were clearly fostered by the content of the 2016 discussion paper and, also, by the opinions the population expressed during the public consultation. Starting from a deep belief that poverty is a social problem, hurting all the members of society and costing it a vast amount of money⁶⁴, the discussion paper clearly affirmed that the only eligibility criteria should have been economic situation, age and residence (one year) in the designated sites. “No other criteria should be employed. For example, individuals who are not yet Canadian citizens should not be excluded from the pilot”⁶⁵. Indeed, according to other

⁶³ More precisely, one of the selection programs of permanent residence applications is restricted to the individuals who have worked in Canada for at least one year.

⁶⁴ H.D. Segal, *Finding a Better Way: A Basic Income Pilot Project for Ontario*, cit. at 60: “[...] The resulting damages caused to human beings’ life chances, to communities and to social and economic productivity and progress are clear, and cannot be ignored. Poverty is the best predictor of early illness, early hospitalizations, longer hospital stays and earlier death. It is a reliable predictor of substance abuse, food insecurity, poor education outcomes, and for some, trouble with the law. So, quite aside from the pain, frustration and immense pressures that poverty inflicts on individuals and families, it also imposes serious economic strain and stress on communities, their schools, hospitals, policing and judicial system, and weakens their local economy overall. Reducing poverty and its negative effects more efficiently would be a serious plus for the well-being of all individuals within a community, regardless of their own level of income and financial stability. Reducing poverty is a solid investment in stronger families, communities, and the economy overall, if done with a measure of both generosity and efficiency”.

⁶⁵ H.D. Segal, *Finding a Better Way: A Basic Income Pilot Project for Ontario*, cit. at 60.

sections of the document, immigrants (along with people with disabilities, single parents and First Nations) represent the part of the Ontarian population hit the hardest by poverty⁶⁶. Thus, if the goal is to eradicate poverty and its negative effects on society, newcomers should be fully taken into account. Finally, according to the discussion paper, social and cultural inclusion was – also for this guaranteed minimum income project – a key result to achieve. As said, these ideas were shared by the population, expressing a culture toward migration definitively more open than the one characterizing the Italian context. The public discussion about the eligibility criteria highlighted that the project had to involve a diverse sample of the population, taking into account the groups that are more likely to benefit from a basic income, as refugees and newcomers (along with homeless people, single parents, etc.)⁶⁷.

Finally, the recent studies carried out in Québec deserve some reflections. Both the 2009 advisory opinion of the *Comité consultatif de lutte contre la pauvreté et l'exclusion social* and the 2017 final report of the *Expert Committee on guaranteed minimum income* are expression of the path undertaken by the public authorities towards a concrete reduction of poverty, which finds its normative foundation in the 2002 *Act to Combat Poverty and Social Exclusion* (Bill 112)⁶⁸. The two studies agree about the need to improve the social assistance system of Québec, and they suggest introducing a basic income support plan. According to the guaranteed minimum income features, it would offer a guarantee of monetary resources for all individuals living beneath a specific poverty line, employed or unemployed⁶⁹.

⁶⁶ The discussion paper also recalls the contents of the report realized by the Ontario Association of Food Banks, *The Cost of Poverty: An Analysis of the Economic Cost of Poverty in Ontario* (2008), online: <https://ccednet-rdec.ca/en/toolbox/cost-poverty-analysis-economic-cost-poverty-ontario>.

⁶⁷ In this sense, see the report about the Basic Income consultations: What we heard, available at: <https://www.ontario.ca/page/basic-income-consultations-what-we-heard>

⁶⁸ The 2002 Act to combat poverty directly established the *Comité consultatif de lutte contre la pauvreté et l'exclusion social*, which is the author of the 2009 advisory opinion.

⁶⁹ In this sense, Expert Committee on guaranteed minimum income, *Guaranteed Minimum Income Québec: A Utopia? An Inspiration For Québec (final report)*, cit. at 54, 15 and *Comité consultatif de lutte contre la pauvreté et l'exclusion social*,

Looking directly at the access requirements, none of these studies explicitly take into account the citizenship issue, but both of them contain clues suggesting the need for newcomers' inclusion. The 2009 advisory opinion uses different words to describe the beneficiaries: citizens, but also individuals, Quebecers, "all Québec households" and "persons and families living in poverty". This suggests that the word "citizen", when used, is used in a non-specific way, meaning resident in Québec, and this interpretation is supported by further evidence: human dignity and equity are recalled as principles to guide Québec towards its "place among the industrialized societies with the least number of individuals in situation of poverty and social exclusion"⁷⁰. Moreover, the need to consider the non-citizens in the fight against poverty is highlighted by a concrete element: one of the members of the *Comité* is also a member of the *Observatoire international sur le racisme et les discriminations-Centre de recherche sur l'immigration, l'ethnicité et la citoyenneté*.

Similar observations can be made about the 2017 final report. Here too, the recipients are described as: citizens, "individuals and families living in Québec", "all vulnerable persons", "most disadvantaged" and households. Again, equity is listed among the three core principles (along with incentive to work and efficiency) to achieve a society without poverty, able to better integrate all its members and with no stigmatization of the least advantaged. Finally, speaking about poverty in persons over 65 years old and about incentives to work, the Committee explicitly takes into consideration migrants' condition. On the one hand, the Committee "is concerned" by the eligibility rules for federal programs that exclude recent immigrants from receiving full support⁷¹. On the other hand, the Committee stresses the need to increase incentives to work (included vocational training) to allow for better integration in the labour market of special

Individual and family income improvement targets. On optimal means for achieving them, and on baseline financial support (advisory opinion), cit. at 53, 22.

⁷⁰ Comité consultatif de lutte contre la pauvreté et l'exclusion sociale, *Individual and family income improvement targets. On optimal means for achieving them, and on baseline financial support (advisory opinion)*, cit. at 53, p. 45.

⁷¹ Expert Committee on guaranteed minimum income, *Guaranteed Minimum Income Québec: A Utopia? An Inspiration For Québec (final report)*, cit. at 54, 134.

categories such as young persons at the end of their studies or immigrants.

Beyond the studies described, the actual social assistance programs provided by Québec deserves one last thought. The Last-Resort Financial Assistance⁷² and the other programs were considered by the Committee not sufficient to create a guaranteed minimum income system, because they leave some persons with little or no protection and because their support is not linked to an explicit minimum threshold⁷³. Beyond their contents, their access criteria consider the nationality of the applicant, demanding Canadian citizenship, refugee status or permanent residence⁷⁴. Therefore, also in this case, no long-term residence is mandatory, but it is necessary to be admitted to Canada as an individual aiming to stay.

4. Conclusion

Looking back at the questions formulated at the beginning of this paper, we must recognize that Italy and Canada have different approach on foreigners' access to social services, giving different emphasis to newcomers' poverty. Indeed, even if this study is limited to the implementations of the guaranteed minimum income in the two legal systems, these hypotheses represent a specification of the broader trends existing in the two countries about foreigners' access to social security⁷⁵, also communicating the different cultural and ideological bedrocks supporting the contrasting solutions.

Starting with the Italian *Citizenship Income*, the request of the EU long-term permit plus ten year of legal residence communicate that foreigners do not deserve social security rights, at least until they meet the requirements to become citizens, and

⁷² Governed by the Individual and Family Assistance Act and the Individual and Family Assistance Regulation.

⁷³ Expert Committee on guaranteed minimum income, *Guaranteed Minimum Income Québec: A Utopia? An Inspiration For Québec (final report)*, cit. at 54, 55.

⁷⁴ In this sense, Art. 26 of the Individual and Family Assistance Act.

⁷⁵ In this sense, see the above-mentioned decisions of the Italian Constitutional Court, which have held unconstitutional numerous laws excluding newcomers from different forms of public support during the last twenty years, *supra* notes 44-45. On this topic, see e.g. C. Corsi, *Peripezie di un cammino verso l'integrazione giuridica degli stranieri. Alcuni elementi sintomatici*, 1 Rivista AIC 1 (2018).

so their poverty should be allowed in our society since they are not fully perceived as a part of the national community and they are strongly distinct from citizens. Moreover, “social security tourism” is easily avoided: the need to wait for ten years is hardly compatible with the decision to move to a country only to take advantage of its guaranteed minimum income. Finally, citizenship becomes – more or less explicitly – a quantitative access criteria to social security. If the economic resources are scarce and “first come, first served” rule is valid to choose the limited number of recipients, the newcomers are always second to the citizens and do not deserve assistance.

Looking now at the Canadian studies and projects on guaranteed minimum income, the Ontario Basic Income Pilot – although it was only a limited field experiment – clearly provides different answers to the above-mentioned questions. On the one hand, after a short term of residence (12 months) foreigners were admitted to the project: they were conceived as part of the society from which poverty must be eliminated. On the other hand, 12 months were supposed to be enough to avoid “social security tourism”; this because, also considering the access conditions to other social security schemes (as Ontario Work and Québec Last-Resort Financial Assistance), it seems that Canada intends to prevent “social security tourism” through the selection of migrants’ entry applications, and not with the requirement of long periods of residence. Finally, as highlighted by the public consultations that preceded the OBIP, there is a widespread social perception that foreigners should benefit from social assistance because they are members of the Canadian population.

Reflecting on the two different approaches, the answers provided by the Canadian system seem more appropriate under several profiles, not only because they appear fairer. Poverty, indeed, is ordinarily perceived as an issue to be solved, a condition of disadvantage, an obstacle to the satisfaction of individual needs and aspirations⁷⁶. Therefore, our morality – which suggests that ignoring this problem is unjust, regardless of whether it affects citizens or newcomers – answers the first

⁷⁶ See B.G. Mattarella, *Il problema della povertà nel diritto amministrativo*, cit. at 4, 359.

question asked in the opening section⁷⁷ differently from the Italian legislator: poverty matters for everybody. Anyway, even without considering the concept of justice and the rights of the foreigners, the Canadian solutions are more in consonance with the principles regulating the actions of public authorities and with the nature of the guaranteed minimum income. At this point, it is useful to recall that guaranteed minimum income is not a basic income (or a citizens' income), so it is not a tool directed to improve the wealth of all the citizens (and only them). As described, the minimum income is a universal and selective tool, addressed to prevent and eliminate the negative effects of poverty, both individual and social: this means eliminate poverty from the entire social context. Therefore, this social assistance scheme risks being inefficient if it ignores a part of the society where poverty may hit harder, exposing the entire population (even citizens) to the negative consequences listed in the second section of this essay (higher health-care costs, higher rates of criminality, etc.). Moreover, the other central aim of the guaranteed minimum income is to foster social integration, especially if the conditionality principle is respected. Also under this profile, excluding foreigners means making this social assistance scheme inefficient. Indeed, it is logical that foreigners may need – more than citizens – to be introduced in the labour market and society, in order to help them become a resource able to reward the public support previously received.

However, if we agree on the need to include foreigners, we must agree also on the need to avoid “social security tourism”. In any case, asking for a long-term residence does not seem the best fitted solution, first of all as per the consideration of the proportionality principle. The commitment of a foreigner to the local community can be demonstrated in other ways, that do not ask him to “survive on his own” for several years. Public help can be fundamental for foreigners in situations of need: we cannot underestimate that they might be alone, without their families (still in their countries of origin), and so lacking a concrete network of social support. More relevance should be given to the selection of entry applications: being legally admitted should already be considered a sign of the capacity to integrate into the

⁷⁷ “Do poverty matter only for citizens?”.

national community. Hence, a shorter period of legal residence (for instance, one or two years), plus the ownership of a residence permit which ensures the stay for another reasonable term (one or two years more) may be sufficient and more proportionate. At this point, a change of perspective is mandatory: the question should not be “what happens if, after all, the foreigner decides to leave?” but, thinking at the foreigner as a resource, “how can we make sure he will stay for long enough, after receiving the support?”.

Finally, the question about the feasibility of ensuring social security rights to foreigners, also in a situation of economic recession, seems better fitted for an economist than a lawyer. Surely public funds are not limitless, and in case of lack of resources it is harder to redistribute them. Moreover, a balanced budget is fundamental, today, for the credibility of a country, especially if financial stability has been included as a rule in its constitution. But other principles are also included in the fundamental norms: principles such as human dignity and human rights protection, strictly connected to the provision of social services. Equality is another fundamental principle, that must govern the action of the public authorities. Thus, crises cannot be the indisputable justification for every sacrifice imposed upon the population, especially to that part of the population already in marginal conditions.

Public authorities have the duty to correctly use the tools of social services at their disposal, without automatically considering them as a “moneybox” from which to withdraw funds in case of emergency. Removal or limitations of a social security scheme must be evaluated keeping in mind not only the scarcity of resources but also the public interest pursued by the social assistance measure. It should be fundamental to verify the capacity of the “reduced” measure to satisfy its goals and, if not, to reflect on the opportunity to cut other components of public expenditure.

For these reasons, beyond any hypothesis on the feasibility of a guaranteed minimum income including also non-citizens, a “first come, first served” rule does not seem compatible with this kind of public intervention, because it does not appear compatible with the aim of poverty eradication, social inclusion and equality enhancement that characterize it.

5. One last thought

As said at the beginning of this reflection, Italy and Canada are different under several aspects (economic, political, social and geographical).

Migration has always been an essential element of Canadian history, society and economy and Canada has a solid tradition of multiculturalism, which became a legally recognized principle⁷⁸. However, Canada enjoys a privileged geographical location (being surrounded by oceans and bordering only with a wealthy state, which filters the migration coming from the south-American countries), which has facilitated the development of an efficient migration policy mainly conducted through the selection of migrants whose characteristics facilitate their integration and beneficial contribution to national economy. Finally, Canada has a large territory with a limited population (37,5 million inhabitants) and 21,9% of this population is made by migrants (7,5 million), with an increase of more than one million foreigners from 2011 to 2016⁷⁹.

Italy, instead, has been a country of emigration for most of its history, becoming a destination of immigration only in the last three decades. Even if 30 years sounds like a sufficient amount of time to become aware of a new trend, the Italian legal system has not yet rationally faced the migratory phenomenon, which keeps on being managed as an emergency. Looking at immigrants' percentage on population, it is limited to 8,5% (5 out 60 million), with an increase of about 300 thousand individuals just in 2018⁸⁰. Finally, Italy is geographically located at the centre of Mediterranean Sea, naturally making it a pivotal location in the current mass migration from the developing countries to the developed ones that, on the one hand, limits the possibility to easily select the entry flows of immigration, but on the other hand, makes the need for a rational management of migration more and more evident. This is a reality that cannot be changed. Instead, what needs to be done is changing our mentality, our social

⁷⁸ Above all, the 1988 Canadian Multiculturalism Act.

⁷⁹ See the 2016 Census of Canadian population, online: www12.statcan.gc.ca/census-recensement/2016/dp-pd/hltfst/imm/Table.cfm?Lang=E&T=11&Geo=00.

⁸⁰ This data are available on ISTAT website: www.istat.it/it/files//2019/02/Report-Stime-indicatori-demografici.pdf.

culture, our approach toward migration: as we said since the beginning, this crisis may offer the occasion to do it. We must understand how crises change the world and acknowledge that, in order to deal with the new circumstances, new solutions are needed; solutions that cannot correspond to an irrational strengthening of old policies and beliefs which appear more and more inappropriate.

Unfortunately, this is not what seems happening in Italy. Words count, and the transition from Inclusion Income to Citizenship Income is clearly meaningful. Citizenship and its benefits keep on being a wall “protecting” the citizens from the “strangers”, until they demonstrate to be identical to us and so tolerable in our society. In this sense, citizenship becomes the end of multiculturalism, instead of being the starting point of a mutual understanding. Anyway, keeping on comparing citizens and foreigners in relation to social services leads us to a distorted image of reality that does not consider the correct terms of comparison. Individuals asking for social services are all members of marginalised communities. Therefore, the other terms of comparison should be the part of the population which is far from a situation of need. These individuals must reconsider their prerogatives when their sacrifice is the key to a more equal society. These individuals are called to reflect on their social role, in order to avoid that solidarity and redistribution keep on being a burden only for the underprivileged.

In conclusion, crisis cannot be the main word audible during an emergency: words as equity, solidarity and social justice must become part of our daily vocabulary and, more importantly, they must become the concrete goals of our actions.

A STRATEGY ON THE INTEROPERABILITY ISSUE WITHIN THE P.A. FROM THE ITALIAN CONSTITUTIONAL PERSPECTIVE

*Costanza Masciotta**

Abstract

The essay aims at analyzing different EU and national interventions in the digital platform interoperability sphere. One of the juridical barriers which concretely hinder the use of Information and Communication Technologies by public administrations is the lack of uniform standards which can make several digital platforms interoperable in key sectors. The essay reconstructs EU interventions, with particular regard to EU Regulation 2018/1724, establishing a single digital gateway to allow single market users to access information, procedures as well as assistance services. According to the EU regulation member States must ensure online access to information and procedures concerning internal market established at national level, while the EU Commission must guarantee access to information and procedures established by the EU level. The essay also analyzes the Italian legal framework starting from the exclusive state legislative competence in the matter of “informative statistical and digital coordination of state, regional and local administration data” and its definition by the Constitutional Court, continuing with the new “digital competence” that the Delrio Law attributes to the Metropolitan Cities.

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1. Foreword

The article hereto aims at analyzing one of the juridical barriers which concretely hinder the use of *Information and Communication Technologies* by national public authorities in the provision of services to citizens and companies: the lack of uniform *Standards* which can make several digital platforms interoperable in key sectors, like transportation, commercial businesses and healthcare. The lack of interoperable formats and models¹ prevents public operators to exchange data on people who avail themselves of public services. As an example we can mention the single municipal manufacturing businesses help desks (SUAP) which often use software, incompatible with one another, and this impedes the exchange of fundamental data for the development of manufacturing capacities in the Italian territory.

The question to which we will try to give an answer through this article is which subject may establish uniform standards and open and interoperable models for public state, local and supranational authorities: the European Union in the exercise of its competence in the “internal market” sector, or the State or regional legislator pursuant to art. 117 Const., or the Metropolitan Cities, limited to the services that are present in their territory by virtue of the “promotion and coordination of metropolitan computerization and digitalization systems” (pursuant to art. 1, sub paragraph 44, subsection f, Law n. 56, April 7, 2014)?

In order to respond to the question it is essential, beforehand, to identify the potentials offered by digital

¹ Between the interoperable models of communications see xml, json, gml, sql.

technologies as an “instrument” at the service of social requests, from individuals and companies, also as a support for the processing of public, innovative and *smart* policies (cfr. paragr. 2).

Any discussion on the employment of ICTs cannot, nevertheless, exclude an adequate analysis of the risks² related to their utilization in terms of discrimination in the use of *online* services due to the *digital divide*, namely the creation of new forms of social marginalization, besides the issues related to privacy protection and the correct management of personal data of the people concerned.

Once the potentials and risks stemming from ICTs have been identified, the article will try to answer the fundamental question on this “digital competence” allocation, pointing out what has been done by the different levels of union, national, regional and local governments and offers an innovative solution aimed at the integration between national and European Union sources.

2. The opportunities offered by ICTs and the risks related to their use.

Since the nineteen seventies of last century the digital communication’s “Networks’ network”, loosely known as

² Talks about new digital technologies as a “new sovereign power” that requires the constitutional law to develop new instruments of action to fix the boundary of this power A. Simoncini, *Sovranità e potere nell’era digitale* (Capitolo II), in T. E. Frosini, O. Pollicino, E. Apa, M. Bassini (eds.), *Diritti e libertà in Internet* (2017). About the new problems that constitutional law is called to face in the digital age see A. Simoncini, *The Constitutional Dimension of Internet. Some research paths*, 16 EUI Working Paper Law (2016); O. Pollicino, G. Romeo (eds.), *The Internet and Constitutional Law. The protection of fundamental rights and constitutional adjudication in Europe* (2016) and G. Sartor, *Human rights and Information technologies*, in R. Brownsword, E. Scotford, K. Yeung (eds.), *The Oxford Handbook on the Law and Regulation of Technology* (2016); H. Dreyfus, *What computers can’t do* (1992); ID., *Mind over machine: the power of human intuition and expertise in the Era of the computer* (1986); Y. N. Harari, *Sapiens* (2015); B. Merritt, *The digital revolution* (2016); M. Bassini, O. Pollicino (eds.), *Verso un Internet Bill of rights* (2015); G. De Minico, *Antiche libertà e nuova frontiera digitale*, (2016); M. Margolis, G. M. Riano, *The prospect of Internet Democracy* (2009). With particular regard to the use of ICT by local public bodies see E. Carloni, *Le prospettive dell’e-Government nella Repubblica delle autonomie*, 4 *Giornale di diritto amministrativo* 453 et seq. (2008).

Internet, has seen a great expansion and has been employed for different purposes and with different and ever-changing modalities.

Let's just think about the diffusion of the Internet of Things (IoT), common use instruments connected to the internet and, therefore, capable of producing data (i.e. quantitative representations of reality) and make them circulate online, such as mobile phones, but also GPS navigation systems, public wi-fi networks, automobiles and credit cards.

Everyday IoT and artificial intelligence technologies development lead to the collection and transfer of an enormous amount of data, the so-called big data³, the analysis of which requires an extremely complex effort. *Data mining* systems allow, in fact, consolidating and extracting information (i.e. correlation among data) from this large amount of data, usable to make decisions by public authorities and private individuals.

Through the use of IoT and data mining systems, digital technology can, therefore, impact the quality of public services rendered to the citizen, operating in three fundamental phases: a) the identification of users' demands; b) the definition of diverse solutions based on social, political, territorial and economic contexts variables; c) the monitoring of results and the yield of applied solutions in order to guarantee services in line with users' interests. ICTs may also be used to define "marginalized" areas, from the "digital divide" perspective, in which efforts to build a widespread infrastructure network for both broadband and ultra-broadband can be concentrated.

While digital technologies represent a formidable instrument for the implementation of quality services offered to the citizen and to companies, we cannot underestimate the several risks related to their development in the absence of a solid juridical framework, due to what Bauman called "the ambivalence of modernity"⁴, which characterizes technological evolution,

³ On the Big data field see V. Mayer-Shonberger, K. Cukier, *Big data. A revolution that will transform how we live, work and think* (2013). On the use of Big data by national public administrations see M. Falcone, "Big data" e pubbliche amministrazioni: nuove prospettive per la funzione conoscitiva pubblica, 3 *Rivista trimestrale di diritto pubblico* 601 et seq. (2017).

⁴ Notion developed by Z. Bauman, *Modernity and Ambivalence* (1991).

namely that continuous swinging among new opportunities for the exercising of freedoms and the risks of limitations of the latter.

Indeed, the digitalization process is not neutral, first of all because public authorities can “control” citizens, their moves and their preferences in the use of services or individual political choices through the management and analysis of a large amount of *big data*. Nevertheless major issues may derive from the use of *predicting policies* techniques which allow foreseeing, with a high level of accuracy, the occurrence of future events through big data analysis in the specific sector. It is known that in the United States such techniques have been employed to predict the occurrence of future crimes, also detailing time, days, neighborhoods and, above all, potential criminals’ physical or behavioral characteristics⁵.

To that we must add the risk of a concentration of power among few economic operators with technical and financial means to produce applications (*software*), devices (*hardware*) at their disposal, or to manage web infrastructure and the consequential danger of creating new “marginalities” tied to the *digital divide*⁶.

EU regulation 2016/679 is bound to considerably impact big data management, expecting several limitations to be set upon public and private entities which operate in the online sector in order to safeguard personal data of those subjects affected by the management process.

Let us think, for example, about the possible creation of integrated computerized platforms for the collection and the analysis of sensitive data, capable of providing *data intelligence* services for public operators: such initiative should necessarily comply with the new European regulation related to sensitive data “profiling”, in line with an “*accountability*” and preventive risk analysis rationale⁷.

⁵ Focuses on the use of these predictive techniques in the criminal sphere and on the constitutional problems stemming from it A. G. Ferguson, *Predictive policing and reasonable suspicion*, 62 Emory Law Journal 259 (2012); A. Bonfanti, “Big data” e polizia predittiva: riflessioni in tema di protezione del diritto alla “privacy” e dei dati personali, 3 Rivista di diritto dei media 13 (2018).

⁶ On the idea of setting up internet access as a fundamental right see T. E. Frosini, *Libertà Egalità Internet* (2016). See also M. Bassini, O. Pollicino (eds.), *Verso un Internet Bill of Rights* (2015).

⁷ See art. 22, Reg. UE 2016/679.

Instead, in order to avoid the creation of a monopoly run by few economic operators for the qualitative and quantitative development of the services provided, there exist, among the possible solutions, the creation of flexible IT infrastructure, built on *standards* and open models and interoperable software that may be utilized by public and private operators to communicate among each other and exchange data to provide innovative services that are closer to citizens and companies, for a subsidiarity, adequacy and differentiation scope.

It is in this framework that the fundamental and real obstacle, object of the inquiry hereto, sets itself: the lack of interoperability among IT systems currently employed by public administrations at national and union level. The interoperability construed as the ability of two or more systems, networks, means or applications to exchange information among each other is, in fact, essential for a correct and timely transfer of data needed for the supplying of services to the citizen.

The analysis of regulations and practices is, therefore, of the essence in order to understand whether there exists a level of government able to set *standards* and technical solutions so as to guarantee the interoperability of union and national public administration's digital platforms.

3. EU intervention in the digital platform interoperability sphere

Within the realm of EU law, the issue of IT systems interoperability has been and it is still today at the center of an E-Government strategy in which realm EU Regulation 2018/1724 has recently been applied, establishing a single digital gateway to allow single market users to access information, procedures as well as assistance and resolution services.

The legal foundation of EU interventions in the public administration's digitalization context is, in fact, represented by a series of provisions in the Treaty on the Functioning of the European Union: art. 4, paragraph 2, letter a, TFUE, which establishes EU's concurring competence in the "internal market" sector; art. 26 TFUE which allows the EU to adopt measures aimed at establishing and guaranteeing internal market operability in which people, goods, capitals and services may freely circulate;

art. 114 TFUE which assigns the EU the task to harmonize member States regulations in such subject matter.

It is in the internal market context and, therefore, that of free circulation of people, services and capitals, that the “single digital market” lodges itself, as defined for the first time by the EU Commission’s Communication as “Strategy for the single digital market in Europe” - adopted on May 6, 2015 - as a market in which free circulation of goods, people, services and capitals is guaranteed and where, regardless of their citizenship or nationality or place of residence, people and companies shall not encounter obstacles to access and carry out online activities under fair competition conditions and being able to count on a high level of consumer and personal data protection⁸.

EU regulation 2018/1724 is the natural continuation of such strategy as well as of the subsequent Commission’s communication from April 19, 2016 titled “The EU Action Plan for E-Government 2016/2020 – Accelerating digital transformation in public administration”, in which the single digital gateway is indicated as being among the priorities in 2017.

3.1. E-Government Action Plan 2016-2020

The Action Plan establishes the fundamental principles which must inspire public administrations’ activities in single member States: a) *Digital by Default*: Public administrations should privilege the supplying of digital services while maintaining other channels for those who do not have technical abilities by choice or by necessity; b) *Once only principle*: citizens and companies should be put in the condition of providing the same information to public administrations once only, hence, public authorities must reutilize said information internally in compliance with data protection laws, so as to prevent any additional burden on the user; c) *Openness and transparency*: Public administrations should share information and data among each other and allow citizens and companies to check, correct their data and monitor the administrative processes that affect them; d) *Cross-border by default*: Public administrations should provide transnational digital public

⁸ This communication was followed by the Commission communication of 28 October 2015 titled “Improving the single market: greater opportunities for citizens and businesses”.

services, hence facilitating mobility within the single market; e) *Interoperability by default*: public services should be designed to function continuously throughout the single market, guaranteeing free circulation of data and digital services in the European Union.

In order to foster the implementation of said principles, the Action Plan also establishes real actions like the adoption of “*key digital enablers*” in digital public services, meaning agreed-upon standards and techniques to increase IT systems interoperability. As an example we may mention e-procurement platforms which allow registered and qualified users to search for vendors and buyers of goods and services in the single market⁹. The Action Plan also includes the creation of a mandatory interconnection among business registries in different member States through the *European e-Justice Portal* and fosters the development of EURES (European Job Mobility portal)¹⁰.

The Plan also incentivizes member States to create e-Health services for transnational exchange of online medical prescriptions and encourages the exchange of high-quality geospatial data (for example land registry maps, addresses, buildings, parks, protected sites, natural-risk zones et al.) to develop urban and territorial planning, as well as traffic management.

In July 2017, in order to carry out the Plan, the Commission has also instituted the EESSI system (*Electronic Exchange of Social Security Information*): a digital platform through which various member States’ welfare authorities can exchange electronic transnational social security documents. National welfare authorities will use electronic documents, translated in their languages, ensuring the correctness and completeness of the exchanged data. Such instrument shall allow for a fast, efficient and coordinated calculation of social security benefits of those who have lived and worked in many European Union countries.

⁹ For example, in the public sector these platforms can be used to win a public procurement contract. Among the public e-procurement operators we remind Consip SpA, an in-house company of the Italian Ministry of the Economy which makes available a specific platform and telematic negotiation tools. We also recall the eIDAS services, trust services of creation, verification, validation of digital signatures or seals or interoperable time validations, governed by the eIDAS Regulation (electronic IDentification Authentication and Signature) - EU Regulation 2014/910 on digital identity.

¹⁰ EURES offers services for job seekers and employers, also allowing the exchange of CV’s.

3.2. Updates introduced by Regulation 2018/1724 and open issues.

To carry out the strategy provided by the Action Plan, the EU Regulation 2018/1724 has stepped in establishing, as anticipated, the single digital gateway: an instrument which must offer citizens and companies a single access point on line with information, procedures, assistance and problem resolution services for the exercise of their rights in the internal market, reducing therefore conformity costs and administrative burdens on companies. Among the pursued objectives there are the simplification and the direct offer of *online* services to facilitate the interaction between citizens and companies on one hand, and competent public authorities on the other.

Citizens and companies should be able to easily access complete and reliable information on their rights as per EU law and on national regulations and procedures they must abide by in case of transfer, residence, study or performance of business activities in another member State.

Pursuant to art. 2 reg. 2018/1724 the single gateway grants access to: a) information on the rights, obligations and national and EU regulations which apply to those who avail themselves of their rights under EU law in the internal market and in the sectors outlined in schedule I; b) information concerning online and offline procedures established by EU law or at national level, in internal market context in the sectors outlined in schedule I; c) information on assistance or problem resolution services, indicated in schedule III, which citizens or companies may resort to for issues related to rights, obligations, regulations or the aforementioned procedures.

Member States must ensure online access through their webpages to information related to rights, obligations, procedures and assistance services established at national level, while the EU Commission must guarantee access to information on rights, obligations, procedures and assistance services established by the EU, pursuant to art. 4 reg. 2018/1724.

As established by recital 25 and art. 1, subparagraph 3, reg. 2018/1724, the regulation does not impact the core of national and union single market procedures and has the sole objective of guaranteeing their accessibility entirely online, without prejudice to national authorities' competence in matter of, for example,

verification of the exactness and validity of the information or proof presented.

Pursuant to art. 18, subparagraph 2, reg. 2018/1724 the single digital gateway must include a common, integrated user interface on the “Your Europe” portal, which shall be managed by the EU Commission. The common user interface must provide links to national and union websites which grant access to information, procedures and assistance and problem-solving services in the single market context and should be available in all of the Union’s official languages.

Schedule I of the regulation outlines the internal market sectors affected by the new single digital gateway regulation: from information on required documents to travel from one member State to another, to information related to work and retirement, from professional qualifications recognition to education systems and research activities, from healthcare to information on parental responsibilities, from consumer rights to consumer product safety, from consumer rights related to personal data protection to information on the starting, running and closing of businesses in member States, from information on taxes to that on waste recycling and management, from information on access to business financing to regulations and procedures on how to participate in tender procedures and obligations related to health and safety in the workplace.

The member States themselves are responsible for the online accessibility to procedures established by them and outlined in schedule II, unless reasons of imperative public interest related to security, health or fight against fraud prevent the execution of the entire online procedure (as per art. 6, subparagraph 3).

Schedule II, indeed, points out the procedures which, pursuant to art. 6 reg., shall be made accessible entirely online. Among these procedures there are the requests for proof of birth or residence registration, requests for diplomas or study certificates recognitions, tax return submissions, vehicle registrations, social security pension applications, commercial businesses notifications and licenses, submissions of corporate tax returns, employee social security contributions.

Art. 9 reg. 2018/1724 establishes rather broad and generic quality requirements for the information that must be provided.

Such information must be simple to utilize by the users, exact and complete for the purpose of exercising their rights in the internal market context, it must contain reference to applicable legal acts and outline the authority in charge or, at any rate, the subject in charge of the contents of the information, as well as client service or problem resolution contact information (i.e., telephone number or email address) and the date of the latest update of the data provided. The information must also be “well structured” and “written in a simple and clear language, appropriate to users’ demands”¹¹.

Before initiating the procedures concerning the internal market, a complete and clear explanation of the several required phases must be provided by the authority in charge of their execution, along with the accepted authentication and signature means, the format of possibly required proof, the appeal methods, the modalities of online payment, the deadlines and, finally, the applicable regulations in case of silence from the authority in charge¹².

In light of the regulation provided in reg. 2018/1724 the issue of IT systems interoperability proves to be particularly irrefutable with regards to online access to internal market procedures for transnational users: art. 13 reg., in fact, provides that online national procedures accessible by non-transnational users must be executable *online* also by transnational users “through the same technical method or an alternative technical method”.

Art. 13, subparagraph 2, imposes the minimum requirements which shall have to be fulfilled by member States in the context of said procedures. The users must be allowed to access instructions to complete the online procedure in a language that is “broadly understood by the largest possible number of transnational users”, to submit the information required by the procedure also if the format of such information is different from the same type of information in the State concerned, to identify themselves, to electronically sign documents, to provide proof required by the procedure and to receive the outcome of the latter

¹¹ See art. 9, parag. 1, g) and i), Reg. UE 2018/1724.

¹² See art. 10 reg. cit. at 12, 10. With regard to information relating to assistance and problem-solving services concerning the exercise of rights in the internal market required by Annex III see art. 11 reg. cit. at 12, 10.

in electronic format if this is possible for users of the State concerned, as well as making online payments through transnational services for paid procedures.

Among the problems of applicability stemming from the provision there is, firstly, the identification of the “structure” of the information necessary for the execution of the procedure and, secondly, the provision of one or more formats for the transnational exchange of information and required documentation.

Moreover, the regulation does not identify the possible alternative technical modalities to guarantee online access and execution of national procedures to transnational users.

Therefore, the issue of “competence allocation” to define information structure, technical formats and possible alternative solutions to guarantee online execution of national procedures to transnational users remains open.

Another provision which engages member States in a rather complex compliance effort is art. 14 reg. 2018/1724, based on which the Commission operates with the States to create a “technical system” for the automated transnational exchange of proof among competent authorities of several member States in the procedures that must be accessible online. The technical system allows, upon explicit request made by the user, for the handling of requests for proof, requests for the exchange and access to it, its automated transmission among authorities in charge in different member States, guarantees confidentiality and integrity of the proof and a high level of security in the transmission and handling of it. The technical system must also guarantee an “adequate” level of interoperability through other relevant systems, in compliance with art. 14, subparagraph 3, letter g.

The provision does not indicate, though, the modalities to ensure communication among IT systems in the several member States and their establishment seems to fall within EU Commission’s competence for the definition of technical and operational specifications, to be exercised through executive acts which will be adopted by June 12, 2021 (cfr. art. 14, subparagraph 9).

The technical system operates only upon request from the users who may still submit proof by means other than online ones.

That does not lift the States from the obligation to integrate the technical system (cfr. art. 14, subparagraph 6) in order to allow the automated exchange of proof with other member State's requesting authorities. Indeed, for the online procedure, the *una tantum* principle rules, based on which the authority in charge of the procedure, upon explicit and unequivocal request made by the user, must request the proof directly to the other member States' issuing authority by way of the technical system.

In parallel, applicability issues regarding IT platforms interoperability stem from subparagraph 2 of art. 14 reg. 2018/1724, whereby it is imposed upon the authorities in charge issuing electronic format proof, within their own member State, the obligation to put such proof at the disposal of requesting authorities of another member State in an electronic format "which allows the automated exchange".

The member States' authorities in charge and the Commission must also guarantee the users, pursuant to art. 20 reg. 2018/1724, access to assistance and problem resolution services indicated in schedule III through a "common instrument for finding assistance services" accessible through the single gateway. The Commission is called to create and manage said common system, as well as defining the structure and the format of the information related to said services which must be accessible through the common instrument.

The regulation, though, does not provide the modalities and the term by which the Commission will have to act in such regard, an aspect that could prejudice the operability and functioning of the common instrument.

A fundamental connecting role between the EU Commission and member States is conferred to national Coordinators which, pursuant to art. 28 reg., are called to invigilate the correct and uniform enforcement of the regulation by the national authorities concerned.

Propulsive and stimulus duties are instead assigned to the "gateway coordination group", formed by a national Coordinator for each member State and chaired by a EU Commission's representative. The group is called to favor *best practices* exchange and update among member States, to assist the Commission in the monitoring of the quality of information and procedures offered

by the single gateway, to express opinions to improve the quality of the services themselves.

As per the costs stemming from the compliance with the regulation's rules, perplexity is aroused by the provision found in art. 32, subparagraph 2, reg. 2018/1724, which charges member States' budgets with expenses related to portals compliance, platforms, assistance services and procedures implemented at national level, unless otherwise provided in the EU regulation.

Ultimately, the regulation leaves a series of fundamental questions open: the definition of the structure of information that is object of transnational exchange, the identification of interoperable *formats* among member States' IT systems and the determination of the subject in charge of defining them permanently, to which is added the fundamental issue of compliance costs, which are fully charged to member States for nationally established portals and services.

As per the entry into force of the regulation, it is necessary to point out that the creation of the single digital gateway, of its interface and the rules on accessibility of information related to the internal market shall bind member States and, therefore, national public authorities, starting from December 12, 2020, while the term for member States' "municipal authorities" has been postponed to December 12, 2022.

Therefore, the Italian State has one year to align national public authorities' portals to quality requirements and make the information related to the sectors and the procedures in Schedules I and II of the regulation accessible.

The strictest and most complex obligations imposed upon the States with regards to *online* access to the procedures in Schedule II (art. 6, reg 2018/1724), also in favor of transnational users (art. 13), and automated exchange of proof relevant to such procedures shall instead be binding starting from December 12, 2023: hence, the online access and execution of such procedures and transnational exchange of electronic format proof shall be guaranteed by all member States and, therefore, by public authorities in charge, state and local, within the next four years.

Finally, the issue related to the identification of "municipal authorities" which may benefit from the most favorable term (i.e., December 2022) for regulation provisions compliance remains open: in particular, it is about understanding whether Regions,

metropolitan Cities and Provinces may fall within the context of such definition.

4. Legal framework of State interventions.

With regards to the distribution of State-level competence in reference to technological and IT systems interoperability development, art. 117, subparagraph 2, letter r, Const. places “informative statistical and digital coordination of state, regional and local administration data” in the context of exclusive state legislative competence. The importance of such matter has progressively been defined by Constitutional Court according to an interpretation which includes the same notion of IT systems interoperability: in judgment n. 17/2004 said coordination is defined as a “merely technical profile to ensure language, procedures and homogenous standards commonality, in order to allow communicability among public administration’s IT systems”.

The real problem which defines such material context is not, therefore, its definition but rather its extension: in fact, the State legislator, when establishing IT systems coordination standards may also regulate those profiles which fall within “regional and local administrative organization” of regional competence. In judgment n. 31/2005 the Constitutional Court has stated that such State coordination may “determine a strong impact on the real exercise of roles with regards to administrative organization of regions and local governments”, but it is “necessary to ensure a more decisive involvement of said governments in the implementation phase [...] through a reciprocal “intesa”” [In the Italian legal system “intesa” is a word that signifies an “enforceable agreement” between two or more subjects/entities]¹³.

Based on the subsequent constitutional jurisprudence, though, the “intesa” is only necessary where State competence impacts the subject matter of “regional and local administrative organization”, while in other material contexts an intervention by the Regions of mere consultative nature is sufficient¹⁴.

¹³ See Const. Court 26 January 2005, n. 31, 2.6.

¹⁴ See Const. Court 13 January 2010, n. 15 and 14 Maj 2008, n. 133.

In the exercise of such State legislative competence the digital administrative code (CAD) has been adopted, through d.lgs. n. 82/2005¹⁵, which in art. 14 reiterates how the State is competent to define “the technical rules that are necessary to guarantee IT systems safety and interoperability, as well as informative flows for data circulation and exchange and access to the services that are provided online by the administrations themselves”.

State, Regions and local governments foster understandings and agreements to identify technical rules and to carry out the objectives of the National and European Digital Agenda through a coordinated and shared process of administrative digitalization and employ the necessary methods for such purpose at Unified Conference level¹⁶.

In this scenario AgID, the Agency for Digital Italy¹⁷, intervenes and, pursuant to art. 14 *bis* CAD, has the task to ensure digital coordination of public state, regional and local administrations and to reach AgID’s goals in line with the European Digital Agenda’s provisions. Among AgID’s fundamental functions there is the adoption of guidelines containing rules, standards and technical instructions, including those on method, vigilance and control over execution and respect of CAD’s regulations in the context of digital Agenda, public administration digitalization, IT Security, *interoperability* and cooperation among national public and European Union’s IT systems.

¹⁵ D. lgs. 7 March 2005, n. 82, subsequently modified and integrated first with D. lgs. 22 August 2016, n. 179 and then with D. lgs. 13 December 2017, n. 217. For a comment on the CAD see at least E. Carloni, *Codice dell’amministrazione digitale. Commento al d.lgs. n. 82 del 2005* (2005); C. D’Orta, *Il sistema di governo delle ICT. Funzioni e organizzazione*, 1 Giustizia Amministrativa (2005); G. Duni, *Amministrazione digitale (voce)*, 1 Enciclopedia del Diritto 36 (2007); F. Cardarelli, *Amministrazione digitale, trasparenza e principio di legalità*, 2 Dir. dell’informazione e dell’informatica 227 et seq. (2015).

¹⁶ Under this framework art. 14, paragraph 3 *bis*, CAD, now repealed, provided for the establishment within the Unified Conference of a permanent Commission for technological innovation in Regions and local authorities with purely advisory functions.

¹⁷ On AgID and its functions, see E. Carloni, *Il decreto “crescita”*, 11 Giornale diritto amministrativo 1040 et seq. (2012) which defines the AgID as “subject to the heart of a renewed governance of public computerization”.

To accelerate the public administrations digitalization's path at national level a specific supervision group was set up for the implementation of the digital Agenda¹⁸: the group was mainly formed by a net governmental preponderance with a limited participation of regional and local governments. The supervision group was, in fact, presided by the Prime Minister or by one of his delegates and composed by the Minister of Economic Development, the Minister of Public Administration and Simplification, the Minister for Territorial Cohesion, the Minister of Education University and Research, the Minister of Health, the Minister of Economy and Finance, the Minister of Agricultural Food and Forestry Policies, one regional President and one Mayor appointed by the Unified Conference. Such system, though, lived a short life due to the excessive fragmentation of competence and the absolute centrality ascribed to the Executive in the group composition.

In the scope to simplify digital agenda's governance, the provisions related to the supervision group have been repealed through d.lgs n. 179/2016 which bestowed on the Prime Minister the power to appoint, for a period of maximum three years, a special Commissioner for the implementation of the digital agenda and established another body, "the permanent Conference for technological innovation", with consultative responsibilities toward the Prime Minister in matters of technological innovation development and implementation in State administrations.

Within the Conference, the regional and local governments' participation is not provided. The body is chaired by a Prime Minister's representative appointed by the Prime Minister himself and is formed by the President of the National Center for IT in Public Administration (CNIPA), CNIPA's members and the Chief of the Department of Innovation and Technologies.

Territorial governments' participation in the formation of AgID's boards is also minimal: in the Steering Committee there are, in fact, only two territorial governments' representatives, appointed by the Unified Conference, while the remaining structure is solely composed by Ministries' representatives¹⁹.

¹⁸ The group was established by the art. 47, d.l. n. 5/2012.

¹⁹ The Steering Committee, according to art. 21, parag. 4, d.l. n. 83/2012 is formed by a representative of the Prime Minister, a representative of the Ministry of Economic Development, a representative of the Ministry of Education,

The current AgID's governance system proves to be problematic due to the net preponderance of the Executive and, in particular, of the Office of the Prime Minister, as well as the limited means of connection between the State and local governments and the absolute scarcity of participation of the newly formed Metropolitan City.

Notwithstanding the above, AgID has fundamental duties like drafting of the three-year plan for IT in public administration, with which the objectives and the main interventions for public administration systems' development and management are set.

The plan is elaborated by AgID and approved by the Prime Minister or by the Minister in charge by September 30 each year.

In the exercise of such competence the 2019-2021 three-year plan for IT in public administration has been adopted: a document of strategic scope and intended for all public administration which shuttles the country's digital transformation and defines the operative parameters for public information technology development.

The plan aims at fostering coherence and certainty of "national interest databases"²⁰, defined by art. 60 CAD as "the totality of information digitally collected and managed by public administration, homogenous by type and contents, the knowledge of which is important to carry out administrations' institutional tasks and for statistical purposes" and for analysis using *big data* methodologies.

Therefore, this is about databases rich of authentic information produced by public administrations, necessary for the supplying of public services. Said databases must be integrated with one another in order to facilitate the reciprocal exchange of information and avoid requesting the citizen or the company the same data (*once only* principle) and must become enabling platforms for the citizen. In order to facilitate the exchange process

University and Research, a representative of the Minister for Public Administration and Simplification, a representative of the Ministry of Economy and Finance and two representatives appointed by the Unified Conference.

²⁰ Art. 60, par. 3 *bis* CAD identifies the following databases of national interest: a) national repertoire of spatial data; b) national register of the resident population; c) national database of public contracts; d) criminal records; e) business register; f) automated archives on immigration and asylum matters; f-*bis*) National register of clients (ANA); f-*ter*) register of agricultural companies.

among public administrations the plan also requires a harmonization and standardization of recurring codes and nomenclature in “controlled vocabularies” to be used in the implementation of public databases, in the definition of “shared data models (ontologies)”, especially when information related to different domains (i.e. people, organizations, services and places) is managed.

To carry out such objectives, several digital enabling platforms at national level, like “PagoPA”, have been set up, allowing citizens and companies to pay public administrations electronically, guaranteeing payment safety and reliability and “SPID”, the Digital Identity Public Service which guarantees citizens and companies a single, safe and protected access to all public administration’s digital services through a single digital identity.

Furthermore, a simplification agreement between government and regions at Unified Conference level was also signed on 25 July 2019, putting four fundamental objectives at the center of the discussion: the creation of the Corporate Cyber Folder, through the future SUAP interoperability by way of adopting *common* standards; the creation of a corporate informational portal where all information related to “company lifecycles” may be found; simplification of company checks to make them transparent and more effective and the standardization and digitalization of forms concerning companies.

5. Best practices at local level.

In the framework of public services digitalization at local level we cannot fail to mention a fundamental role that the Delrio Law attributes to the new Metropolitan City²¹: the “promotion and

²¹ The debate on the legal framework of Metropolitan Cities is vast, see at least L. Vandelli, *Le autonomie nella prospettiva delle riforme*, 1 Ist. Fed. 10 et seq. (2014); ID., *La legge Delrio all’esame della Corte: ma non meritava una motivazione più accurata?*, 2 Quad. cost. (2015); ID. (eds.), *Città metropolitane, province, unioni e fusioni di comuni. La legge Delrio, 7 aprile 2014, n. 56 commentata comma per comma* (2014); E. Carloni, *Differenziazione e centralismo nel nuovo ordinamento delle autonomie locali: note a margine della sentenza n. 50/2015*, 1 Dir. Pubbl. 145 (2015); C. Pinelli, *Gli enti di area vasta nella riforma del governo locale di livello intermedio*, 3 Ist. Fed. 569 (2015); G. Gardini, *Crisi e nuove forme di governo territoriale*, ivi; A. Sterpa (eds.), *Il nuovo governo dell’area vasta* (2014); A. Simoncini, G. Mobilio,

coordination of computerization and digitalization systems in the metropolitan territory”, as per art. 1, subparagraph 44, letter *f*, Law April 7, 2014, n. 56.

It is, therefore, the same legislator who explicitly asks the new entity to adopt public *smart* policies able to coordinate the various computer platforms already in use in the metropolitan territory through the ongoing support from ICTs.

It is not by chance that the 2030 Metropolitan City of Florence Strategic Plan²² has put digitalization policies at the center of the new metropolitan development strategies, based on the “Interconnection-competitiveness” binomial. Pivotal importance is given to the development of info-mobility systems able to provide real time information on transportation modalities and wait time in the metropolitan area, as well as the creation of a multi-way mobility.

Correspondingly, the Metropolitan City of Milan Strategic Plan pursues the development of suitable communication networks and digital infrastructure to support digitalization of public authorities and sees in the availability of “digital

L'identità delle Città metropolitane attraverso i loro Statuti: sintomi di una sindrome “bipolare”?, 4 Le Regioni 669 (2016); F. Pizzetti, *La riforma degli enti territoriali. Città metropolitane, nuove Province e unioni di Comuni* (2015); G. Vesperini, *Il disegno del nuovo governo locale: le città metropolitane e le province*, 8-9 Giorn. Dir. amm 786 (2014); A. Lucarelli, *La Città metropolitana. Ripensare la forma di Stato e il ruolo di Regioni ed enti locali: il modello a piramide rovesciata*, 13 Federalismi (2014). On the fundamental choices that characterized the Statutes of the new metropolitan body, see different essays in A. Lucarelli, F. Fabrizzi, D. Mone (eds.), *Gli Statuti delle Città metropolitane* (2015). Critical remarks against the sentence of the Constitutional Court n. 50/2015 which confirmed the overall structure of the Delrio Law, see A. Spadaro, *La sentenza cost. n. 50/2015. Una novità rilevante: talvolta la democrazia è un optional*, 2 AIC 18 et seq. (2015); S. Bartole, *Legislature statale e Corte costituzionale alla ricerca della città metropolitana*, 2 Giur. cost. 460 et seq. (2015); G. C. De Martin, M. Di Folco, *L'emarginazione del principio autonomistico e lo svuotamento delle garanzie costituzionali per le istituzioni provinciali in una sentenza “politica”*, *ivi*, 466 et seq.; G. Serges, *L'istituzione delle Città metropolitane, le clausole legislative di auto-qualificazione e l'elettività “indiretta” degli organi istituzionali (a margine della sent. n. 50 del 2015)*, *ivi*, 478 et seq.

²² See Metropolitan Renaissance, Metropolitan City of Florence, 2030 Strategic Plan, p. 23, 41 and 47.

infrastructural assets and services a strategic factor for the economic development from a Smart City perspective”²³.

The adoption of ICTs by Metropolitan Cities may also curtail prejudice stemming from “ontological” dyscrasia which has characterized their very creation: the dyscrasia between the new city’s administrative boundaries, identical to those of homonymous Provinces, and the so-called “functional metropolitan area”, which includes the socio-economic mechanisms of a specific territorial context.

As an example, the territorial boundaries of the Metropolitan City of Florence do not include strategic entities like Prato, Pistoia or Pisa, with which the economic interactions are, instead, constant. Analogous considerations also apply to the Metropolitan City of Milan which doesn’t encompass, for example, the Monza district.

The development of integrated digital technologies and, therefore, a steady *network* among metropolitan entities and operators of a certain “strategic metropolitan area” may curtail prejudice deriving from the aforementioned dyscrasia by way of exchanging statistical, economic and commercial data relevant for the supply of public services.

There is another aspect which should not be underestimated: large part of metropolitan Statutes opted for a

²³ See the three-year Strategic Plan of the Metropolitan City of Milan 2016-2018, adopted with resolution no. 27 of 12 May 2016, p. 112. The Strategic Plan of the Metropolitan City of Genoa looks at digitalization as functional to the administrative simplification, the efficiency of services, the strengthening of participation and the overcoming of digital divide, see p. 60 and 66. The Strategic Plan of the Metropolitan City of Turin 2018-2020 sets among the fundamental objectives the overcoming of digital divide and the creation of a large space for sharing and integrating data between municipalities and all public and private actors (Private Cloud), as a facilitator tool for supra-municipal and strategic projects, see p. 60 and 61. The Metropolitan Strategic Plan of the City of Venice provides for the adoption of a “Metropolitan Digitization Plan” which will identify the interventions for the digital transformation of the metropolitan territory, see p. 125, 146 and 147. Finally, the Metropolitan Strategic Plan of Bologna 2.0 includes among the fundamental objectives the definition of a digital metropolitan Agenda, see p. 21, and the overcoming of digital divide, see p. 59.

second grade government type, in which the fundamental bodies of the new entity are not directly appointed by the electorate²⁴.

We therefore pass from a political representation entity (i.e., the Province) to a territorial representation one with an instrumental and coordinating role for the pursuit of objectives which the municipalities alone would not be able to attain from a subsidiarity and loyal cooperation perspective. We must think about the functions given to the Metropolitan City with regards to strategic plan, service integration, infrastructure and metropolitan networks: the development of ICT may very well give value to this “instrumental” and “functional” dimension of the new entity, thought of as “facilitator” of municipal and intermunicipal functions through a coordination and support activity.

From the standpoint of facilitating service fruition in the Metropolitan City of Florence and in the “functional metropolitan area”, the University of Florence, in collaboration with the new Metropolitan City, has created an *open* digital platform called KM4city, designed to make the Metropolitan City of Florence a “sentient smart city”²⁵.

KM4city is a free, multilingual and multiuse platform which allows gathering and integrating data from several metropolitan area operators, both *open data* and personal data, static and in real time. It concerns multi-domain integrated data related to mobility and transportation, culture, events, parking, tourism, health, safety, free Wi-Fi, civil protection notifications, Internet of Things’ sensors. Such platform allows the integration of data related to these sectors, check offered services, provide new services and monitor metropolitan development also through sensors (i.e., traffic sensors) or *social media*. The main issues which have been handled and resolved with KM4city are tied to acquisition and management of massive amounts of

²⁴ With the exception of the Statutes of the Metropolitan Cities of Milan, Rome Capital and Naples.

²⁵ In doctrine focuses on the legal framework of the “sentient cities”, also looking at the European smart cities model, E. Carloni, *Città intelligenti e agenda urbana: le città del futuro, il futuro delle città*, 2 *Munus* 235 (2016); M. Caporale, *L’attuazione delle “smart cities”. Competenze e coordinamento tra livelli di governo*, 4 *Ist. Fed.* 949 (2015); A. Pensi, *L’inquadramento giuridico delle “città intelligenti”*, 9 *Giust. Amm.* (2015); E. Carloni, M. Vaquero Pineiro, *Le città intelligenti e l’Europa. Tendenze di fondo e nuove strategie di sviluppo urbano*, 4 *Ist. Fed.* 865 (2015).

heterogeneous data, characterized by different sources, protocols and formats. The shortage of interoperability and the different quality of data have been handled by KM4city through data mining instruments which allow collecting data and correcting problems within acceptable parameters.

No matter the format or protocol to which the data is tied or its source, KM4city extracts and aggregates information and knowledge to be used to support public strategies and improve the quality of services for users through fully automated data collection and handling processes.

Such platform allows, for example, evaluating the quality of provided services in the metropolitan area of Florence, provides instruments for the analysis of the collected data, for decision-making support and user behavior analysis.

KM4city also offers integrated analysis instruments of infrastructure resilience which allow to produce and validate models and steer the decision maker in case of emergency or in case of critical infrastructure, creating various data: open data, in real time, surveys, evaluation of stakeholders, operators' and citizens' data and users' behavior analysis.

All data is collected in a completely anonymous manner: the platform maps the user profiles that can be exploited by the Metropolitan City and by private operators to understand when consumers use such services, which they prefer, in which areas and through which modality.

KM4city is founded on *dashboards*: control and synthesis visualization structures which are used to monitor the status of mobility services, parking, vehicles and people flows, events, maps, public services quality, wifi quality and, also, weather forecast²⁶.

Currently, with its data, KM4city covers Tuscany as a whole in terms of road information, points of interest²⁷, public

²⁶ This tool also allows users to create multiple control panels using different elements (i.e. numbers, percentages, indicators, graphs, compare web pages, weather forecasts) that are automatically updated in the dashboard based on the parameters set by the users.

²⁷ In reference to culture, tourism, accommodation, restaurants, education and business.

transportation services, information on hospitals, traffic flow, parking, environment and social media²⁸.

Among regional level best practices, the creation by Tuscany of an online platform called “Star” is rather important. It allows access to manufacturing businesses’ single gateways in all Tuscan municipalities, the execution of online procedures related to certified notifications of construction work start (SCIA) and the dispatch of communications related to the characteristics of hospitality structures, as well as tourist rental communications.

In the Metropolitan City of Milan, instead, the creation of a single metropolitan gateway for manufacturing businesses in relation to the sixteen municipalities in the entire North West area of Milan is underway, while a metropolitan level SUAP is already in use in the Metropolitan City of Bologna.

6. Closing observations

From the national and European legal framework and from examined best practices it emerges how the adoption of common ontologies and interoperable platforms is perceived as a central issue by the European Union (cfr. EU Commission Action Plan, reg. 2018/1724), by State level (i.e. CAD, 2019-2021 three-year plan and Digital Agenda), as well as regional and metropolitan level.

The regulatory interventions carried out until today have not yet given a satisfactory response to the fundamental question underpinning the survey at hand, namely which level of government should provide interoperable models and uniform standards for the exchange of static and dynamic data among the many Union and State public administrations’ digital platforms.

On closer inspection a similar problem of “competence allocation” was found in the context of personal data protection: in such sector, as we know, there was an initial harmonization intervention at European level through directive 95/46 which

²⁸ In this regard, a control on social media is carried out through Twitter Vigilance: a tool for analyzing Twitter in real time and offline which ensures the collection of 98% of tweets / retweets related to events of the metropolitan area. Twitter Vigilance allows to evaluate moods of city users on services, it informs city users, discovers and evaluates new trends. Twitter Vigilance is used in Florence and Tuscany by Lamma for weather forecasting and by SII-mobility to evaluate mobility services.

established fundamental principles and common objectives to be gradually pursued in the various member States. D.lgs 196/2003, “personal data protection Code” has therefore been adopted to achieve the objectives set by the EU directive. Lastly, in order to fill the previous regulation’s gaps, especially with regards to profiling and automated personal data handling, the European legislator has intervened once more, this time with regulation 2016/679 which established a self-sufficient and binding legislation in each one of its elements for every member State.

From the different perspective of creating a single digital gateway the European Union has immediately intervened with the “regulation” source to outline the minimum quality requirements of information available online in internal market sectors, but leaved open the real IT systems interoperability issue. Regulation 2018/1724 sometimes defers the definition of technical instruments, especially that of interoperable models and *formats* to a future intervention by the Commission through enforcement measures for the adoption of which there is often a lack of peremptory terms (cfr. art. 18, subparagraph 5, art. 24, subparagraph 4, art. 25, subparagraph 5).

Let us consider art. 18, subparagraph 5, according to which the Commission *may* adopt enforcement measures which provide interoperability requirements to facilitate the gathering of information within the common user interface. The provision of a discretionary intervention by the Commission seems incompatible compared to those provisions of the regulation which impose the exchange of information on rights, procedures and services among the many member States’ IT systems.

To that we must add the non-provided peremptory term by which the Commission shall define, through its own enforcement measures, methods of automated collection and exchange of anonymous statistics on visits at the single gateway and the connected web pages²⁹. State authorities in charge and the

²⁹ The statistics must be collected and exchanged, in accordance with art. 24 reg. 2018/1724, in an anonymous and aggregate manner and will have as their object data relating to the number, origin and type of users of the single gateway, their preferences, and information on the availability and quality of information, procedures and assistance services accessible through the single gateway. Similarly, art. 25 reg. 2018/1724 provides an anonymous feedback tool on the quality of services and information provided through the single gateway

Commission, summoned to collect the aforementioned statistics, shall therefore carry out a “profiling activity” pursuant to art. 22, subparagraph 2, letter b), reg. 2016/679, but the lack of a peremptory term by which collection and exchange methods must be established could severely impact users’ rights.

Ultimately, in light of regulation 2018/1724 the responsibility to guarantee national IT system interoperability seems to bear down on the single member States according to the respective distribution of competence between central and local level, while for IT platforms set up at European Union level the responsibility falls on the European Commission.

From the Italian perspective, in light of the definition offered by Constitutional Court in the matter of “computerized information coordination of state, regional and local administrations data”, the imposition of *interoperable* standards fully falls within the realm of exclusive State competence according to art. 117, subparagraph 2, letter *r*, Const.

Nevertheless, having considered the complexity of such “coordination activity” at national level, and the lack of opportunity for a *top down* approach, the path that will lead to the provision of interoperable systems at national level will be gradual and with “gradual geometry” from a territorial standpoint. A fundamental coordination role among central, regional and local levels may be, indeed, carried out by Metropolitan Cities. Such entities are, in fact, conceived with a support function to municipalities in the “promotion and integrated management of services, infrastructure and communication networks of interest of metropolitan cities” and in the “promotion and coordination of computerization and digitalization services in the metropolitan area”.

From this perspective Metropolitan Cities may coordinate among themselves to identify interoperable formats and ontologies, to offer therefore good practices able to steer the legislator from a *bottom-up* perspective which is best suited for a strongly municipalized administrative system like the Italian one.

Compared to the path which has led to the identification of a European regulation on personal data protection, the route to

and the common interface. Art. 25, par. 5, reg. 2018/1724 also provides the Commission intervention without indicating any peremptory term.

identify a correct digital platform interoperability regulation should be, therefore, characterized by a fundamental modification: the key role of Metropolitan Cities which, in the privacy sector, has lacked.

The Metropolitan Cities should intervene in the exercise of their computerization and digitalization promotion and coordination role to *suggest* and *propose* models, common ontologies, interoperable standards both for national and EU platforms.

From a supranational perspective, metropolitan best practices may be outlined at coordination group's meetings, as per art. 30 reg. 2018/1724 and may guide the EU Commission toward the adoption of those acts which the regulation defers for the identification of interoperable formats and models for the different platforms established by the EU.

The new Metropolitan City, although conceived as "instrumental" for national government levels, especially municipal, may therefore have usefulness well beyond State boundaries, exercising a stimulus and steering role also with EU institutions.

From a national standpoint, instead, the arrangement of a panel between AgID's Steering Committee and Regions and local governments' representatives, including Metropolitan Cities seems appropriate in order to discuss operational issues which currently infringe upon the interoperability of national platforms in sectors covered by the regulation 2018/1724.

In this perspective the current conference-system with governmental preponderance does not prove to be sufficient³⁰.

The presence of only two territorial governments' representatives, appointed by the Unified Conference, inside AgID's Steering Committee is not, in fact, suitable to guarantee

³⁰ Such as the "permanent Conference for technological innovation" which is chaired by a representative of the Prime Minister and is formed by the President of the National Center for Information Technology in Public Administration, the members of the CNIPA and the Head of the Department of Innovation and Technology. Similarly, the "Technical Committee of Intelligent Communities", established within the AgID, is composed of only two persons designated by the Permanent Conference for relations between the State, the Regions and the autonomous Provinces of Trento and Bolzano, one designated by the National Association of Italian Municipalities and one from the Union of Italian Provinces.

adequate means of connection between central government and local governments and does not consider the computerization and digitalization systems coordination role, attributed to Metropolitan Cities by the Delrio Law.

The panel should therefore see the dialogue among AgID's Steering Committee, a representative from each Metropolitan City and territorial governments representatives appointed by the Unified Conference at a number higher than two units compared to the current system.

At the so-integrated panel the *best practices* employed at regional and metropolitan level could be discussed: such practices may exercise a *boosting role* before the State legislator to define the regulations on "computerized information coordination of state, regional and local administrations data" and, therefore, to define technical means of communication among public administrations IT systems at national level.

In particular, a list of standards and formats allowing the various state, regional and local public administrations platforms to communicate could be arranged at the panel, as well as a timetable which outlines the various phases of the digitalization process with "gradual geometry".

Such synthesis document should therefore guide the State legislator toward the imposition of interoperable formats and the provision of a gradual process which shall lead to the exchange of transnational information concerning internal market by December 2022 and to the full execution of online procedures by all state and local public administrations by 2023.

MAY THE LAW RULE THE PAST? WHAT IF THE ECtHR HAD DECIDED BERLUSCONI'S CASE

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Abstract

In a long-awaited judgment, the European Court of Human Rights has decided not to decide on Berlusconi's disqualification from the Italian Parliament. The case regarded the Italian anti-corruption legislation that prohibits convicted individuals from sitting in Parliament, and its conformity with the human right to not be subject to retroactive criminal sanction – Article 7(1) European Convention of Human Rights. The former Prime Minister of Italy claimed his disqualification fell under the latter, and therefore the new legislation should not have been applied to his criminal conduct that predated its adoption. However, the Italian Government maintained that the measure was administrative law, thus it was duly applied in Berlusconi's case. The Strasbourg Court took a long time to decide on the case. Meanwhile, Berlusconi was rehabilitated through the Italian legal system, getting back his right to stand for election. The analysis the European Court of Human Rights should have undertaken would have provided a welcome clarification on the relationship between the rule of law concept and its temporal application. This article aims to accomplish this task with a simple conclusion: a backward-looking law is not only possible, but sometimes even necessary for the sake of rule of law.

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1. Introduction

On November 22, 2017, the European Court of Human Rights (ECtHR) held a hearing on a curious petition: the former Prime Minister of Italy, Silvio Berlusconi, claimed that he suffered an injustice by the application of the new Italian legal anti-corruption framework. Indeed, Berlusconi had lost his seat in Parliament on account of this law, as a consequence of his prior criminal conviction. He claimed that, being this disqualification substantially a criminal sanction, it should have been subject to the principle of non-retroactivity according to Article 7(1) European Convention of Human Rights (ECHR). In the opinion of the Italian Government, conversely, the disqualification was considered to be an administrative law measure, and therefore it was justly applied to past acts as well, such as the criminal acts committed by Berlusconi, which predated the adoption of the law. One year later, and five years after Berlusconi's expulsion from the Italian Parliament, the ECtHR declined to pronounce judgment on the case. On May 11, 2018, Berlusconi had obtained a judgment of rehabilitation by the competent Italian court that ended the effects of his criminal conviction; thereby, the disqualification's effects ceased as well since they expressly relied on the conviction dismissed.

Accordingly, on July 27, 2018, Berlusconi withdrew his claim at the ECtHR. Finally, the ECtHR concluded in its Decision of November 27, 2018, that no special circumstances relating to

respect for human rights required it to continue the examination of the case.

Despite the odd conclusion of the case, and its neutral outcome – Berlusconi having back his passive electorate and Italy not having repealed its law –, the issues at stake are so crucial that a legal analysis and a possible conclusion are needed. So, *what if* the ECtHR had ruled – or had decided to rule – on the substance of the case? The actual question that the ECtHR should have dealt with is to what extent and in which fields the law – read, a legislation that provides for disqualification of convicted parliament members – may rule the past. In principle, a backward-looking law is incompatible with the rule of law.

The rule of law ideal has been interpreted, *inter alia*, as a guiding tool for human actions. From this perspective, how could the law rule past events without infringing the very basic dignitarian principle that an individual's behaviour should be judged according to the legal framework operating at the time? The very notion that someone could be punished for a rule that came into existence only after they had acted is repulsive to us. The traditional criminal law prohibition of retroactivity – *nullum crimen, nulla poena sine praevia lege poenali* – refers to this concept. Nonetheless, the rule of law would fail in its goal to govern human behaviour if it were prevented from ruling on events that have already taken place. In truth, any legal adjudication necessarily involves past events, and the prohibition of retroactivity only aims to set exclude certain types of legal entitlements from the general temporal projection of the ruling of the current law. This other feature of the rule of law is expressed by the principle *tempus regit actum*, according to which a judgment should be formulated having due regard to the law in force at the time when the judgment itself is made. When this is applied to acts committed under a past legal framework, the law is said to rule retrospectively to that extent.

Should a law deprive citizens who have been sentenced for a particular offence of an otherwise strong legal entitlement, such as the right to be elected to a public office, whom should be affected by this law? Everyone who had previously been sentenced, only those sentenced when the law was already in force – such as Berlusconi – or only those who committed the relevant acts amounting to a criminal offence after the law had

been enacted? Strict compliance with the prohibition of retroactivity demands that we consider only the third option, since in the other two categories, the individual could not have relied on that law to guide their behaviour.

According to the principle of *tempus regit actum*, the law would surely apply to the last two categories and, through a more complex process, to the first one as well. At first glance, the choice would mainly depend on the legal category under which the ruling law falls. If the deprivation of political rights due to a criminal conviction were considered a criminal sanction, the argument for the prohibition of retroactivity would gain strength: applying a law to persons convicted when that law was not in force when they committed the relevant facts would mean violating the prohibition of retroactive criminal law. Should the law be classified as of an administrative nature instead, its application to convicted persons would not be obstructed by these temporal questions.

Obviously, the matter becomes more complicated if we do not rely on the division between criminal and administrative according to the national law, but according to the ECHR.

In this article, I will preliminary adopt a legal theory approach to examining the question. The current argument is that the rule of law, where inspired by an administrative law perspective, has an inherently progressive character. That is, it may legitimately dismantle consolidated and former legal entitlements, thereby permitting its retrospective enforcement. In order to examine the possible compliance of Italian law with ECHR, the first claim will be that the law challenged does not provide a criminal sanction, but an administrative requirement, thus to be applied to past events. Secondly, a law regulating political rights contains general interests that go beyond the individual right's entitlement, which should be applied equally to everyone to prevent distortion in the electoral competition. In conclusion, the Parliamentary vote for the disqualification of Berlusconi was a due act as the law providing it was in compliance with the ECHR. The ECtHR should have decided in this manner had it ruled on the case.

2. The Italian legal Anti-corruption framework and Berlusconi's claim

Italy has traditionally been considered the “black sheep” of Europe in the fight against corruption. An effort to halt this trend was carried out in 2012, when the Italian Parliament adopted the law of November 6, 2012, n. 190 containing criminal and administrative anti-corruption provisions. The law also delegated to the Government the task of adopting a regulation regarding the access to public offices, and the provision of disqualifications in cases where candidates or public officials hold criminal convictions. Accordingly, the Government adopted Legislative Decree December 31, 2012, n. 235. Under the name of “incandidabilità” it provided a six years ban on running for public elected offices, or loss of one's seat in case the office had already been assigned, for those who had been sentenced with imprisonment for a period longer than two years for crimes whose provision of incarceration was at least four years.¹

The adoption of the new regulation on loss of public office did not raise any particular debate. It was even applied in a regional election without causing any scandal,² until the day former Prime Minister of Italy, and active Parliament Member, Silvio Berlusconi, was convicted.

During the Parliamentary election of February 24, 2013, Berlusconi was elected to the Senate of the Republic. The Court of Appeal of Molise, the district where he got elected, ratified his election on March 1, 2013. However, on August 1, 2013, Berlusconi was convicted of tax fraud and sentenced to four years imprisonment by the Court of Cassation.³ According to the law, Parliament should only have taken notice of the conviction and proceeded to vote in favour of the expulsion of Berlusconi from Parliament. After a long debate, on November 27, 2013, Parliament finally did so, taking Berlusconi's seat in Senate from him.⁴

¹ Article 1, Sec. 1, c, d.lgs. 31 December 2012, n. 235.

² Cons. St., Sez. V, 6 February 2013, n. 753.

³ Corte Cass., Sez. Fer., 1 August 2013, n. 35729, which rejected the appeal against Corte d'Appello di Milano, Sez. II Pen., 8 May 2013, n. 3232, which confirmed Tribunale di Milano, Sez. I Pen. 26 October 2012, n. 10956, which had sentenced Berlusconi.

⁴ Senate of the Italian Republic, Order 27 November 2013, Doc. III, n. 1.

Beyond mere political⁵ and other elective⁶ issues, a serious legal concern was raised, by Berlusconi supporters and eminent jurists alike: at the time that Berlusconi committed the facts for which he was convicted, the law on access to and loss of public offices did not yet exist. How could he be deprived of the political right to be elected, because of a crime for which, when committed, the legal framework had not provided that kind of additional consequences? The criminal conviction was delivered when the law was already in force, but, according to Berlusconi's claim, the application of the ban to public offices as a result of his wrongdoings, considering the relevant facts had occurred in a distant past, would have constituted a retroactive criminal sanction, which is prohibited under the Italian Constitution.⁷ Indeed, the Legislative Decree came into force on January 5, 2013, while the facts for which Berlusconi was convicted dated back to 2004. However, the case law on the application of the new legal framework of conditions on access to and loss of public offices the consistently ruled otherwise. Actually, the claims presented were related to positions even more critical than Berlusconi's: in these cases, the criminal convictions were delivered even before the law had been adopted.

Thus, the limitation of the individuals' rights to run for or to hold a public office was even more difficult to link to the related criminal convictions, since at the time of delivering, the legal provision of ban or loss of public office had not yet been enacted. Their grounds for claiming the unfair retroactive application of the same legal provision were therefore stronger than

⁵ Three political problems were raised: the opportunity to vote for the expulsion of the leader of one of the coalition Government from the Parliament, the several legal proceedings in which Berlusconi was involved at that time, giving strength to his claim of being a "legal martyr", and that he was only expelled once his political stardom had started waning.

⁶ In particular Berlusconi could have been indeed declared not eligible to sit in Parliament through the law regarding the eligibility of Parliamentary Members (d.p.r. 30 March 1957, n. 361), given his position of public concessionaire (Art. 10, Sec. 1). Nonetheless, the law had never been applied, even if invoked, after any other Parliament election, since the Parliamentary majority was always in Berlusconi's favor.

⁷ Italian Constitution, Article 25, Sec. 2.

Berlusconi's. Nevertheless, these claims have not been successful.⁸ Administrative courts, which are entrusted to hear this type of claims in the Italian legal framework, have mainly relied on the case law of the Constitutional Court on legitimacy of restraints to political rights. The Constitutional Court had indeed stated that the "incandidabilità" has the aim of identifying those candidates who lack the moral dignity for holding public offices and is then constitutionally legitimate.⁹ The rationale of this legal provision was to keep the public offices clear of individuals, whose "moral indignity" – as a legal concept – had been established by a final judgment of criminal conviction. In order to achieve this goal, Parliament had the power to associate a final criminal conviction for certain offenses with a negative requirement for access to the public offices, being proof of moral indignity of the candidate or the holder.¹⁰

Additionally, the Council of State stated that, for the sake of the principles of integrity, efficiency and service to the Nation, Parliament's decision to associate criminal convictions, pronounced even before the adoption of the law itself, with a negative impact on the status of public offices was reasonable.¹¹ Successively, the Constitutional Court confirmed that a legal framework that sets particular conditions for access to and loss of public offices – such as Parliament seats – by prohibiting appointing members who have a criminal record, was consistent with the Italian Constitution. Interestingly, the Constitutional Court stated that the new disqualification provision was inherent to both administrative law's purview and the public administration needs.¹²

Subsequently, Berlusconi lodged a plea with the European Court of Human Rights (ECtHR),¹³ claiming that, as he was

⁸ Cons. St., Sez. V, 29 October 2013, n. 5222; T.A.R. Lazio, Sez. II *bis*, 8 October 2013, n. 8696.

⁹ Corte Cost. 5 June 2013, n. 118; 15 July 2010, n. 257; 3 March 2006, n. 84.

¹⁰ Corte Cost. 31 March 1994, n. 118.

¹¹ Cons. St., Sez. V, 6 February 2013, n. 695.

¹² Corte Cost. 19 November 2015, n. 236.

¹³ In accordance with Article 34 ECHR and Articles 45, 47 Rules of ECtHR. The application was lodged on 10 September 2013, and registered as *Berlusconi v. Italy* (58428/13). The Grand Chamber – to which the jurisdiction was relinquished on 5 June 2017 – held a hearing on 22 November 2017.

expelled from Parliament, Article 7(1)¹⁴ of the European Convention of Human Rights (ECHR) had been infringed in his case.¹⁵ Article 7 ECHR provides for fundamental principles of the rule of law in the field of criminal law, such as prohibition of its retroactive application. With regard to Article 7 ECHR's substantial content, its application is limited to convictions and sentencings ("*nulla poena sine lege*"). However, the notion "penalty" has an autonomous meaning as established by the ECtHR, and does not depend on the classification in domestic law. Indeed, the ECtHR has already stated, on several occasions, that a law that would be considered of an administrative nature in the national legal order could be considered of criminal nature under the ECHR.¹⁶ At the UN level, it is the almost equally worded Article 15 of the International Covenant on Civil and Political Rights that provides for the principle of legality and the prohibition of retroactive application for criminal law. Both provisions are founded on the basis of Article 11(2) of the Universal Declaration of Human Rights.¹⁷ The EU Charter of Fundamental Rights further includes the principle of no "punishment" without law, and, in its Article 49, adopts almost all the safeguards provided at Article 7 ECHR.

¹⁴ European Charter of Human Rights, Article 7(1): *No punishment without law 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*

¹⁵ Minor claims regarded Article 3 of Protocol No. 1 (right to free elections), since Berlusconi submitted that the legislation and the disqualification did not comply with the principles of legality and proportionality, thus breaching both his right to fulfill his electoral mandate and the electorate's legitimate expectation that he would serve his term as senator; Article 13 (right to an effective remedy), since he complained about the lack of an accessible and effective remedy under domestic law by which to challenge the disqualification; Article 14 (prohibition of discrimination), since he stated that he had been banned from standing for election for six years, on an equal footing with a person who had been given a more severe ancillary penalty of disqualification from public office than he had.

¹⁶ ECtHR, *Grande Stevens & others v. Italy*, 4 March 2014; *S.W. v. The United Kingdom*, 22 November 1995; *C.R. v. The United Kingdom*, 22 November 1995; *Öztürk v. Germany*, 21 January 1984.

¹⁷ Ben Juratovitch, *Retroactive Criminal Liability and International Human Rights Law* (2005) 75(1) *British Yearbook of International Law* 337; Charles Sampford and Andrew Palmer, *Judicial Retrospectivity* (1995) 4 *Griffith Law Review* 170.

Berlusconi made his claim against Italy in the hope that the ECtHR would declare the non-compliance of Italian law with the ECHR, and thereby get back his right to be elected – as Italy would be required to execute ECtHR rulings.¹⁸

While awaiting the Strasbourg judgment, Berlusconi applied for obtaining a judgment of rehabilitation that could end the effects of his criminal conviction.¹⁹ On May 11, 2018, the competent Italian court issued the desired judgment.²⁰ In accordance with the anti-corruption law, the disqualification effects also expired, since they would rely on the conviction dismissed in the recent judgment.²¹ As a result, the ECtHR took the application off its list on November 27, 2018.

The analysis of the possible decision the ECtHR could have made is principally based on its case law and its approach towards sanctions and political rights, but, preliminarily, a legal theory premise has to be clarified to understand the nature of the law provision in the broader context of backward-looking laws and administrative law.

3. The aims and limits of the Rule of Law in governing past human actions

The first, self-evident *desideratum* of a system the goal of which is to subject human conduct to the governance of its rule, is that there must be rules. However, general rules are not sufficient *per se*: a system cannot define itself as a legal system simply by having rules. A legal system has rules that are characterized by a series of requirements that distinguish the legal rules from any other form of rules.²² In particular, legal rules should comply with certain requirements, which Lon Fuller called internal morality of law, among them, is the requirement that no law can be retroactive.²³ The nature and the rationale for the existence of

¹⁸ ECHR, Article 46.

¹⁹ Italian Criminal Code, Article 178.

²⁰ Tribunale di Sorveglianza di Milano, ord. n. 4208/2018, 11 May 2018.

²¹ Article 15, Sect.2, d.lgs. 31 December 2012, n. 232.

²² Joseph Raz, *The Authority of Law* (1979) 212.

²³ Lon Fuller, *The Morality of Law* (1964) 46 and 51.

these underlying requirements, and especially the prohibition of retroactive law, is much debated.²⁴

Mostly, they have been held to be necessary for controlling and directing humans without infringing their dignity.²⁵ Actually, the prohibition of retroactive law seems essential once we assume the position that the value protected by the rule of law is human dignity.

Governing today's conducts with rules that will be enacted tomorrow blatantly impedes human dignity.²⁶ Indeed, it would be impossible for people to follow the rules laid down by law if the rules are retroactive.²⁷ In this context, a retroactive law truly seems a legal monstrosity.²⁸ Technically, the retroactive law applies to the past as though the law were in force when the past action took place, substituting yesterday's legal framework with that of today. By doing so, retroactivity alters the legal status of a past action: an action that was legally permissible at the time it occurred, is either made illegal, or is burdened, in the past, prior to the applicable date of the new law.

Nonetheless, there are rules that also apply to past human actions and still are not retroactive.²⁹ These rules are said to be retrospective, or, in the civil law tradition, their application

²⁴ Tom Bingham, *The Rule of Law* (2010); Jeremy Waldron, *The Concept and the Rule of Law* (2008) 43 *Georgia Law Review* (2008), 1-64; Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004); Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework* (1997) *Public Law* 467-87.

²⁵ Jeremy Waldron, *Is the Rule of Law an essentially contested concept* (2002) 21 *Law & Philosophy*.

²⁶ Jeremy Waldron, *The Appeal of Law - Efficacy, Freedom or Fidelity?* (1994) 13 *Law & Philosophy*.

²⁷ Fuller, cit. at 23, 39.

²⁸ Fuller, cit. at 23, 53.

²⁹ Jeremy Waldron, *Retroactive Law: How Dodgy was Duynhoven?* (2004) 10 *Otago Law Review* 631; Paul Salembier, *Understanding Retroactivity: When the Past Just Ain't what it Used to Be* (2003) 33 *Hong Kong Law Journal* 99; Jan G. Laitos, *Legislative Retroactivity* (1997) 52 *Wash. U. Journal of Urban & Contemporary Law* 81; Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-making* (1995) 75 *Boston University Law Review* 954; Stephen R. Munzer, *A Theory of Retroactive Legislation* (1982) 61 *Texas Law Review* 425; Elmer A. Driedger, *Statutes: Retroactive Retrospective Reflections* (1978) 56 *Canadian Bar Review* 268; David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking* (1960) 48 *California Law Review* 216.

follows the principle *tempus regit actum*.³⁰ A law that operates with retrospectivity affects the legality of past action but after the applicable date of the law: while it also affects pre-enactment actions, it does so only in the post-enactment future. Therefore, these rules do not set a new legal command, but rather they shape the value of past human actions for the present and the future. The difference between retroactive law and retrospective law is thus evident, even if they both operate on past actions. Retroactive laws explicitly state that their effects will take place before the day of their enactment, whereas retrospective laws modify the legal consequences of what happened in the past exclusively from the day of its enactment.³¹

For distinguishing the two, should the law have a backward-looking effect, it is necessary to ask whether the law alters the legal status of an action in the past (pre-enactment), retroactive, or in the present and in the future (post-enactment), retrospective. For backward-looking legislation to be retroactive, the legislation must change past legal status of past human actions; it is not enough that the legislation has an effect that eventually adversely affects past human actions.³² Therefore, retrospective legislation does not seem radically inconsistent with the rule of law.³³ Firstly, its effect on the past is limited compared to retroactive legislation, reducing the harm to the rule of law requirement; secondly, it is needed to permit the proper enforcement of the rule of the law. The idea of ruling through the law itself requires that, whereby the prohibition of retroactivity for human dignity reasons does not apply, the general scope of the current law re-enacts, ruling the whole reality, as formed by different and multiple past events, through the law. Indeed, a

³⁰ Andrzej Grabowski, *Juristic Concept of the Validity of Statutory Law* (2013) 507; Henry Hart and Martin Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (1995) 64.

³¹ Against this distinction, Jill Fisch, *Retroactivity and Legal Change: An Equilibrium Approach* (1997) 110 Harv. L. Rev. 1056-1069; Michael J. Graetz, *Retroactivity Revisited* (1985) 98 Harv. L. Rev. 1820-1822.

³² Indeed, Fuller writes that backward-looking laws may sometimes “*be essential to advance the cause of legality*” Fuller (n 23) 53; Tony Honore, *Real Laws*, in Peter Hacker and Joseph Raz (eds.), *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (1977) 105.

³³ Jeremy Waldron, *Transcendental Nonsense and System in the Law* (2000) 100 Colum. L. Rev. 16.

system of laws exclusively prospective in nature would be too confining and limiting to a lawmaker wishing to modify the *status quo*. The rule of law thus needs laws that also rule the past, or, at least, its consequences for the sake of present and future, as retrospective legislation does.³⁴

Here, retrospectivity, as opposed to retroactivity, is an inherent element of the rule of law, performing an indispensable role: its backward-looking character is essential for having the law ruling.³⁵ If the prohibition to retroactive law were so broad as to comprehend also retrospective law, the ideal of the rule of law itself would have an intrinsic, ineradicable conservative character. Its character would be closely linked to maintenance of current and previous legal entitlements. If every time someone relied on existing law in arranging their affairs, they were made secure from any future change in legal rules, the body of law would be ossified forever. Even if this perspective would sound appropriate to many great legal thinkers of the rule of law – Hayek above all –, ³⁶ this conception would sound terribly limited to us, and in an unjust way, if the rule of law had not the power to readdress the past for the sake of today's goals.

4. The scope of the application of the concepts of retroactivity and retrospectivity

Constitutional provisions prohibiting *ex post facto* laws are common in constitutional law,³⁷ added to which the principle *nullum crimen, nulla poena sine praevia lege poenali* is also held as a general principle in international law.³⁸ For those legal systems that rely on judge-made-law principles, the development of criminal law through judicial law-making is permissible only within the boundaries of foreseeability, which echoes the

³⁴ Jeremy Waldron, *The Rule of Law in Public Law*, in Mark Elliott and David Feldman (eds.), *The Cambridge Companion to Public Law* (2015) 58.

³⁵ Charles Sampford, *Retrospectivity and the Rule of Law* (2006) 139.

³⁶ Friedrich A. Hayek, *The Constitution of Liberty* (1973) 21.

³⁷ E.g. Italian Constitution, Article 25, Sect. 2; US Constitution, Article 1, Sect. IX; German Constitution, Article 103; Spain Constitution, Article 9(3); Declaration of the Rights of the Man and of the Citizen, Article 8.

³⁸ ICJ Statute, Article 38 (1) c.

provision of prohibition of retroactive laws.³⁹ Whatever its variants, the principle of prohibition of retroactive law has been mainly set down in the criminal law area, since, among all branches of the law, criminal law is the one that mostly aims to shape and sanction human actions.⁴⁰ However, it is also true that laws of all kinds, and not merely criminal law, enter into people's calculations, and drive their actions.

An *ex post facto* law interferes with the stability and certainty of legal relationships, no matter under which area it falls. Nonetheless, it is retroactive criminal law that seems most like a legal monstrosity to us, punishing humans today for something done yesterday when it was not prohibited. Thus, the prohibition of retroactive law is commonly only applicable in the area of criminal law. Outside of that, it is generally accepted that laws can rule past actions, by retroactive or retrospective application, without relying much on the distinction.⁴¹ From this perspective, the problem of the scope of application of the prohibition of retroactive law essentially becomes a question of the scope of application of criminal law. A law ruling on the past is forbidden by constitutional provisions, and likewise by Article 7 ECHR, if it falls within the area of criminal law. The same legal provision, however, would be allowed if its content does not fall within the criminal law area; its application to the past will then be generally permitted, as it is in the Italian legal system.⁴²

While the civil law tradition is clearer in establishing that retroactive criminal laws are not permitted – and thus retroactive non-criminal laws are in principle allowed –, the common law

³⁹ ECtHR, *Del Rio Prada v. Spain*, 21 October 2013, para. 91; *S.W. v. The United Kingdom*, 22 November 1995, para. 35 *contra* ECtHR, *C.R. v. United Kingdom*, 22 November 1995.

⁴⁰ ECtHR, *Del Rio Prada v. Spain*, 21 October 2013, para. 82; *Gheorghe v. Romania*, 3 April 2012, para. 26; *Öztürk v. Germany*, 21 January 1984, para. 53.

⁴¹ ECtHR, *Del Rio Prada v. Spain*, 21 October 2013, para. 116; *Kokkinakis v. Greece*, 25 May 1993, para. 52.

⁴² In Italy, Article 11 Preliminary Rules to Law; Corte Cost., 7 July 2006, n. 274; Oliviero Mazza, *Lo chasse-croise della retroattività in margine alla "legge Severino"* (2014) *Archivio Penale* 1; Remo Caponi, *Tempus regit actum. Un appunto sull'efficacia delle norme processuali nel tempo* (2006) *Riv. Dir. Proc.* 449; Marco Siniscalco, *Irretroattività delle leggi in materia penale. Disposizioni sostanziali e disposizioni processuali nella disciplina della successione di leggi* (1987); Giovanni Grottanelli De' Santi, *Profili costituzionali della irretroattività delle leggi* (1970).

tradition frames the concept slightly differently. The latter affirms that retroactive laws are not permitted at all (besides very exceptional cases), while retrospective laws are permitted, even in the criminal law area. One could say that the two conceptions conflict. However, in my opinion, their theoretical differences could be solved. In civil law systems, the distinction between what is criminal and what is not is generally more marked and more easily perceived by citizens than in common law. In the former, what the constitutional provisions aim at most is prohibiting law ruling the past in as much as it impacts on those interests (liberty and life above all) that are traditionally covered by criminal law. In common law, it is more difficult to draw the boundaries between criminal laws. Therefore, its main concern has been to restrain the temporal projection of the law itself, no matter its nominal definition, generally allowing all retrospective laws and banning all retroactive laws.

However, both conceptions originate in the same ideal of the rule of law that has been previously mentioned, and share a similar application. The rule of law general projection is inevitable, and it is a specific value of its capacity to amend what has been done in the past. This projection is only impeded when the new legal consequences attached to an action are so unforeseeable that they interfere with the dignitarian principle contained in the way of ruling human actions that the rule of law entails. The core of this principle could be protected by a limitation of its scope, such as in the civil law tradition, where criminal law covers the area that is supposed to be more closely linked to human dignity that would be dramatically infringed by the State's coercive power. In the common law tradition, the very same principle is maintained by a conceptual limitation instead, since any retroactivity at all is prohibited, meaning that retrospective changes are allowed, since they simply attach legal consequences and do not alter what the law prescribes.

Whichever tradition is followed, both legal concepts have the same function. Actually, the same principles inspiring these concepts allow a bridging between them: In the civil law tradition, the most common rule is a general prohibition of retroactive law, which could be derogated from through law, but not in the criminal law area; this is equivalent to the general prohibition of *ex post facto* laws in common law systems, which admits

exceptions, but never in criminal law. At the same time, according to the civil law principle of *tempus regit actum*, a judgment should be formulated having due regard to the law in effect when the judgment itself is made; in common law, conversely, the same cases are covered by retrospective legislation, which is the application of a legislation that attaches a new legal consequence to an event that took place in the past.⁴³ However, if we reconsider this complex relationship, the common-law principle of retrospective legislation is simply the consequence of the principle *tempus regit actum*, since the law in force at the time should be applied to all the pending cases even if their constitutive elements have been developed in the past. At the same time, the civil law principle of *tempus regit actum* is the theoretical premise to the application of legislation when it has retrospective effects.

5. The necessarily temporal nature of our Administrative Law

Despite the fact that distinguishing between retroactivity and retrospectivity is not always an easy task,⁴⁴ they affect the rule of law differently. While the former is generally an anathema, and should be avoided as much as possible, the latter has a constitutive value for the rule of law itself, and especially in regard to administrative law. Even if, theoretically speaking, retroactive administrative law could exist, most of the administrative laws that rule the past are retrospective instead, following the principle of *tempus regit actum* in their application.⁴⁵

This is not surprising at all. The principle of *tempus regit actum* is particularly consistent with the function and the scope of administrative law. The principle simply states that administrative power should be exercised in accordance with the legal framework of the time of its enforcement, and that only one procedure need be followed at any time, which is the one currently in force. There could be no other option: what kind of

⁴³ Waldron, cit. at 27, 3.

⁴⁴ Waldron, cit. at 26, 137.

⁴⁵ Particularly, in Italy: Corte Cost. 4 July 2017, n. 218; 7 July 2006, n. 274; 19 March 1990, n. 155; Cons. St., Sez. IV, 28 June 2016, n. 2892; Sez. IV, 21 August 2012, n. 4583; Sez. IV, 7 May 1999 n. 799; Corte Cass., Sez. III, 15 February 2011, n. 3688.

ruling would the rule of law be if the law should apply a no longer valid legal framework? And how many discrepancies and inequalities would it carry out, to judge each individual case according to the legal framework in force at the time of events rather than judgment?

Two pillars of the functioning of administrative law would be dramatically interfered with – the law in force at the time of judgment as the only legal source for the legitimate exercise of an administrative power, as a matter of rule of law and legal sources; equality in the application of administrative power, as a matter of rule of law and impartiality of administrative action. By its very nature, administrative law is positioned on a temporal line. It rules the functioning of the modern State, in all its aspects: healthcare services, public contracting, business licenses, work permits, judiciary, and democratic functioning.⁴⁶ The need for the development of all these activities to be regulated in accordance with the law currently in force, is intuitive to us. No one would claim that since they started to carry out one of these activities in compliance with rules of a previous legal framework, they would, in the present, still be entitled to act as they used to notwithstanding a change in the law.⁴⁷ Therefore, the temporal nature of administrative law is a requirement of the rule of law. Otherwise, the ruling of law would be ineffective by leaving the task of ruling the future to past legislators and depriving the current legislator of the possibility of doing so. Evidently, this risk exists for all areas of law, but it is particularly significant for the administrative law area.

Otherwise, the State apparatus, which mainly operates through administrative law, would be bound to apply a legal framework no longer existent. The legitimacy of the public

⁴⁶ We can use procedural statutes as an example. Procedural statutes are always applied retrospectively to all proceedings that are not concluded at the time of the judgment, no matter when the action occurred. It would be indeed unfair to apply different procedural rules to the same actions based on when they had occurred. This could even be applied to procedural statutes in criminal law, even if with more conceptual difficulties: e.g., the first criminals apprehended and charged primarily on the basis of DNA evidence could have claimed that, had they known that the police could make use of it, they would have changed their behavior, perhaps even have decided not to commit the crime. See Sampford (n 34) 123 and 244.

⁴⁷ Andrei Marmor, *The Rule of Law and its Limits* (2004) 23 Law & Philosophy.

functions would be dramatically impeded. At the same time, sustaining that administrative law should be bent to the law in force at the time the legal entitlement was awarded, would be a gross violation of the principle of equality. In fact, this would imply differentiated treatment between individuals by applying a different set of rules in respect of the time of activity, in turn making it unreasonable and irrational. Thus, the rule of law is necessarily progressive, meaning a refusal of an inferiority complex towards the previous legal entitlements, where the law is inspired from the perspective of administrative law.

6. Moral dignity as an administrative requirement rather than a sanction

In accordance with what has been expressed regarding the scope of the rule of law and the temporal nature of administrative law, it is possible to make an assessment on the administrative, rather than criminal, nature of the Italian law disqualification, in order to evaluate its compliance with Article 7 ECHR which prohibits retroactive criminal sanctions, and even to dismiss the whole issue by emphasizing the non-sanctioning nature of the provision.

First at all, it should be noted that, when assessing whether a legal act constituted a criminal offence under national law at the time when it was committed, the ECHR's Contracting States' classification is of certain significance. Indeed, interpreting and applying the law lies primarily within their purview. However, compliance with the ECHR could not be exclusively delegated to national parameters.⁴⁸ The effectiveness of the ECHR as a tool for protecting human rights would be seriously jeopardized if national legal orders were entirely free to determine what does and what does not constitute criminal law, thus simply overcoming the guarantees provided by the ECHR itself. To this end, the ECtHR has set down three parameters for developing its own autonomous judgment on the nature and existence of a criminal sanction, the so-called *Engel* criteria:⁴⁹ the qualification of

⁴⁸ ECtHR, *Grande Stevens & others v. Italy*, 4 March 2014; *Menarini Diagnostics S.r.l. v. Italy*, 27 September 2011; *Zaicevs v. Latvia*, 31 July 2007; *Jussila v. Finland*, 23 November 2006.

⁴⁹ ECtHR, *Engel and others v. Neetherlands*, 8 June 1976, paras. 82-83.

the offence operated by the national legal system, the deterrent-punitive function of the sanction and its gravity.⁵⁰

The first parameter does not require much clarification. As illustrated before, the preparatory works and the aim of the legislation, as well as the following administrative and constitutional judgments, make it clear that the Italian legal order clearly intends the legal provision as an administrative and not a criminal law provision, and thus Article 7 ECHR does not apply.⁵¹

The Italian Parliament did not intend to adopt a new criminal charge; it simply ruled that a non-discretionary and automatic consequence of unsuitability of a person for public office, outside of any margin of appreciation, is linked to certain convictions.⁵²

The analysis of the second legal parameter – the presence of a deterrent in or punitive character of the legal provision – is more complicated, but it solves itself in a similar manner.⁵³ In the provision of a ban on running for public offices or loss of the seat after a criminal conviction, the function of punishment does not seem to exist. This is very clear in the case of people still running for public office; less so, but still uncontroversial, for those who already hold a public office. There is no punitive character when there is an automatic certification by an administrative authority, as happens when the candidate is excluded from the electoral competition for having reported a criminal conviction.⁵⁴ It is hard

⁵⁰ ECtHR, *Société Oxygène Plus v. France*, 17 May 2016; *Žaja V. Croatia*, 4 October 2016.

⁵¹ It is of interest to note, that there is a general European consensus on the objectives the Italian law pursues, and that the Council of Europe anti-corruption body (GRECO)'s recommendations have been taken into account in the adoption of the law. The consensus was also wide in the Italian Parliament, which itself voted almost unanimously in favor of the law. Somewhat ironically, it was Berlusconi IV's Government that proposed a first draft of the law, which already contained the provision of "incandidabilità" (Art. 10, Government Bill 4 May 2010, n. 2156).

⁵² ECtHR, *Rohlena v. Czech Republic*, 27 January 2015, para. 51; *Kononov v. Latvia*; 17 May 2010, para. 187.

⁵³ ECtHR, *Benham v. United Kingdom*, 10 June 1996, para. 56; *Bendenoun v. France*, 24 February 1994, para. 47; *Öztürk v. Germany*, 21 January 1984, para. 53.

⁵⁴ Interestingly, in Italy (Italian Criminal Code, Art. 28; Art. 2, Sect. 1, *d, e, c. 2*, d.p.r. 20 March 1967, n. 223), the ban to be elected could also be an ancillary sanction of the criminal conviction. *In that case*, it could be sustained that it is a criminal sanction, or better a criminal effect of a criminal sanction. It is also of

to speak of a punitive character of a sanction, where, as in this case, there is no specific, case-by-case evaluation but rather an automatic disqualification from public office.

In particular, the administrative authority providing the sanction – or better, which certifies the presence of a constraint on candidacy, such as a conviction – does not have discretionary power of evaluation: it simply has to apply the law. The concept of punishment should indeed involve an evaluation of the circumstances with a proportioned ratio between the behaviour targeted and the punishment inflicted. Within the legal provision of the anti-corruption law, none of these elements is present. It is indeed quite challenging to speak about sanction, punishment, and individual penalty where it is not possible to have any singular evaluation regarding the case.

The concept of deterrence deserves a separate comment.⁵⁵ Deterrence does not flow from the law provision itself, but from the criminal sanction linked to the offence, such as bribery or embezzlement, to which the disqualification is attached. Indeed, it is hard to claim that someone would refrain from bribery or embezzlement because they are afraid that they will lose the possibility to run for public office – quite a remote possibility for many – but they would risk imprisonment. It is the latter sanction that causes widespread deterrence and is most commonly known.

Moreover, in this particular case, Berlusconi knew the law when he was elected as much as he knew that he was currently under criminal proceedings, as the first ruling against him had already been delivered. The law was already bound to direct his behaviour; he knew the normative framework and his personal state, so he could have decided not to compete in the electoral run and thus not to fall under the sanction that was provided by the

interest that Berlusconi has also been recipient of this sanction for a period of two years (Corte Cass., Sez. III, 14 April 2014, n. 770). However, the two provisions are structurally different. The judge, through their own discretionary evaluation, issues the ancillary sanction on grounds that are different from the ones sustaining the ‘incandidabilità’. Moreover, according to Article 15, Sect. 2, d.lgs. 31 December 2012, n. 232 the disqualification operates independently from accessory sanction. Accordingly, the ECtHR Case *Welch v. United Kingdom* (9 February 1995, para. 33) could not be invoked here, since the ‘incandidabilità’ does not follow the discretion of the judge.

⁵⁵ ECtHR, *Demicoli v. Malta*, 27 August 1991, para. 34; *Campbell v. United Kingdom*, 28 June 1984, para. 72.

legal framework. In other words, the array of legal provisions regulating his life as a Parliament member was already stabilized and clear when he ran for the seat. The normative behaviour-directing function exercised by the rule of law is of one kind in criminal law, and another kind in administrative law, such as the regulation of access to public function. It would be difficult to affirm, for instance, that someone would not have committed a certain act if they had known that it would have changed their access to public office. This consequence to one's political right is not the primary object of the deterrence, the criminal punishment is. The same could be said about the parameter of the gravity of the sanction, which is often utilized as an integrative criterion to the former two.⁵⁶ The ban on running for public offices or the loss of a public office is a considerable drawback, but it actually does not seem to impede those fundamental rights of individuals, which, where prejudiced by the sanction, give gravity to the sanction. The declaration of disqualification from public office pales – or should pale – in comparison to the stigma attached to a conviction for a serious criminal offence.

Beyond an analysis of the applicability of the *Engel* criteria, a concrete approach to the question would have lead the ECtHR to the same conclusions. Preliminarily, it should be noted that previously the ECtHR had already denied the criminal nature of a similar French law provision, stating that they are directed to guarantee the proper functioning of parliamentary election, and not to punish personal behaviour.⁵⁷ From this point of view, there is another argument for sustaining the administrative nature of the provision. The ban on running for public office and the loss of public office refers to a situation of moral indignity for particular and serious convictions. This legal provision's aim is to protect the constitutional values of exclusive service to the Nation,⁵⁸ impartiality,⁵⁹ good administration,⁶⁰ public officials' loyalty and

⁵⁶ ECtHR, *Lauko v. Slovakia*, 2 September 1998, para. 57; *Garyfallou v. Greece*, 24 September 1997, para. 34; *Bendenoun v. France*, 24 February 1994, para. 47; *Campbell v. United Kingdom*, 28 June 1984, para. 73.

⁵⁷ ECtHR, *Pierre Bloch v. France*, 21 October 1997, para. 56.

⁵⁸ Italian Constitution, Article 98.

⁵⁹ Italian Constitution, Article 97.

⁶⁰ Italian Constitution, Article 97.

honour.⁶¹ For the sake of these goals, the rule of law allows for the possibility of restraining a previous legal framework and individual rights as well, such as the one to be voted for. The rule of law may establish new facts that are relevant to prove the moral dignity of an individual, new requirements which, since the law entered into force, should be applied to everyone, notwithstanding the legal framework that was in place at the time they entered public office.

In conclusion, there is no question of any offence being caused or abolished by the law questioned. The exclusion from the election run or the loss of the public office is merely a declaratory act of a situation already determined by a criminal conviction. There is no retroactive application of a sanction: Parliament adopted a rule valid from the present on, which necessarily would regulate situations in the past, since the rule of law does not operate in a legal vacuum. In point of fact, it could be concluded that the provision of “incandidabilità” is neither a criminal sanction, nor even a sanction at all. It is a (negative) element for holding candidacy to public office that, for the subject who has reported a final criminal conviction, constitutes a prohibition. Would the lack of the right age or nationality requirements be considered a sanction?

Obviously not. Italian case law confirms this view: It is neither a part of the punishment for a criminal charge,⁶² nor does it contain sanctions of a criminal or administrative nature;⁶³ it is simply not a sanctioning legal provision.⁶⁴ It all proves that there are other sanctions than criminal sanctions, and that there is other administrative law than administrative sanctions. The legal provision challenged is therefore an administrative law provision, not a criminal one. Its application correctly follows the principle of *tempus regit actum* and, consequently, it may operate retrospectively as in the Berlusconi case. Administrative law must comply with its own principles in addition to the rule of law principles. First and foremost of these principle is that the exercise of the administrative power has to comply with the rule, which regulates its action, and, in its temporal dimension, the

⁶¹ Italian Constitution, Article 54, Sect. 2.

⁶² T.A.R. Lazio, Sez. II *bis*, 8 October 2013, n. 8696.

⁶³ Cons. St., Sez. V, 29 October 2013, n. 5222.

⁶⁴ Cons. St., Sez. V, 6 October 2013, n. 695.

administrative power is ruled by the *tempus regit actum*. In the rule of law lexicon, this means that the current law regulates the law that must be applied.

7. The Rule of Law constraints to political rights

The refusal to consider Berlusconi's disqualification as a violation of human rights is also grounded in the nature of the right at the basis of the claim, and the general interest the law carries out. According to the interpretation given by the Italian Constitutional Court,⁶⁵ the general entitlement to the right to run for election is the norm, and its deprivation is exceptional.

This is also the general approach in the international legal practice.⁶⁶ In the Western legal tradition, the right to be elected –⁶⁷ as well as the right to vote – is defined as a political, functional and relative right.⁶⁸ Political, because it regards the individual in their function as part of the community, generally as a citizen, and to whom is, as such, entrusted a portion of the public power. Functional, because it has a direct and immediate impact on the functioning of the State and democracy. It remains an individual right, and its status of entitlement does not differ from other rights, but it also serves a goal that goes beyond the ones of the individual. In particular, it serves both an individual (expression of a political choice) and a general interest (composition of the elective public offices). Relative, since the individual's right to contribute to this public goal is not entirely unrestricted, and must be balanced with certain conditions that the representatives must comply with by law. This holds true for both the right to vote,⁶⁹ and the right to be elected.⁷⁰ These rights are the cornerstones of representative democracy that allow individuals to have a say in

⁶⁵ Corte Cost., 26 March 1969, n. 46.

⁶⁶ Council of Europe, European Commission for Democracy through Law (Venice Commission), Opinion n. 807/2015, October 26, 2015, para. 16.

⁶⁷ Alessandro Pace, *Problematica delle libertà costituzionali* (2003) 83.

⁶⁸ Giulio Enea Vigevani, *Stato democratico ed eleggibilità* (Giuffrè, 2001) 30.

⁶⁹ Italian Constitution, Article 48.

⁷⁰ Italian Constitution, Article 51.

the forming of a national Parliament, and determine the Nation's interest.⁷¹

Thus, while political rights remain individual fundamental rights, Parliament is entrusted with ruling them by setting conditions for their exercise.⁷² In a similar case, the ECtHR had already stated that it is necessary to balance the general interest with the individuals' rights in democratic States.⁷³ The Opinion of the Venice Commission, presented in the Case before the ECtHR, follows this same line about balancing political rights and public interests.⁷⁴ Indeed, Parliaments are entitled to regulate – through the law – the exercise of the right of the active electorate and the right of the passive electorate.⁷⁵ It is rather obvious that the judgment, for example of moral dignity, is important for the right of the active electorate, but even more so for the right of the passive electorate. Public interest is very present in the exercise of the right to choose people's representatives, and even more in the right to be elected as a people's representative.⁷⁶ This is also evident in most of the national legal frameworks. While it is possible to be excluded from being elected for and at the same time maintain the right to vote, being excluded from voting always means to be excluded from being elected as well.

It is easier to lose the right to be elected than the right to vote because the first one should be assigned with even greater care.⁷⁷ Therefore, a precise hierarchy exist among the values of these rights: the right to be elected is the most delicate one, and the one that Parliament is allowed to restrain with more discretion

⁷¹ Malcolm Thorburn, *Justifications, Power, and Authority*, (2008) 117 Yale L. J. 1076.

⁷² Corte Cost., 5 June 2013, n. 118.

⁷³ ECtHR, *Coeme v. Belgium*, 22 June 2000, para.145.

⁷⁴ Council of Europe, European Commission for Democracy through Law (Venice Commission), Opinion n. 898/2017. On July 19, 2017, the President of the ECtHR invited the Venice Commission to present observation as *amicus curiae* in the Case *Berlusconi v. Italy*. The opinion, requested on July 24, 2017, regarded “the minimum procedural guarantees which a State must provide in the framework of a procedure of disqualification from holding an elective office”. Opinion delivered on October 9, 2017.

⁷⁵ Venice Commission Opinion n. 898/2017, para. 6.

⁷⁶ Venice Commission Opinion n. 898/2017, para. 7.

⁷⁷ ECtHR, *Hirst v. the United Kingdom* (n. 2), 6 October 2005, paras. 58-61 and 69-71.

– and States with a greater margin of appreciation –,⁷⁸ allowing individuals who lack moral dignity to maintain their voting rights, but only allow them to vote for individuals who instead have moral dignity. Clearly, these restrictions must be constructed in the negative form: the fundamental nature of political rights means that Parliament has to describe the situation, wherein any individual cannot be elected, as exceptional.⁷⁹

Nevertheless, it is a relative right not only in the sense that it is functional to a goal, but also in the sense that the individual's right to contribute to this goal is not entirely unrestricted, but must be balanced with a certain general interest;⁸⁰ that the representatives in the assembly must fulfil certain fundamental conditions; that they are to be citizen of Italy, adult, literate, and with moral dignity, i.e., lack moral indignity.⁸¹

The Italian legal framework has long recognized two different types of constraints to political rights: incompatibility (“incompatibilità”) and ineligibility (“ineleggibilità”). The challenged new law provision does not fall under either of these two, but it explicitly constitutes a third one called “incandidabilità”. Particularly, “incandidabilità” differs from incompatibility, which merely refers to a case where the individual has the right to choose between the public office seat and a position elsewhere, and ineligibility, which protects the public office and the functioning of democracy from imbalance in the electoral competition. The distinction between ineligibility and “incandidabilità” matters especially here, since they both refer to an obstacle to assuming the public office. The grounds for ineligibility relate to the functioning of the electoral competition, in order to prevent that certain individuals exercise a *captatio benevolentiae* and/or *metus potestatis* by using their powers or position, thus unfairly influencing the voting public.⁸²

Therefore, it follows that the ineligibility grounds may be removed: once the individual no longer holds the position that has led to their ineligibility, they could be elected again. Conversely,

⁷⁸ ECtHR, *Paksas v. Lithuania*, 6 January 2011, para. 101; *Ždanoka v. Latvia*, 16 March 2006, paras. 106-114.

⁷⁹ First Additional Protocol to ECHR, Article 3.

⁸⁰ Corte Cost., 5 June 2013, n. 118.

⁸¹ Corte Cost., 3 March 2006, n. 84.

⁸² Corte Cost., 26 March 1969, n. 46.

the grounds for “incandidabilità” concern the status of the person, radical unsuitability to the public office. It cannot be amended since the requirement of moral dignity should have always been part of the individual’s character. “Incandidabilità” operates before the election run. The competent electoral office checks on the disqualification grounds,⁸³ and must erase the name of any applicant who did not submit a declaration that there are no grounds for “incandidabilità”.⁸⁴ Therefore, the rationale of this disqualification provision does not directly regard the electoral competition, but rather the person who aspires to it, and the public office concerned.⁸⁵ In this sense, this ban is “pre-democratic”: it prevents access to the run for public offices to anyone lacking the requirements which are associated with public offices, which are Italian citizenship, adulthood, knowledge of language and writing, and moral dignity, at least to the degree that it is not compromised by certain criminal offenses. Hence, it has rightly been said that the “incandidabilità” is more of an inter-requisite than a pre-requisite to public office.⁸⁶

The “incandidabilità” is therefore a legal status close to the lack of passive electorate, that, once again, is not a sanction. However, for different reasons, it attaches to the individuals who do not hold Italian citizenship, minors, illiterates and, to the extent provided by the anti-corruption law, certain convicts. The law provides that, in certain circumstances expressly provided by law, and solely in those, the right to be elected is *ope legis* diminished. This fundamental right is not eliminated but simply limited. It could also be restored if the grounds for which it has been limited, ceased to exist, as happened to Berlusconi once he obtained the rehabilitation that dismissed the effects of his conviction. This limitation to the right occurs in concurrence with the issuing of the conviction: the delegated authority certifies the conviction with a declaratory act, and proceeds to exclude the candidate from the electoral run.⁸⁷ The same could be said of the individuals who already hold public offices: the “incandidabilità” affects them at

⁸³ D.p.r. 30 March 1957, n. 361, Article 22.

⁸⁴ D.lgs. 31 December 2012, n. 235, Article 2, Sec. 2

⁸⁵ Corte Cost., 6 May 1996, n. 141; 31 March 1994, n. 118.

⁸⁶ Valeria Marcenò, *L'indegnità morale dei candidati e il suo tempo* (2014) 1 Giurisprudenza Costituzionale 621.

⁸⁷ Corte Cost., 31 March 1994, n. 118; 29 October 1992, n. 407.

the moment of the conviction, and the expulsion from office simply follows the modification of the electoral right. The delegated authority simply has to apply it: in this case, that means Parliament by the only means it is authorized for: voting.

The Berlusconi case should also be evaluated in this greater context: once established, not to apply the (exceptional) limitations to political rights means a violation of both the general interest that the law serves – having Parliament members with moral dignity – *and* the rights of the other candidates running who have complied with the requirements. The ban on retroactive legislation, claimed in Berlusconi's favour, does not consider that by lifting a restriction on him, could infringe on the other candidates' political rights. Berlusconi, as permitted by the electoral law of that time, was in competition with all the candidates of all the Italian sections. Concretely, a violation of a right would have occurred against the law-abiding runner-up in the Molise electoral district for which Berlusconi obtained a seat. Indeed, the Parliamentary election is a competitive situation by nature. In any competitive situation, the issue of not applying legislation always means disadvantaging the competitor who is in compliance with the law.

Conferring a benefit upon Berlusconi – by not applying the legal provision contained in the legislation of access to and loss of public offices to him – means disadvantaging another candidate to whom the past legal framework would only apply in their disfavour. The electoral competition is a “zero-sum” game: the due application of the same legal framework to all candidates places a disadvantage on one and gives an advantage to another, which has been established by law.

8. The lack of discretion in the application of the Administrative Law measure

Pending the decision of the ECtHR, Berlusconi's claim received surprising support from the Italian Parliament. Augusto Minzolini, also member of the Senate, was convicted for embezzlement with final judgment on November 12, 2015. In this case, no issue of retroactivity was raised because the first judgment against Minzolini dated back to February 14, 2013, when the law on access to and loss of public offices was already in force.

Surprisingly, on March 16, 2017, the Senate voted against Minzolini's suspension, in contrast to the order of the day that indicated removal. Some Parliament Members voted against the disqualification by stating that the judgment that led to the disqualification was tainted (*fumus persecutionis*) by political prejudice against him. Although Minzolini resigned a week later, the vote had shocking ripple effects because it eroded one of the pillars at the core of Berlusconi's expulsion, that the vote for the expulsion was a due act, required by law as an automatic consequence of a criminal conviction. The supporters of the legitimacy of Parliament's decision to not execute the criminal judgment in regard to the loss of seat of Parliament – and, thereby, the supporters of Berlusconi's position –, claimed that the law itself provided that it was for Parliament to decide on its own composition and thus to vote on the loss of the seat of one of its members discretionally, even if in opposition of a law which precisely provides that individuals with criminal convictions should lose their seats.

The law indeed requires that, in the case of disqualification due to a criminal conviction, the Parliament has to proceed in compliance with the Constitution that confers the right to vote in regard to its composition to Parliament alone.⁸⁸ A literal interpretation of the constitutional provision gives full discretionary power to Parliament, which also creates the possibility of rejecting the relevance of the criminal conviction and thus *de facto* overcoming the law provision of the loss of seat.

Interestingly, the Italian Government itself has sustained this interpretation, arguing before the ECtHR that the Berlusconi case concerned the non-validation of his election, and so his removal was a due act, while the Minzolini case represented the classic case of a procedure of disqualification, where Parliament may decide not to implement the disqualification even if the statutory conditions are met. Here, plausibly, the Italian Government followed the Opinion of the Venice Commission.⁸⁹ However, the Berlusconi and Minzolini cases are very similar. Through a systemic and teleological interpretation of the same constitutional rule, it is possible to demonstrate that the

⁸⁸ Italian Constitution, Article 66.

⁸⁹ Venice Commission Opinion n. 898/2017, para. 29.

Parliament was bound to disqualify Berlusconi as much as Minzolini.

Firstly, Parliament's right to vote on the access and loss of the seat of its members is a legal concept elaborated for preventing external intervention regarding its functioning and its composition.⁹⁰ Its rationale is to ensure that no subjects outside of the popular will interfere with the composition of Parliament. Therefore, it was not meant to frustrate the judicial activity in issuing criminal convictions the Parliament itself has established as a negative for acceding to its ranks. Secondly, the Constitution indicates that, in cases of incompatibility and ineligibility, the Parliament has a right to vote: perfectly logical. Parliament may assess the "incompatibility" between a job position and a Parliament seat or the "ineligibility" of a candidate on account of their undue influence over the electoral run. Regarding the situation of "incandidabilità", instead, there is nothing to be assessed. The criminal conviction is a simple fact that the Parliament has to take into account in regard to the admission of a candidate to the office or the removal if the conviction has emerged after they have been elected already. Thirdly, the Italian Parliament retains this discretionary power for cases of ineligibility, and, according to the law itself, the case of "incandidabilità" follows the ineligibility methods for determining the outcome of the whole procedure. However, in order to give effect to the law provision of "incandidabilità", another interpretation should be used, which is perfectly consistent with the conceptual category of this disqualification provision. "Incandidabilità" is a different kind of obstacle to public offices than that of ineligibility. If a candidate reports a criminal conviction, they should be deprived of the public office in the same way as a foreigner or a minor should be, had they obtained a Parliament seat by mistake.

The fact that the procedure for "incandidabilità" is the same one as for ineligibility is due to the lack of an autonomous office in Parliament that could examine whether candidates fulfil the requirements for candidacy. Parliament is indeed exclusively entitled to vote on its own composition, but this is so because voting is the one and only way to exercise its power: no other

⁹⁰ Venice Commission Opinion n. 898/2017, para. 13.

office can perform this function. Voting is the only expression of a political collective body: it is not a proof of entitlement of a discretionary power, but the inevitable recognition of the collective nature of the body. Disqualifications from Parliamentary office due to convictions are generally automatic. Even when they are not, the deciding body – be it Parliament in its entirety or a committee – does not control the judicial decision, but merely takes it into account, and may make the decision on the date that the convicted individual has to leave Parliament.⁹¹

Parliament's composition is restrained by the Constitution and by laws, and lack of the necessary requirement of nationality or age, provided by them, works as a limit to Parliament's composition that neither Parliament – through voting – nor the people – through election – have the power to overcome. The fact that a judge enacts the restraint does not interfere with Parliament's autonomy any more than the civil registry – an administrative office – certifying the age and nationality of the public office holder. The obligation of Parliament to vote according to what the law has established and a criminal proceeding has certified actually corresponds to enforcement of the rule of law, as set by Parliament itself, which should be its guidance. The only way in which Parliament could legitimately disregard this or other laws is through law-making,⁹² by repealing the previous law and replacing it with another one that does not compel it to implement judicial decisions. Furthermore, the fact that Parliament disregards what the judiciary had decided, and which the law had established as binding for Parliament, is a breach of the separation of powers, which is another pillar of the rule of law.⁹³

In the Minzolini case, the Italian Parliament breached the rule of law and the separation of power as determined in its own law, which had expressly given a certain balancing power to the judiciary – for the sake of the integrity of public offices –, which limits the popular will as a source for Parliament's composition.

⁹¹ Venice Commission Opinion n. 807/2015, para. 107.

⁹² Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in James Fleming (eds.), *Nomos 50: Getting to the Rule of Law* (2011) 3-31.

⁹³ Jeremy Waldron, *Separation of Powers in Ought and Practice* (2013) 54 B.C. L. Rev. 433.

As the Venice Commission pointed out, criminally sanctioned acts by the representatives – no matter when they are revealed – are relevant for the right of the passive electorate. This could make disqualification from public office following a criminal conviction – as supervening “incandidabilità” is – more admissible than ineligibility.⁹⁴ Disqualification of an electoral mandate should therefore not be considered as limiting democracy, but rather as a means of preserving it.⁹⁵ Parliament’s autonomy, in a rule of law system, is always determined by different factors. The electoral power remains the Parliament’s main source in establishing its members, with the constraints established by law, which, where it concerns the monitoring of criminal conducts, inherently relies on judicial activity and its judgments.

9. Conclusions

Berlusconi’s case before the ECtHR has been analysed for the underlying problem of the case that is crucial from the standpoint of systematicity of a legal order. The legal order works as a system, and it works to the extent that the main rules hold it together. The principle of separation of power along with other rule of law values, such as the ordinary work of the *tempus regit actum* principle, are key to this systematicity. The situation wherein Parliament does not feel bound by its own legislation represents an attempt to undermine the rule of law.⁹⁶

⁹⁴ Venice Commission Opinion n. 898/2017, para. 9.

⁹⁵ Venice Commission Opinion n. 898/2017, para. 11.

⁹⁶ Jeremy Waldron, *Legislation and the Rule of Law* (2007) 1 *Legisprudence* 91-74.

LEGAL INFRASTRUCTURE AND URBAN NETWORKS FOR JUST AND DEMOCRATIC SMART CITIES

*Christian Iaione**

Abstract

This article positions itself within the urban law and policy scholarship as a contribution to the creation of a subsection of this body of law, the urban law of services and assets. It shows that in three kind of urban infrastructure and networks (*i.e.* transport, energy, digital) there is growing attention towards a new general legal principle of urban law, the principle of tech justice which can be the center pillar of a more comprehensive legal infrastructure, the internet of humans. This legal infrastructure is necessary if public authorities want to design and shape just and democratic smart cities. Concepts like the Internet of Things, Internet of Everything and Internet of People suggest that objects, devices, and people will be increasingly inter-connected through digital infrastructure able to generate a growing gathering of data. At the same time, the literature on smart city and sharing city celebrate them as urban policy visions that by relying heavily on new technologies bear the promise of efficient and thriving cities. When addressing the impact of technological innovations, law and policy scholarship has either focused on questions related to privacy, discrimination, security, or issues related to the production and use of big data, digital public services, e-government. Little attention has been paid to the disruptive impact of technological development on urban governance and city inhabitants' rights of equal access, participation, management and even ownership, in order to understand whether and how technology can also enhance the protection of human rights and social justice in the city.

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1. Introduction

This article aims to shed light on the scarce attention paid to the disruptive impact of technological development on urban governance and city inhabitants rights and possibilities, in order to understand whether and how technology can also enhance the protection of human rights in the city. It carves the concept of Tech Justice building on the literature review and from the analysis of selected case studies. The article stresses the dichotomy existing between market-based and society-based applications of technology, the first likely to increase the digital divide and the challenges to human rights in the city, the latter bearing the promise to promote equal access to technology in the city.

The main argument advanced by this paper is indeed that Tech Justice is an empirical dimension that can steer the developments of smart city and sharing city policies toward a

more just and democratic city. Similar reflections are currently lacking in the literature on the smart and sharing city. This is undermining the potential of such innovations to promote human progress and human rights. The achievement of Tech Justice in the smart/sharing city may bring about the realization of the “Internet of Humans” (IoH), implying equal access to the Internet and in general access and other rights related to the technological developments for every human being. Only an IoH approach can bring about a just and democratic smart/sharing city. It is therefore urgent to embed social justice considerations (*i.e.* fairness, democracy, social and economic justice, equal access to digital infrastructures) in the analysis of tech-based visions of the city.

This argument is rooted in the article within the right to the city and commons-based governance approaches as applied to technological developments and in the theories of the city as commons. On the first approach, the right to the city is a concept introduced by the urban sociologist Henry Lefebvre in the late sixties¹. Lefebvre observed the urban roots of social movements in the late Sixties in France and emphasized the active role of urban inhabitants in the struggle against capitalism as impacting the quality of urban life.² The concept of the right to the city is expressed by citizens’ and social movements organization of protests and advocacy to reclaim more participation in the decision making process about the use of urban spaces and more generally in decisions that concern city planning³. The second above-mentioned approach, the “city as a commons” theory, which builds on the theory of the commons developed by Elinor Ostrom⁴, advances the idea that different types of urban

¹ H. Lefebvre, *The Urban Revolution*, (1970); see also H. Lefebvre, *The Right to City*, in *Writings on Cities* 147 (1968).

² D. Harvey, *The Right to the City*, 27 *Int’l J. Urb. & Reg’l Res.* 939 (Susan Clark & Gary Galle eds., 2003); M. Purcell, *Excavating Lefebvre: The Right to the City and its Urban Politics of the Inhabitant*, 58 *Geoj.* 99 (2002). See also World Urb. F., *World Charter On Right To The City* (2004), <http://abahlali.org/files/WorldCharterontheRighttotheCity-October04.doc>; European Council Of Town Planners, *The New Charter Of Athens* (2003), <http://www.ceu-ectp.eu/images/stories/download/charter2003.pdf>.

³ U. Mattei & A. Quarta, *Right to the City or Urban Commoning? Thoughts on the Generative Transformation of Property Law*, 1 *Italian L. J.* 2, 303, 305-306 (2015).

⁴ E. Ostrom, *Governing the commons* (1990).

resources, including digital tools and technological infrastructures, mobility infrastructures, green areas, building, services of common interest can be governed as commons and the commons-based governance of those resources and services can be enabled and coordinated by urban public institutions at different level: from block, to neighborhoods and district to the City wide level⁵.

Tech Justice within the commons theory can represent one of the most important empirical dimensions of the normative model of the urban governance model based on the reconceptualization of the city as a commons⁶. What we suggest is that looking back at Lefebvre and Ostrom the guiding and design principles to improving the governance of the tech city can be found. Furthermore, the promotion of self-organization, self-government and citizen participation should complement the discussion on the just tech city. Further research is needed in order to investigate deeper: the question on how to mediate the existing dichotomy between market-based and society-based tech developments; the empirical dimension of tech justice to drive the variation of smart city and sharing city policy and legal models toward a more just and democratic city. A fertile ground for future research includes also the need for: a reflection on the scale and scalability of such innovations; an understanding of the features, shape and scale more appropriate for institutions responsible for granting the right to a just tech city; an analysis of potential state and urban government reconfiguration and changing roles; a research on the role of the law and regulations in facilitating the just tech city; an assessment of the risk that the tech city would even worse the current 'surveillance society'. This article could not cover all these issues but has contributed to raising them and to laying the ground for further investigating the opportunity and challenges of embedding Tech Justice in the smart/sharing city discourse.

The issues of equal access and of the right to participate in decision-making processes, involvement in the management and

⁵ S. Foster & C. Iaione, *The city as a commons*, 34 Yale L. & Pol'y Rev 281 (2016).

⁶ S. Foster & C. Iaione, *Ostrom in the City: Design Principles and Practices for the Urban Commons*, in D. Cole, B. Hudson, J. Rosenbloom (eds.), *Routledge Handbook on the Study of the Commons* (2019).

ownership of urban-based new technologies are scarcely considered. This can arguably be due to the prevalence of an optimistic debate surrounding the smart transition. Smart technologies in cities have often been presented as technologies 'of liberation'. Nevertheless, the reality has often been different, with smart technology worsening inequalities and unbalance of power already existing before the smart transition. Along this line, Kim et al.⁷ have argued how Smart Cities and Smart Home stand out as the 'most prominent' IoT applications, however missing the participatory component. Yet several authors developed arguments on the extent to which the IoT, applied to the Smart City paradigm, brings the potential (despite its numerous challenges) to improve citizens' health and wellbeing, stressing the importance of their direct involvement.⁸ The promise is that people's inclusion in the smart transition's agenda will mitigate the risk of unequal and unjust smart society.

This article suggests that the 'Internet of Humans' notion could be applied to the discourses on the smart and sharing city in order to steer them towards a Tech Justice. This article builds on the idea of the Right to the City, first advanced by Henry Lefebvre⁹ who observed the urban roots of social movements in the late Sixties in France and emphasized the active role of urban inhabitants in the struggle against capitalism as impacting the quality of urban life¹⁰. The concept of the Internet of Humans is presented as rooted in human rights literature and particularly on the Right to the City approach. Furthermore, the article

⁷ T. Kim, C. Ramos & S. Mohammed, *Smart City and IoT*, 76 *Future Generation Computer Sys.* 159 (2017).

⁸ A. Berti Suman, *In Search for the Value of Connectivity: Accountable Citizens Fostering Accountable Governance via Connectivity*, IEEE International Conference on Cloud Engineering Proceedings (2017).

⁹ H. Lefebvre, *The Urban Revolution*, (1970); see also H. Lefebvre, *The Right to City*, cit. at 1.

¹⁰ D. Harvey, *The Right to the City*, 27 *Int'l J. Urb. & Reg'l Res.* 939 (Susan Clark & Gary Galle eds., 2003); Mark Purcell, *Excavating Lefebvre: The Right to the City and its Urban Politics of the Inhabitant*, 58 *GeoJ.* 99 (2002). See also World Urb. F., *World Charter on Right to the City* (2004), <http://abahlali.org/files/WorldCharterontheRighttotheCity-October04.doc>; European Council Of Town Planners, *The New Charter Of Athens* (2003), <http://www.ceu-ectp.eu/images/stories/download/charter2003.pdf>.

proposes the Theory of the Commons¹¹ as a governance approach that can bring Tech Justice into the smart and/or sharing city discourses. Despite the connection existing between smart city/sharing city applications and human rights in cities, existing application of the IoT to the smart and sharing city do not attribute sufficient space to discussion of the issue of rights to the city inhabitants and to local communities to participate, shape the decisions on the infrastructure or services provided.

It seems worthwhile to reflect on David Harvey's¹² recently proposed model, which derives from the application of the Right to the City approach. David Harvey,¹³ who in the footsteps of Lefebvre introduced the concept of Rebel Cities, highlighted that the anti-capitalist struggles of urban revolutionary movements in the rebel cities, as happened in New York City with the 'Occupy Wall Street Movement', are attempts to reclaim a 'collective right to the city'. Episodes of urban riots and urban conflicts have deep and multidimensional causes. The author observed urban social movements protesting against financial speculation and economic globalization in the European Union and the US. Consequently, Harvey's advanced the concept of the rebel city. In Harvey's view, the "rebel cities" are those cities where urban social movements carry out an active resistance against the process of capitalist urbanization through conventional or unconventional forms of participation and protest. Episodes of urban riots and urban conflicts have deep and multidimensional causes. What here is assumed is that inequalities in income distribution and job opportunities in the cities might profoundly affect a city and create fractures. The technological developments may either reinforce or mitigate this trend, depending on whether the principle of Tech Justice is properly implemented.

The failure to address the issue of justice in the (smart/sharing) city has been recently been counterbalanced by an emerging scholarship stressing the role of citizen's rights in the city, the need for a citizen-centered urban transition as well as the search for an empirical study of the city. This scholarship

¹¹ E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (1990).

¹² D. Harvey, *Rebel Cities: From The Right to The City To The Urban Revolution* (2012).

¹³ D. Harvey, *The Right to the City*, cit. at 1.

(which will be explored in section 2 of this article) is identified with the literature on human rights cities and the more recent literature on commons-based cities. Both streams of thought advance the notion of urban justice through similar approaches (participation and co-creation). They also share the quest for an empirical grounding of these theories.¹⁴ However, there is a lack of connection between the two scholarships. By filling the gap between these two bodies of literature, we intend to contribute to existing strands of thoughts by advocating for empirically grounded studies of urban governance theories that a fairer technological transition in the city.

The article is divided in three sections. Section 2 raises the issue that the dominant discourses surrounding the notions of the IoT and IoX do not take into account issues of fairness, democracy, social and economic justice. The article then reviews the literature on the tech-based platform city: the smart city and the sharing city, underling the justice gap in these discussions. The notion of the Internet of Humans advanced in this article implies bringing Tech Justice and therefore human rights talk and commons-based approaches to the smart and sharing city. The article finally positions the concept of 'Tech Justice' within the legal scholarship that investigated whether cities should have a role in safeguarding human rights. The main challenges arising in urban context in terms of human rights the legal, philosophical, sociological and political science approaches that build the concept of a right to the city approach are investigated in connection with the tech development. Section 3 introduces and operationalizes the concept of Tech Justice and its foundations. The operationalization of the dimension of Tech Justice shows the extent to which it is a matter of an incremental dimension, ranging across four sub-dimensions: access and distribution; participation, co-management; and co-ownership. Section 4 introduces case studies from four urban policy siloes: urban digital networks, urban data, urban energy, urban mobility. For each area, we offer a brief description and an example or some case studies that illustrate different aspects relevant for the dimension of Tech Justice. Finally, section 5 discusses the results of the empirical overview of the relevant

¹⁴ B. Oomen et al., *Global Urban Justice. The Rise of Human Rights Cities* (2016).

case studies where the concept of Tech Justice has emerged and offers concluding remarks that advance the hypothesis that the commons approach (in light of the studies carried out by scholars on the commons on urban, digital and infrastructure commons) could enhance technological justice in the governing of tech infrastructure and services, tackling the barriers to equal access to technology in the city and therefore delivering a more just and democratic smart city.

2. Internet of Things, Internet of Everything and Internet of People

The term "Internet of Things" was coined by Kevin Ashton¹⁵ to describe a huge array of new consumer devices (e.g. mobile phones, tablets, watches, cuffs, headbands, helmets, etc.) tracking, measuring, recording, and analyzing different personal aspects of daily life (e.g. steps taken in a day, calories burned, heart rate, blood pressure or blood glucose levels, hours asleep, soccer performance, daily exposure to ultraviolet rays, need to reapply sunscreen, blood flow, oxygen saturation when cycling, baby's sleep habits, temperature, and breathing patterns, changes in autonomic nervous system to detect mental state (e.g., passive, excitable, pessimistic, anxious, balanced) and ability to cope with stress, brain activity to track the ability to focus, etc.¹⁶.

In addition, home-automation systems, driving and automobile monitors, new lines of connected ovens, refrigerators, and other appliances, home electricity and water-usage trackers measure driving habits, kitchen-appliance use, home electricity and water consumption, and of course work productivity. The exponential growth of mobile data traffic - which in 2012 was almost twelve times larger than all global Internet traffic was in 2000 -¹⁷ is essentially driven by intelligent devices and sensors¹⁸

¹⁵ See K. Ashton, *That "Internet of Things" Thing*, RFID J. (June 22, 2009), <http://www.rfidjournal.com/articles/view?4986> (last visited March 26th, 2009); see also K. Finch & Omer Tene, *Welcome to the Metropticon: Protecting Privacy in a Hyperconnected Town*, 41 Fordham Urb. L.J. 1581, 1599 (2014).

¹⁶ S. R. Peppet, *Regulating the Internet of Things: First Steps Toward Managing Discrimination, Privacy, Security and Consent*, 93 Tex. L. Rev. 85, (2014).

¹⁷ See Cisco, *Cisco visual networking index: global mobile data traffic forecast update*, <http://www.cisco.com/en/US/solutions/collateral/ns341>

belonging to the Internet of things technology.

The Internet of Things usually raises questions related to the ownership of the data these sensors generate, the use that these data receive, the security of devices, consumers' awareness about the legal implications. The dominant discourses surrounding the notions of the IoT, IoX do not take into account issues of fairness, democracy, social and economic justice. It is to demonstrate this argument if we "urbanize" these questions and have a quick look at the conversation around smart and sharing cities, which are the two dominant narratives which intersect data and the city.

2.1 The smart city and the sharing city as two different implementations of the model of tech-based platform city.

In the academic literature focused on the development of a normative model of the city governance, we identified the paradigm of the tech-based city, reflecting the smart and the sharing city models. The concepts of smart city and sharing city sometimes overlap both in the public debate and in the scientific literature as well as at the public policy level¹⁹. This section introduces and explains the two models more closely related to the scope of this Article.

The concept of smart city is becoming increasingly popular in both scientific literature and policy making arena. Initially, the concept of smart city was referred to the increasing relevance of ICT infrastructures in the city. Recent definitions entail that the smart city is a city where communities, institutions, infrastructure, devices and objects are interconnected and integrated by technology, they are sustainable and respond in a smart way to the challenges posed by the urban context²⁰. The

/ns525/ns537/ns7O5/ns827/white paperc1 1-520862.pdf (last visited March 6, 2018).

¹⁸ D. Evans, *How the Internet of Everything Will Change the World ... for the Better #IoE [Infographic]*, Cisco Blogs (Nov. 7, 2012), <http://blogs.cisco.com/news/how-the-internet-of-everything-will-change-the-worldfor-thebetter-infographic> (last visited March 6, 2018).

¹⁹ A. Miller, *Amsterdam is now Europe's first named "Sharing City"*, in *Shareable* (February 24, 2015), <https://www.shareable.net/blog/amsterdam-is-now-europes-first-named-sharing-city>. (last visited March 6, 2018).

²⁰ V. Albino, U. Berardi and R. M. Dangelico, *Smart Cities: Definitions, Dimensions, Performance, and Initiatives*, 22 J. of Urban Technology, 3-21 (2015).

field of the study of the law and the smart city is just emerging²¹. This despite the fact that there are several legal and policy issues that might be addressed: privacy protection²², security, law enforcement access and insurance²³, among the others. Several observers of the smart city admonish us to reflect over the wider implications of the technological evolution of cities. The increasing dependence of cities on technology makes them functional and equitable, but also exposed to vulnerabilities²⁴ (i.e. to potential hacker attacks). It was observed that a smart transition of the city provides city inhabitants with a window of opportunity to express their civic activism at best, but it might at the same time fuel already existing conflicts in socially and economically stratified cities²⁵ and deepen social divisions²⁶.

Similarly, the sharing city relies heavily on ICT technologies and data, but it has its own peculiar features. According to Ageyman and McLaren, the distinction is clear: the smart city should be conceived as a means to reach the sharing city²⁷. Consequently, the transition towards the smart city should be the starting point and the precondition for achieving a sharing city. The dominant vision of the sharing city is based on the most diffused understanding of the sharing economy as a “crowd-based capitalistic city” that relies heavily on the use of sharing technologies and platforms to create value from the human and material capacity available in the city, as proposed by Arun

²¹ D. Glancy, *Sharing the Road: Smart Transportation Infrastructure*, 4 Fordham Urb. L. J. 1617 (2014).

²² K. Finch & O. Tene, *Welcome to the Metropticon: Protecting Privacy in a Hyperconnected Town*, 41 Fordham Urb. L. J. 1581, 1599 (2014).

²³ D. Glancy, *Sharing the Road: Smart Transportation Infrastructure*, 4 Fordham Urb. L. J. 1617 (2014).

²⁴ A. Townsend, *Smart Cities: Big Data, Civic Hackers, and the Quest for a New Utopia* (2013).

²⁵ A. Townsend et al., *A planet of civic laboratories: the future of cities, information and inclusion*, Institute for the future of cities, Palo Alto Calif., <http://www.iftf.org/our-work/global-landscape/cities/the-future-of-cities-information-and-inclusion/> (last visited 10 April 2018).

²⁶ R. Hollands, *Will the real smart city please stand up?* 12 City, 303 (2008).

²⁷ D. Ageyman & J. McLaren, *Sharing Cities. A Case for Truly Smart and Sustainable Cities* (2015); A. Miller, *Interviewed: "Sharing Cities" Authors Duncan McLaren and Julian Ageyman*, in *Shareable* (March 23, 2016), <https://www.shareable.net/blog/interviewed-sharing-cities-authors-duncan-mclaren-and-julian-agyeman>. (last visited March 6, 2018).

Sundarajan.²⁸ Conversely, the definition of sharing city provided by McLaren and Ageyman acknowledges this distinction. In the sharing city, capitalism would be replaced by more value-oriented businesses. The technology is still considered as a crucial infrastructure in the sharing city, but it is not conceptualized as merely profit-oriented, being considered as a tool for building resilient and healthy communities.²⁹ The rise of the sharing economy can possibly be understood, in the view of Nestor Davidson and John Infranca, as a reaction to the current profit-oriented landscape of the smart city's governance³⁰, where often the market dominates the scene. In the present contribution, we acknowledge the importance of moving from a market-based smart and sharing city to a citizen-centered, values-oriented city.

2.2 The Internet of Humans: bringing Tech Justice to the City

This section explores the foundation of the principle of Tech Justice, building on the literature on human rights and technology, human rights in the city, the Right to the City and studies that analyzed justice and equality issues in connection with technology. The ultimate aim is to build a "Right to Tech in the city" as the legal content of a principle of Tech Justice which should inspire the design of an institutional and policy infrastructure supporting the Internet of Humans and complementing the digital infrastructure of IoT, IoE or IoX, IoP.

The relationship between human rights and technology as a declination of the more complex relationship between law and technology is crucial for a just social and economic development throughout the world. The challenges of the interplay between human rights and technology have been widely discussed by policy makers and scholars, scientists and lawyers. From a law and policy perspective, there are several issues concerning this relationship. First of all, one should consider the disruptive impact of technology on human rights. Those includes air pollution produced by industrial developments which lead to the violation of interests protected by law to live in environment free

²⁸ A. Sundarajan, *The Sharing Economy* (2015).

²⁹ D. Mc Laren & J. Ageyman, *Sharing Cities* (2015).

³⁰ N. Davidson & J. Infranca, *The sharing economy as an urban phenomenon*, 34 Yale L. & Pol'y Rev. 238 (2016).

from contamination³¹; the potential threat to the right to privacy³² and to freedom of expression³³ due to the development of surveillance technologies; the potential threat represented by the growth of biotechnology³⁴ and by scientific discoveries in the field of nuclear physics³⁵.

There has been an increase in law making activity by the United Nations on this matter addressing both the issue of the access to technology as a human right³⁶ and the safeguard of human rights. Already in 1968, with the Proclamation of Teheran later adopted as a resolution, the UN declared that “while scientific discoveries and technological advances have opened up prospects for economic, social and cultural progress such developments may nevertheless endanger the rights and freedom of individuals and will require continuing attention”³⁷. In current times, UN issued policy reports on the right to privacy, the gender digital divide³⁸ from a human rights perspective and on the normative framework applicable to the right to enjoy the benefits of scientific progress and its applications. In the latter, it is also addressed the key point that international human rights law did not recognize a general right to access the internet, but it is nevertheless possible to find an existing right to the internet for persons with disabilities based on the provisions of articles 4, 9,

³¹ Y. Dinstein, *Science, technology and human rights*, 5 Dalhousie L. J. 155 (1979).

³² F. Fabbrini, *Human Rights in the Digital Age: The European Court of Justice Ruling in the Data Retention Case and Its Lessons for Privacy and Surveillance in the United States*, 28 Harv. Hum. Rts. J. 65 (2015).

³³ N. Lucchi, *Internet Content Governance and Human Rights*, 16 Vand. J. Ent. & Tech. L. 809 (2014).

³⁴ T. Murphy, *Human Rights in Technological Times*, in Roger Brownsword, E. Scotford & K. Yeung (eds.), *The Oxford Handbook on the Law and Regulation of Technology* (2017).

³⁵ M. Kirby, *Human rights and technology: a new dilemma*, 22 U. Brit. Colum. L. Rev. 123 (1988).

³⁶ T. E. Frosini, *Access to internet as a fundamental human right*, 5 Italian J. Pub. L. 226 (2013).

³⁷ G. Brand, *Human rights and scientific and technological development*, 4 Human Rights Journal 351 (1971); *General Assembly Resolution*, 2450 (XXIII) 19 December 1968.

³⁸ Human Rights Council, *Annual report of the United Nations high commissioner for human rights*, 35/9, *Promotion, protection and enjoyment of human rights on the Internet: ways to bridge the gender digital divide from a human rights perspective*, 5 May 2017.

21, and 30 of the Convention on the rights of persons with disabilities³⁹. The report concluded that the right to enjoy the benefit of scientific progress is a largely neglected right despite its importance for the enjoyment of other human rights and fundamental freedoms in the modern world and impediments to access to information, technology and knowledge are identified mainly in poverty and discrimination⁴⁰. In a resolution of 2016 that recalls all those achievements and relevant resolutions, the UN “decides to continue its consideration of the promotion , protection and enjoyment of human rights as well as of how the Internet can be an important tool for fostering citizen and civil society participation, for the realization of development in every community and for exercising human rights⁴¹”.

2.3 Human rights and the city

There are two streams of thought that discuss the intersection between human rights and the city: the human rights cities approach and the right to the city approach.

The literature on human rights and the city currently revolves around issues like the choice between universalistic versus adaptive approaches, top-down versus bottom-up processes of implementation, the dialogue and the confrontation of different priorities between civil society and local governments.⁴² Two

³⁹ Report of the United Nations High Commissioner for human rights. *Report on the seminar on the rights to enjoy the benefits of scientific progress and its applications*, 1 April 2014.

⁴⁰ Report of the United Nations High Commissioner for human rights, *Report on the seminar on the rights to enjoy the benefits of scientific progress and its applications*, 1 April 2014, at 13.

⁴¹ General Assembly resolution 32/L. 20, at 4. This approach seems to stress a connection between the right to Internet and the right to development, as already highlighted by Jennifer Myers, *Human rights and development: using advanced technology to promote human rights in Sub-saharan Africa*, 30 Case W Res. J. Int'l L. 343 (1998) and A. J. Cerda Silva, *Internet Freedom is Not Enough: Towards an Internet Based on Human Rights*, 18 Int'l J. on Hum Rts. 17 (2013). The IoT can also facilitate city residents' self-production of energy, use of driverless cars and manufacturing and distributing goods, enabling sharing economy to flourish at a very low or zero marginal cost. See also J. Rifkin, *How the Third Industrial Revolution will create a Green Economy*, 3 IET engineering & technology, 7, 26-27 (2008); Jeremy Rifkin, *Towards Internet of Things and shared economy*, 2 Corporation Research 14-21 (2015).

⁴² B. Oomen et al., *Global Urban Justice. The Rise of Human Rights Cities* cit at 14.

main streams of thought have emerged: the Human Rights Cities approach and the Right to the City approach⁴³. Human Rights Cities literature has been inspired by single cities or cities' networks policy initiatives such as: the Montreal Charter on Rights and responsibilities, the Mexico City Charter for the Right to the City, the European Charter for the Safeguarding of Human Rights in the City (ECHRC)⁴⁴ or the Global Charter Agenda for Human Rights in the City⁴⁵ promoted by United Cities and Local Governments (UCLG), as well as the NGO-driven initiatives like the Rosario and other 17 cities proclamations promoted by the NGO People's Movement for Human Rights Learning (PDHRE)⁴⁶.

Skepticism about the real implementation and feasibility of these urban human rights based policies has given rise to the need to engage with empirical analysis in assessing implementation of urban laws and policies based on human rights. At this stage, however, empirical approaches and evidence on the success of a Tech Justice-based city are still scarce.⁴⁷ In addition, Human Rights Cities literature recently suggested the need to concentrate further research on the role of social practices in shaping these discourses in the city and their implementations. According to this approach, laws and policies on human rights cities are not to be conceived as isolated from the context that can shape them (i.e. socio-cultural legacies) and should not be analyzed without an analysis of the social practices that produce them⁴⁸. We support this body of thought as we deem a context-

⁴³ E. Chueca, *Human rights in the city and the right to the city: two different paradigms confronting urbanization*, in B. Oomen et al., *Global Urban Justice. The Rise of Human Rights Cities* cit at 14.

⁴⁴ *European Charter for the Safeguarding of Human Rights in the City* (ECHRC) signed in Saint Denis in 2000 after two years of debate between European Cities, civil society organizations and human rights experts <https://www.uclg-cisd.org/en/right-to-the-city/european-charter> (last visited 06 Apr. 2018).

⁴⁵ UCLG, *Global Charter Agenda for Human Rights in the City*, <https://www.uclg-cisd.org/en/right-to-the-city/world-charter-agenda> (last visited 06 Apr., 2018).

⁴⁶ S. Marks et al., *Human rights cities civic engagement for societal development* (2008).

⁴⁷ M. Grigolo, *Human rights and cities: the Barcelona Office for Non-Discrimination and its work for migrants*, 14(6) *Int. J. of Hum. Rts.* 894-912 (2010).

⁴⁸ M. Grigolo, *Towards a sociology of the human rights city: focusing on practice*, in B.

dependent research agenda indispensable to the implementation of appropriate laws and policies in the city.

The second stream on thought envisions a rights-based approach to technology in the city, a completion from what is named the “Right to the City” approach, presented widely in chapter 2, to a concept of Right to Tech in the City. What here is assumed is that, as recognized by the right to the City literature, inequalities in income distribution and job opportunities in the cities might profoundly affect a city and create fractures. The technological developments may either reinforce or mitigate this trend, depending on whether the principle of Tech Justice is properly implemented.

Joe Shawn and Mark Graham discussed the application of the right to the city approach to technology, particularly in regard to the access to information in order to achieve a fairer geography of information in the city⁴⁹. The starting point of the authors’ argument is that ubiquity of digital information and communication technologies (ICTs) producing and distributing the abstract urban space is central to the reproduction of urban space as conceptualized by Lefebvre⁵⁰. Kitchin and Dodge, for instance, analyzed the ways that computer code can shape how spaces are brought into being⁵¹. Mark Graham earlier pointed to the ways that digital information can augment spatial experiences⁵².

The conceptualizations provided by those authors of the spatiality of code and content serve as a starting point to reflect upon the problematic entanglements between digital information and a Lefebvrian understanding of abstract space. Mobile applications related to access to information and transportation such as Wikipedia or Uber and, in general, the actor of digital and tech companies are gaining increasing power, that is also

Oomen et al., *Global Urban Justice. The Rise of Human Rights Cities* cit at 14.

⁴⁹ J. Shaw & M. Graham, *An Informational Right to the City? Code, Content, Control, and the Urbanization of Information*, 49 *Antipode* 907 (2017).

⁵⁰ H. Lefebvre, *The Right to City*, in *Writings on Cities* 147 (1968).

⁵¹ R. Kitchin & M. Dodge, *Code/space: Software and Everyday Life* (2011).

⁵² M. Graham, *The Virtual Dimension*, in M. Acuto and W. Steele (eds.), *Global City Challenges: debating a concept, improving the practice* (2013), at 117-139.

overcoming that power usually attributed to traditional urban actor-developers, planners and landlords⁵³.

2.4. Justice and equality in the tech field, especially at the local level

Artificial Intelligence and blockchain are two examples of a disruptive technology that promises to generate strong legal innovations within the fields of administrative decision making and public contracts or services. These technologies are still in their infancy so their analysis cannot yet be exhaustive, however many already anticipate the need for a human rights based approach that will allow for the proper deployment of more advanced technologies while furthering the respect for basic, essential, fundamental rights.

The quest for an AI for social good is probably due to this rising conversation. With the newly announced initiative by McKinsey and Google⁵⁴, policy-oriented uses of Artificial Intelligence have taken center stage.

In addition, the EU has produced Ethical Guidelines for AI based on the notion of “Trustworthy AI” and the more recent White Paper On Artificial Intelligence where the concept of trust is a center pillar⁵⁵. The partnership between the Blockchain Charity Foundation (BCF) and the UNDP goes in the same direction. BCF has unveiled its goal to utilize AI in the aid for economic development and in strongly contributing to reach the SDGs.⁵⁶

⁵³ J. Shaw & M. Graham, *An Informational Right to the City? Code, Content, Control, and the Urbanization of Information*, 49 *Antipode* 907 (2017).

⁵⁴ See McKinsey Global Institute, *Notes from the AI frontier. Applying AI for Social Good*, in <https://www.mckinsey.com/~media/McKinsey/Featured%20Insights/Artificial%20Intelligence/Applying%20artificial%20intelligence%20for%20social%20good/MGI-Appling-AI-for-social-good-Discussion-paper-Dec-2018.ashx>. See also Google, *Advancing AI for everyone*, in <https://ai.google>.

⁵⁵ High-Level Expert Group On Artificial Intelligence, *Ethics Guidelines For Trustworthy AI*, in <https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai> (last visited 30 January 2020). See now European Commission, *White Paper On Artificial Intelligence. A European approach to excellence and trust*, Brussels, 19.2.2020 COM(2020)65.

⁵⁶ UNDP, *Blockchain Charity Foundation and UNDP Announce Partnership to Explore Blockchain for Social Good*, 25 September 2018, in www.asia-

The issue of a rights-based approach to regulation of new technologies in cities is contemplated in the literature on smart cities by focusing the attention on the challenges posed to privacy protection⁵⁷. Only a part of the scholarship highlighted the impact of new technologies in cities on its economic and democratic functioning.

Some authors put a spotlight on the current business models of sharing economy. Blockchain, for instance, could facilitate peer-to-peer cooperation for ride sharing eliminating the need for an intermediate platform such as Uber or Lyft or for the self-production and exchange of energy in the urban energy smart grids⁵⁸.

Olivier Sylvain has defined “broadband localism”⁵⁹ an approach that seeks to overcome broadband infrastructure and service disparities by race, ethnicity and income. The author suggests that regulators should go beyond “network neutrality” to achieve “network equality”⁶⁰ meaning substantive equality in technology access.

Brett Frischmann argued that the diffusion of digital platforms and information technology, producing techno-social engineering of humans⁶¹ largely ignored by legal scholars, might represent one of the greatest constitutional issues caused by the spread of technology, because it could make people behave like machines and arguably becoming predictable and programmable.⁶²

From different standpoints, authors focusing on platform cooperativism⁶³ are stressing the attention on the issue of the

pacific.undp.org/content/rbap/en/home/presscenter/pressreleases/2018/blockchain-charity-foundation-and-undp-announce-partnership-to-e.html.

⁵⁷ I. Brown, *Keeping our secrets? Designing internet technologies for the public good*, E.H.R.L.R. 4, 369-377 (2014).

⁵⁸ M. Finck, *Blockchains: regulating the Unknown*, 19 German L. J. 665 (2018).

⁵⁹ O. Sylvain, *Broadband localism*, 73 Ohio St. L. J. 795 (2012).

⁶⁰ O. Sylvain, *Network equality*, 67 Hast. L. J. 103 (2016).

⁶¹ B. Frischmann, *Thoughts on Techno-Social Engineering of Humans and the Freedom to Be Off (or Free from Such Engineering)* Theoretical Inquiries L. 17, 535 (2016).

⁶² B. Frischmann, *Thoughts on Techno-Social Engineering of Humans and the Freedom to Be Off (or Free from Such Engineering)*, cit. at 535.

⁶³ T. Scholtz, *Platform Cooperativism. Challenging the Corporate Sharing Economy*, Report of the Rosa Luxemburg Foundation, in <http://www.rosalux->

safeguard of workers' rights in the digital economy governed by big tech companies and platforms providing services. Diane Ring and Shu Yi Oei⁶⁴ highlighted the regulatory ambiguity deriving from the situation of the workers of sharing platforms. Furthermore, an emerging strand of literature is focusing the attention on the issue of human rights and technology in cities starting from the angle of the discrimination in the access to the Internet. There are concerns about discrimination in ride-sharing and home-sharing platforms due to, among other reasons, more intimate nature of sharing economy transactions, which increase the salience of gender and limits the law's ability to control these adverse effects.⁶⁵ The diffusion of the sharing economy is arguably bringing about a diffused disparity of power, which should be taken into account in promoting such approaches.⁶⁶ The previously discussed aspects are only selected examples of the debates ongoing on technological developments and human rights concerns. However, they contribute to illustrate some of the challenges of the ongoing tech transitions in the city.

3. Investigating the dimensions of Tech Justice in the City

Building on the literature about human rights and Technological Justice is a dimension that measures the potential to access, participate, co-manage and co-own technology and digital infrastructures and services in the City. Tech justice is built on the paradigm of the shift from formal equality to substantial equality⁶⁷. It is rooted in part in the idea of human

nyc.org/platform-cooperativism-2/, (January 2016) (last visited 30 October 2018).

⁶⁴ S. Oei & D. M. Ring, *Can Sharing Be Taxed?*, 93 (4) Wash. U. L. Rev. (2016).

⁶⁵ N. Schoenbaum, *Gender and the Sharing Economy*, 43 Fordham Urb. L.J. 1023, 1070 (2016).

⁶⁶ See the analysis of the disparity of power through a contracts survey carried out by G. Smorto, *Protecting the weaker parties in the sharing economy*, in N. Davidson, M. Finck & J. Infranca (eds.), *Cambridge Handbook on Law and Regulation of the Sharing Economy* (2018).

⁶⁷ Leonardo Morlino introduced a model of quality of democracy that provides both procedural dimension, such as the rule of law and substantive dimensions such as equality. Among the dimensions of the quality of democracy, the dimension of the rule of law and in particular the sub-dimension of institutional capacity could be helpful to measure the role of the state and the efficiency of

capacity and well-being⁶⁸ and in recognition of structural inequalities. Tech Justice is conceived as a tool for facilitating and sharing information and building capabilities that are necessary for urban wellbeing. The concept aims at developing targeted actions to grant vulnerable minorities and *disadvantaged* populations access to the benefits deriving from technology.

The dimension of Tech Justice is also a tool for measuring the implementation of the international policy agenda set forth within the framework of Open Government⁶⁹ operationalized through the realization of democratic platforms that enables collaboration between local actors and governments. The collaboration variable is a key variable in the Open Government agenda, yet poorly implemented by state-of-the-art country policies in the EU⁷⁰.

The tech justice dimension brings the perspective of the urban co-governance to the use, management, ownership of technological infrastructures and tools in cities. The literature on collective action and the commons Elinor Ostrom solidly contributed to the definition of the concept of social capital, activation of collective action and the understanding of its functioning in complex situations regarding commons pool resources. Ostrom, together with Ahn, identified the key element of trust in trustworthiness, the focus on other's intrinsic motivation, as the link that activates the evolution from social capital to collective action. Ostrom and Ahn also examined the role of rules, both legal rules and social rules, as crucial in democratic societies to understand the concrete functioning of social capital⁷¹. Literature on commons- based cities and the urban commons in general is very recent. The urban commons literature emerged from Elinor Ostrom's empirical research on

the public administration in implementing an equal fair access to technology, also in cities, L. Morlino, *Changes for democracy 196-199* (2011).

⁶⁸ M. Nussbaum & A. Sen, *The quality of life* (1993).

⁶⁹ B. Noveck, *Wiki government: how technology can make government better, democracy stronger and citizens more powerful* (2009); D. Lathrop & L. Ruma (eds), *Open Government: Collaboration, Transparency, and Participation in Practice* (2010).

⁷⁰ E. De Blasio & D. Selva, *Why choose open government? Motivations for the adoption of open government policies in four European countries*, 8 *Pol'y & Internet* (2016).

⁷¹ E. Ostrom & T. K. Ahn, *Foundations of social capital* (2003).

Common Pool Resources (CPRs)⁷² which demonstrated that a cooperative governance strategy was a viable way of dealing with CPRs dilemma, avoiding the tragedy of the commons. Ostrom identified the conditions or principles which increase the likelihood of long-term, collective governance of shared resources. Although these principles have been widely studied and applied to a range of common pool resources, including natural and digital commons, there has not been enough research aimed at applying them to the urban commons. The only exception is represented by Harini Nagendra and Elinor Ostrom.⁷³ They applied the institutional analysis and development IAD framework of institutional analysis to the governance of natural resource in cities such as Bangalore. Their aim was to apply Ostrom's design principles in the peri-urban and urban context. The urban commons are also addressed in the sociological or anthropological strand of literature on activation of forms of collective action and political protest for reclaiming urban commons as a reaction against the impact of financialization and the post-2008 economic crisis⁷⁴. These analysis stress on one side relational process of collaboration – not focusing only on the commons as shared resources, but also as a process of social cooperation – and on the other side on the way they reconfigure the relationship between urban social movements and public institutions and investigate the dynamics of production of urban commons as a social practice⁷⁵. These aspects also relate to some of the case studies of policies and governance innovations that this article is capturing. The strand of research that is focusing on the urban commons merges this literatures with the common pool resources literature, extending Ostrom's methodology not to natural resources in the city, but to

⁷² E. Ostrom, *Governing the commons* (1990).

⁷³ H. Nagendra & E. Ostrom, *Applying the social-ecological system framework to the diagnosis of urban lake commons in Bangalore, India*, *Ecology & Soc'y* 19(2): 67. (2014).

⁷⁴ M. Garcia Lamarca, *Insurgent acts of being-in-common and housing in Spain: Making urban commons?*, in M. Dellenbaugh et al. (eds.), *Urban commons: moving beyond state and market* (2015); see also A. Kioupkiolis, *The Common and Counter-Hegemonic Politics. Rethinking Social Change* (2019).

⁷⁵ M. Dellenbaugh et al, *Urban commons: moving beyond state and market* (2015); C. Borch & M. Kornberger, *Urban Commons: Rethinking the City* (2015).

the governance of constructed and regulated resources in the city. Legal scholar Sheila Foster⁷⁶ first inquired whether there are identifiable urban commons governance institutions existing in cities, such as community gardens or business improvement districts. It has been also questioned whether through a commons-based approach to the governance of shared spaces and urban services it would be possible to envision the city itself as a commons⁷⁷. To say that the City is a commons means recognizing that “the city shares some of the classic problems of a common pool resource—the difficulty of excluding people and the need to design effective rules, norms and institutions for resource stewardship and governance”⁷⁸. The city as a commons concept recognizes that the City shares some features with the typical common pool resources but also entails relevant distinctions. For instance, the fact that although there are many resources that are non-exhaustible and non-renewable (i.e. rivers) the majority of resources and services in the city are constructed commons, resulting from social processes and institutional design. What marks a great difference is also the fact that cities are context characterized by high political and legal complexity. As a result, the city as a commons theory ultimately adapted Ostrom’s design principles to the urban context and proposed five design principles (collective governance; enabling state; experimentalism; pooling economies and tech justice) that represent the types of conditions and factors that “instantiate the city as a cooperative space in which various forms of urban commons not only emerge but are sustainable”⁷⁹.

⁷⁶ S. Foster, *Collective Action and the Urban Commons*, 87 Notre Dame L. Rev. (2011), 57.

⁷⁷ C. Iaione, *The tragedy of urban roads. Calling on citizens to combat climate change*, Ford. Urb. L. J. (2010); C. Iaione, *Governing the urban commons*, Italian J. Pub. L. (2015); C. Iaione, *The Co-City: Sharing, Collaborating, Cooperating, and Commoning in the City*, 75 Am. J. Econ. & Soc. 415 (2016); C. Iaione, *The right to the co-city*, Italian J. Pub. L. 80 (2017); C. Iaione & E. De Nictolis, *Urban Pooling*, 44 Fordham Urb. L.J. 665 (2017).

⁷⁸ S. Foster & C. Iaione, *Ostrom in the City: Design Principles and Practices for the Urban Commons*, in D. Cole, Blake Hudson, Jonathan Rosenbloom (eds.), *Routledge Handbook on the Study of the Commons* (2019), at 235.

⁷⁹ S. Foster & C. Iaione, *Ostrom in the City: Design Principles and Practices for the Urban Commons*, cit. at 237.

In analyzing tech justice, we can make use of the common methodological concepts of dimension/sub-dimension and scale. These concepts enable us to explain tech justice more clearly and to better understand the fact that tech justice is an essential dimension of urban collaborative city governance. Therefore, this article identifies four dimensions in the notion of Tech Justice, namely Access and Distribution; Participation; Co-management; and Co-ownership. Each dimension is investigated in the context of the Tech Justice discourses and of the cases analyzed. The variable is built on an incremental co-governance scale: Access - Distribution; Participation; Co-management; and Co-ownership. The different level of the scale, also defined as sub-dimensions, are aimed at measuring and providing the design principles to improve access to power and its distribution in governing of technological infrastructures and services, through the promotion of self-organization, self-governance⁸⁰, co-governance or polycentric governance⁸¹ of urban communities.

The first elaboration of a scale to measure the level of citizen involvement in public decision-making processes was elaborated by Arnstein who designed the “ladder of citizen participation”, a scale for civic participation, which includes eight incremental levels⁸². The difference between the levels explains the different power attributed to citizens within a specific process (in the cases analyzed by Arnstein, the different level of influence on public decisions exercised by citizens). The reasoning developed by Arnstein formed the basis for the construction of the Tech Justice variable in the model presented in this article, adding to the measuring feature a prescriptive value. An inspiration for this was the “democracy cube” described by Archon Fung with the goal of updating Arnstein’s ladder of citizen participation. Fung introduced an analytical tool

⁸⁰ E. Ostrom, *Governing the Commons*, (1990).

⁸¹ C. Ansell & A. Gash, *Collaborative governance in theory and practice*, 18 M 543–571(2007). V. Ostrom et al., *The organization of government in metropolitan areas: a theoretical inquiry* 55 Am. Pol. Sci. Rev. 831–842, (1961); E. Ostrom *Polycentric systems for coping with collective action and global environmental change* 20 Global Envtl. Change 550-557 (2010); M. Mc Ginnis & J. Walker, *Foundations of the Ostrom workshop: institutional analysis, polycentricity, and self-governance of the commons*, 143 Pub. Choice 293–301 (2010).

⁸² S. Arnstein, *A Ladder of Citizen Participation*, 35 J. Am. Plan. Ass'n 216 (1969).

composed of institutional design choices (participants' selection, authority and power, communication mode) according to which varieties of participatory mechanisms (i.e. deliberate and negotiate; co-govern; direct authority) can be located⁸³. The different sub-dimensions of the ladder provide in fact both an empirical value and a normative value, as they contain policy recommendation for achieving a satisfying level of Tech Justice in the city.

The variable of Tech Justice is also relevant because it allows to highlight the potentiality of digital infrastructures and access to technology as an enabling factor for local development and social cohesion⁸⁴. The idea of net equality stresses the positive externalities of an open digital infrastructure, which might generate a virtuous cycle: openness generates innovation, which attracts interest from the users and other actors, leading to more investments in technological urban infrastructures and bringing benefits to vulnerable groups. This dimension also relies on the concept of Digital Sovereignty, meaning that users can freely decide which data can be gathered and distributed about themselves, and on the ownership of such data. In the next paragraph, the four incremental sub-dimension of Tech Justice will be explained.

3.1. Access and Distribution

Tech Justice's first sub-dimension is technological equality, based on access and distribution of tech and digital infrastructure. This first level is based on a concept of formal equality, or equal access. The assumption is that, in order for ordinary city inhabitants to cooperate across social and economic differences, they must each have equal access to the means of cooperation. The digital divide, in terms of access to broadband and digital devices, as well as the level of digitization of public services provided by municipalities, is an important factor in bringing together a diversity of people to self-organize for the realization of urban commons.

⁸³ A. Fung, *Varieties of Participation in Complex Governance*, Public Administration Rev., 66-74. (2006)

⁸⁴ O. Sylvain, *Network equality*, 67 Hast. L. J. 103 (2016).

The Tech Justice factor can rely upon secondary data on cities extrapolated from different sources of information on transparency, the city smart governance, e-government etc. deriving from infrastructures of public institutions such as the European Union (Open Data Barometer, EU DESI Index) and the World Bank. As already stressed above in the article, the variable of Tech Justice is aimed at measuring the capacity of including minorities in the access to concrete opportunities related to technological development. Consequently, the variable can be measured also through the presence/absence of local public policies/programs aimed at overcoming (ethnic/cultural/geographic/economic) digital divides; or assessing the presence/absence of specific local NGO projects focused on the overcoming of (ethnic/cultural/geographic/economic) digital divides.

3.2. Participation

Tech Justice can be assessed measuring the participation of the city inhabitants in projects/initiatives such as the one just described above. This can happen with the promotion of self-organization of urban communities around those projects/initiatives. The participation sub-dimensions can be measured through the mapping of experiences of urban policies that promotes participation of city inhabitants into the production/decision-making/management of digital infrastructures or services and even policies that promote urban communities' self-organization.

The sub-dimension of participation is particularly evident in the cases pertaining to open data and e-government. As illustrated above, platforms often focus on improving citizens' access to information and open data with the aim of including them in public decision-making processes through online public consultations and deliberations. As further discussed below, the experience of the *Decidim Barcelona* and *Decide Madrid* platforms are successful examples of the participation dimension, as well as widely diffused platforms for running the Participatory Budget process through online deliberation and vote, such as in the case of Paris or Milan.

3.3 Co-management

Co-management is the third dimension of Tech Justice and it is aimed at measuring the presence of defined roles and responsibilities for civic actors/communities envisaged by the project promoting the involvement of the city inhabitants into the direct management of digital infrastructure or services. This form of involvement may also imply the creation of job opportunities in the city. City inhabitants could in fact be involved in the management of infrastructures or services not just on a voluntary basis but also in a professional way. To avoid the risk of discrimination against disadvantaged communities, which might not have the skills to participate actively in the management of the infrastructure, a process of accompaniment is necessary. This would take place through an intense fieldwork consisting of both a learning phase and co-working facilitation. Such process would allow urban communities to be provided with skills to carry out some of the activities necessary for an infrastructure management.

This dimension emerges in cases of community-led projects that contribute to the management of certain services and infrastructures, as observed in some of the cases of the Wireless area (i.e. Coviolo in Reggio Emilia or the Co-Rome process) when urban communities take advantage of existing infrastructures to improve the services offered and thus improve the access to the Internet or manage neighborhood services based on technology.

3.4. Co-ownership

Lastly, co-ownership is the highest degree of intensity of the Tech Justice variable and it identifies whether, as result of full access to technology and the overcoming of the urban digital divide, the communities involved are able to collectively participate in and build their own cooperative platforms. The variable also investigates whether the skills and tools the community acquires are directly used in an entrepreneurial way. This would configure a system of 'civic digital enterprises' distributed in the city.

This last dimension emerges from the observation of some of the most relevant case studies, for instance in the field of wireless. Many of the design principles that the wireless community networks apply indeed mirror the design principles

of the urban commons. As stated in the Declaration of Community Connectivity⁸⁵, the design principles of the community network initiatives include: a) collective ownership (the network infrastructure is owned by the community where it is deployed); b) social management (the network infrastructure is governed and operated by the community); c) open design (the network implementation details are public and accessible to everyone); d) open participation (anyone is allowed to extend the network, as long as they abide the network principles and design); e) free peering and transit (community networks offer free peering agreements to every network offering reciprocity and allow their free peering partners free transit to destination networks with which they also have free peering agreements); and f) the consideration of security and privacy concerns⁸⁶ while designing and operating the network.

The case studies analyzed in this article seem to be particularly resistant to the dimension of co-ownership, despite this goal being often the object of a research program (as happened with regards to the pilot experimentations conducted by city governments in the case studies concerning data). The case studies in the wireless area, particularly the case studies of community mesh and broadband networks, often embody forms of co-ownership and promote what legal scholar Olivier Sylvain calls “broadband localism”⁸⁷. They are also able to promote a form of Digital Sovereignty, as shown by those projects guided by urban authorities that enable citizens to produce, access and control their data and exchange contextualized information in real-time through institutional, platforms ensuring confidentiality accountability and scalability of the model.

⁸⁵ L. Belli, *Community connectivity: building the Internet from scratch*, Annual report of the UN IGF Dynamic Coalition on Community Connectivity (2016).

⁸⁶ In the debate around the Internet of Things from a right-based perspective, the issue of privacy and data ownership is crucial. See B. D. Weinberg, George R. Milne, Yana G. Andonova & F. M. Hajjat, *Internet of things: Convenience vs. privacy and secrecy*, 58 Bus. Horizons, 615-624 (2015).

⁸⁷ O. Sylvain, *Broadband Localism*, 73 Ohio St. L. J. 795 (2012).

4. Case studies

This paragraph introduces a taxonomy of tech justice case studies based on three types of urban infrastructures: mobility; energy; digital networks. Those types of infrastructures embody the challenges described in the paragraphs above related to human rights concerns in the governance of technologies in cities. These case studies also show clearly the features described by the dimensions of tech justice as an institutional design principle to design urban laws for a just and democratic smart city.

4.1. Urban Mobility

Urban transportation is one of the most profitable terrains for the expected success of technological and digital developments, but it also holds the potential to host many controversial challenges in different areas. The IoX will likely arrive in urban transportation and produce a disruptive impact. Recently a network of data companies including Qualcomm, automotive companies and the University, have launched a testing project for applying the IoX to urban transportation: “Connected Vehicle to Everything of Tomorrow (ConVeX)” is a consortium for carrying out the first announced Cellular-V2X (C-V2X) trial based upon the 3rd Generation Partnership Project’s (3GPP) Release 14, which includes Vehicle-to-Everything (V2X) communication. The trial efforts are expected to focus on Vehicle-to-Vehicle (V2V), Vehicle-to-Infrastructure (V2I) and Vehicle-to-Pedestrian (V2P) direct communication, as well as Vehicle-to-Network (V2N) wide area communications⁸⁸. The phenomena of the sharing economy, in particular the gig economy platforms of Uber and Lyft, have already shown the effects and challenges it produces at the urban governance scale. Sharing/gig economy platforms are an area where the risks and challenges of tech penetration are more evident. In countries like France⁸⁹ or Belgium, the sharing economy platforms like Uber have triggered protests of taxi drivers and fueled reactions by regulatory agencies and courts of law. The same could happen for other

⁸⁸ Qualcomm Technologies Inc. (2017), *Press release*, [online]. Available at <https://goo.gl/NfBuFg>. [Accessed: 18 December 2017].

⁸⁹ A. J. Rubin & M. Scott, *Clashes Erupt Across France as Taxi Drivers Protest Uber*, June 25th 2015 www.nytimes.com/2015/06/26/business/international/uber-protests-france.html.

categories of platforms, in particular for initiative of workers whose job will be disrupted by technological advancements if regulatory and/or policy action are not taken. The other pressing issue is the risk of discrimination that occur in the sharing economy platforms that we discussed in the first part of the article. However, they might be take different shapes, such as discrimination based on cultural identity, ethnicity, religion, political opinions, gender discrimination, economic discrimination.

Besides the examples of the sharing economy and gig economy platforms, we can also observe the blossoming of not-for-profit platforms, where users exchange goods or services for several purposes other than profit, mainly saving resources and money, or improve their social networks and their socialization and skills learning opportunities. In the field of urban transportation, this is the case of the car-pooling platforms. There are several cases of car-pooling platforms initiated by communities and NGOs (in Italy, the platform *Bla Bla Car* is a widely diffused not-for-profit carpooling platform) and of public policies aimed at providing incentives to carpooling for commuters. Some policies were implemented in the US long before the current wave of sharing economy first appeared. One example is the regulation introduced during the Second World War by the Federal Government of the US to manage peoples' behaviors and facilitate the sharing of cars in order to save energy and metal, thus supporting the State's war efforts. In a first phase, between 1942 and 1945, the government promoted car-pooling to support the war effort. The system began to work through "car sharing clubs", or "car clubs". A government regulation called for workers to organize themselves to travel to the workplace through car-pooling if public transport was not available and a program was created, the "Car Sharing Club Exchange and Self-Dispatching System" which functioned as a carpooling platform, but without technological help⁹⁰. It was distributed in the form of a bulletin in the bigger workplaces that crossed demand and supply of the workers' commute. Companies and factories, as workplaces, were required to provide the service (the bulletin)

⁹⁰ N.D. Chan & S. A. Shaheen. *Ridesharing in North America: Past, Present, and Future*, 32:1 Transport Reviews 93-112 (2012).

and to encourage the creation of Car Sharing Clubs. Sharing plans rest primarily on the premise of citizens' collaboration with the authorities. Adherence to these plans must be collaborative and cannot be mandatory. As noted by Bulman⁹¹, public opinion had accepted the approval of these plans and any resistance was due only to fear of relapses in terms of civil liability in the event of a traffic accident. There are other regulatory attempts of providing carpooling incentives, such as the CarPool Incentives programs addressing commuters implemented by the US agency for Environmental protection in 2004. There are also attempts of urban authorities to provide citizens with smart transportation services that provides a collaborative model of governance that do not foresee yet technology in the policy strategies but will do so in the near future, and on which it would be important to focus attention in order to accompany the transition and not incur into the controversial integration of technology. The City of Barcelona has implemented the superblock (*Superilles*), introduced in 2006 by Mayor Jordi Hereu i Boher, with a first pilot in Gràcia neighborhood. It is an innovative example of reform of the urban transportation system that is aimed at facilitating city inhabitants' socialization and community building, although it does not foresee, at the current stage of advancement, a role for a digital platform. The block however does appear to be a promising step in empowering them and thus achieving the final goal set by the policy. The Superblock was described as being a new model of mobility that changes the traditional structure of the urban road network⁹². The superblock's goal is to restrict traffic to a select few of the larger roads, in order to design car free areas that maximize public space and turn urban streets into community spaces⁹³. Cars are forced to ride around the car free grid. The goal is to create a pedestrian civic grid constituted by twelve blocks by 2018⁹⁴. With

⁹¹ J.S. Bulman, *Car sharing plans*, 31:2 Georgetown L.J. 185-200 (1943).

⁹² See <https://ajuntament.barcelona.cat/superilles/en>.

⁹³ M. Bausells, *Superblocks to the rescue: Barcelona's plan to give streets back to residents*, 17 May 2016, in www.theguardian.com/cities/2016/may/17/superblocks-rescue-barcelona-spain-plan-give-streets-back-residents.

⁹⁴ BBC, *Superblocks: Barcelona's war on cars*, 8 February 2017 <https://www.bbc.com/news/av/magazine-38895435/superblocks-barcelona-s-war-on-cars>.

its implementation, the superblocks provide solutions to the main problems of urban mobility and improve both the availability and quality of public space for pedestrian traffic. Through modifications to the basic road network, restricting the access to cars and the establishment of differentiated routes for each transportation vector, the urban public mobility system will be re-organized. The superblocks are bigger than any actual block and yet smaller than a neighborhood. They create a new ecosystem inside the public spaces making them quieter, more walkable and greener. This in itself enhances social interactions and improves coexistence. The superblock produced some negative impact, mainly on traffic and length of car-based travel, but protests evaporated. Each superblock is designed and implemented through a participative process. Different entities and citizens are involved through workshops and consultations with the aim of understanding their needs and defining specific actions. In addition, each neighborhood has a team where both entities and public administration are represented in order to lead the process⁹⁵.

A typology of the sharing economy can be drawn from the wide variety of empirical manifestations of the digital economy that have been applied to urban transformation. The European Union has made an effort to understand the local dimensions of the sharing economy and it has proposed a comprehensive analytical framework (European Committee of the Regions 2015). The protests against Uber by taxi drivers that we recalled in the first part of the paper have occurred also in Spain. In Spain, where there was a situation similar to the Italian one with the taxi company that lodged an appeal against Uber, the Juzgado Mercantil n° 3 of Barcelona chose to refer to the European Court of Justice with a reference for a preliminary judicial review. The object of the appeal was the determination of the legal nature of the activity provided by Uber. In fact, the Spanish judge asked the European court whether the services provided by Uber could be classified as electronic mediation services or information society services within the meaning of Article 1 (2) of Directive

⁹⁵ F. O'Sullivan, *Barcelona's Car-Taming 'Superblocks' Meet Resistance*, 20 January 2017, <https://www.citylab.com/transportation/2017/01/barcelonas-car-taming-superblocks-meet-resistance/513911/>.

98/34 / EC2 of the European Parliament and of the Council of 22 June 1998 providing for an information procedure in the field of technical standards and regulations and rules relating to information society services (European Court of Justice 2015). The Court decided to receive the thesis of the General Attorney of Court of Justice, and classified Uber as a transportation service. The Court stated in fact that "an intermediary service, such as the one object of the case, concerning the intermediation through an application for smartphones and the remuneration of non-professional drivers own vehicle with people wishing to make a move in the urban area, must be considered inextricably linked to a transport service and therefore falling within the qualification of 'service in the transport sector', under the law of the union. this must therefore be excluded from the scope of the freedom to provide services in general and the directive on services in the internal market and the directive on electronic commerce".

If a platform such as Uber is to be classified as a transportation service, considering the impact of the platform on the existing mode of transportation in the city, it could be considered proper to include it within an integrated model of urban mobility, in itself an object of city regulation. The most challenging issue from a regulatory perspective seems to be the building of a governance model for integrated urban mobility that includes public operators, private operators, so line transportation and not-line transport (including taxi, limo companies) and sharing/collaboration/pooling-based private transport as an additional dimension of the not-line private transportation. In the EU there has been a recent blossoming of experimentation of the model of Maas, mobility as a service based on the creation of unique line of transportation services. The idea is to integrate public and private systems of transportation into a single digital service. , The leading example of this is that of Finland, the city of Helsinki in particular⁹⁶. This model would enable collaboration between different actors of the existing mobility system (the City, private companies, private transportations individual and collective, taxi drivers) and would

⁹⁶ A. Hietanen & S. Sahala, *Mobility as a Service. Can it be even better than owning a car?*, in www.itscanada.ca/files/MaaS%20Canada%20by%20Sampo%20Hietanen%20and%20Sami%20Sahala.pdf.

facilitate the integration of technological infrastructures and services. The City would act as an enabler of the creation of digital platforms of experimentation consisting in partnership for the building of community-based system of Mobility as a Service (community-based MaaS). The governance of the platform would involve users, private developers, workers of the platform and the City itself. It would then require implementing the second level of participation, and involving the different categories of participants in the governance structure with deliberation and participatory tools that could require different degrees of involvement: consultation, decision, advise. The governance structure would guarantee anti-discrimination procedures, thus realizing the level of Tech Justice regarding access and distribution. However, the realization of Tech Justice would not be realized solely through a top-down approach, which would be ensured also through the realization of a workers-to-users of the platform intermediation. The interest of users and workers of the platform would be organized from the ground up in forms, procedures or institutions that will guarantee them rights of collective organization consisting in forms of “urban transportation pools”.

4.2. Urban Energy

Similarly to what is happening in the field of urban transportation, we can also observe emerging locally networked energy production within a community through the establishment of “micro-grids” to become more energy self-sufficient and resilient⁹⁷. Energy services in the city are deeply affected by the diffusion of the IoT and IoX. The collaborative production, management, distribution and ownership of urban energy is a key challenge to be addressed for a city that implement a right to the tech approach.

This issue is subject of a series of policy experimentation in EU cities.

The City labs from the Horizon2020 Smarter Together project, in particular the lighthouse cities Lyon, Munich and

⁹⁷ J. Duda et al., *Building Community capacity for energy democracy: a deck of strategies*, Democracy Collaborative, <http://prototypes.democracycollaborative.org/energydemocracy/fullscreen.html>. (last visited 16 March 2018).

Vienna, are concrete experimentation of large-scale smart city solutions in demonstrative neighborhoods of tech-based tool for climate adaptation, environmental sustainability and energy self-production in social and private housing complexes and public facilities, electric mobility. The experimentations will focus on finding the right balance between ICT technologies, citizen engagement and institutional governance to deliver smart and inclusive solutions. The services and housing and public facilities refurbishments are prototyped through co-creation processes. The city of Barcelona is investing huge efforts in enforcement of the right autonomous local energy production and commons-based governance of urban assets and infrastructures⁹⁸.

Few other examples can be mentioned that are supported by the EU through urban programs (Urbact and Urban Innovative Actions). The City of *Viladecans* implemented an innovative approach with the support of the EU through the Urban Innovative Action program, part of the Regional Development Fund, the UIA Vilawatt project (Viladecans 2017). It foresees the implementation of a public-private-citizen partnership for energy governance, starting with an experimentation in the *Montserratina* District. The Energy Transition will be initiated by the creation of an Innovative Public-Private-Citizen Governance Partnership at Local level (PPCP) that will manage the new local tools for the transition: energy supply, energy currency, energy savings services, deep energy renovation investments and renewable energy production. This entity will have the Municipality together with the local businesses and the citizens of *Viladecans* as its members and it will create a Local Energy Operator that will be the local energy supplier and the renewable energy producer, and an Energy Savings Company, offering energy savings services and energy renovation investment to all the members⁹⁹. The city of Gothenborg created a district level energy system, integrating electric power, heating and cooling. The project, named FED

⁹⁸ U. Mattei & A. Quarta, *Right to the City or Urban Commoning: Thoughts on the Generative Transformation of Property Law*, 1 Italian L. J. 303, 326 (2015).

⁹⁹ Urban Innovative Actions. (2017), *Gothenburg FED project*, [online]. Available at <https://uia-initiative.eu/en/uia-cities/gothenburg> [Accessed: 18 January 2020].

Fossil Free Energy District¹⁰⁰ use technologies such as heat-pumps and wind into larger system to reduce peak loads and the use of fossil fuels.

It was already explained¹⁰¹ how this model could be realized through the inspiration of the Non-Profit Utility (NPU) model. In *Melpignano*¹⁰², in the province of Lecce (Region Puglia, Italy), a community cooperative was constituted by a group of residents for the production of energy from renewable sources in partnership with the City. These residents contribute to the project by providing their houses for the installation of solar panels and they receive in exchange the produced energy at zero cost. The profits generated by the sale of surplus energy are reinvested in infrastructures and services for the local community. Further steps could be implemented now that the European Commission recognized the role of *citizens' energetic communities*¹⁰³ as efficient and economically sustainable platforms to respond to citizens' needs in terms of energetic provisions, services and local participation. Moreover, it is able to ensure access to the energetic market to categories of people that would not otherwise have access to it.

4.3. Urban Digital Networks

Finally, an area where we can observe a dramatic increase of tech justice case studies are urban policies and practices aimed at improving citizens involvement and powers in the governance of digital infrastructures, networks and services.

A first typology is represented by the City of Barcelona, which is implementing the right to the city approach applied to the digital sphere through policies promoted by its innovation office in order to achieve a “digital or technological

¹⁰⁰ Urban Innovative Actions. (2017), *Viladecans Vilawatt project*, [online]. Available at <https://www.uia-initiative.eu/en/uia-cities/viladecans> [Accessed: 18 January 2020].

¹⁰¹ C. Iaione, *Governing the urban commons*, 7 Italian J. Pub. L. 1 171, 221 (2015).

¹⁰² Melpignano Community Cooperative, <http://www.coopcomunitamelpignano.it/> (last visited 1 November 2018).

¹⁰³ Directive (Eu) 2019/944 Of The European Parliament and Of The Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast).

sovereignty”¹⁰⁴. This approach is aimed at tackling the key issue of data ownership and puts the digital rights of citizens at the center of the discussions on citizens’ data use.

A different approach towards tech justice in the city digital governance is represented by cities investing on the co-management and co-ownership of broadband infrastructure. The most exemplary case is represented by the “Coviolo Wireless” project in Reggio Emilia which received also an important recognition by the European commission through the European Broadband Awards 2017¹⁰⁵. A group of city inhabitants organized in the Neighbourhood Social Center of Coviolo, in collaboration with the City of Reggio Emilia and Lepida (the regional digital infrastructure operator), blending public and community funding, built the infrastructure and currently manages bearing all the management costs. Coviolo inhabitants have now access to high speed internet at an affordable cost and the capacity of the network can be expanded up to 1 Gbps without any structural intervention. This solution was developed through a participatory bottom up program called Neighborhood as Commons and through the same program it is now being expanded to other neighborhoods¹⁰⁶.

Urban digital networks whose governance is inspired by design principles adherent to the urban commons framework are also emerging from community-based practices. Examples are represented by cooperatively-owned platforms that adopt mechanisms similar to those of sharing economy but are owned by a community cooperative that ensure the transparency and democratic nature of the data governance and redistribute or reinvest its profits in the community itself. Trebor Scholtz argued that a model of platform cooperativism is emerging from the

¹⁰⁴ R. Espelt & M. Garriga, *Digital platforms and democracy*, in F. Badia Dalmases, A. Rubi & M. Balestrini (eds.), *The ecosystem of an open democracy* (2017). See also I. Calzada, *(Smart) Citizens from Data Providers to Decision-Makers? The Case Study of Barcelona*, 10 Sustainability 9, 3252, (2018).

¹⁰⁵ See *Good broadband practice: Coviolo Wireless, Italy*, <https://ec.europa.eu/digital-single-market/en/news/good-broadband-practice-coviolo-wireless-italy>.

¹⁰⁶ See Comune di Reggio Emilia, *Il quartiere bene comune*, <https://www.comune.re.it/retecivica/urp/pes.nsf/web/Dcntrmnt1?opendocument>.

ground, with cooperatively owned and democratically governed digital platforms which might constitute an alternative to the model of value creation embraced by the dominant sharing economy corporations¹⁰⁷. Building on this approach, the commons approach would require the formation of civic unions that would represent a network of organization in order to coordinate their activities. This type of platform is particularly interesting when implemented at the neighborhood or district level. Interesting examples are available in the area of culture, heritage and sustainable tourism. In Italy, the cooperatively-owned platform “FairBnb”¹⁰⁸. In France, the platform *Les oiseaux de Passage*, a French-based cooperatively-owned platform for sustainable tourism and hospitality carried out by residents themselves¹⁰⁹.

5. Concluding remarks

The results of the analysis developed in this article allow to identify few cardinal dimensions of a legal infrastructure which can support the construction of an urban law microsystem dedicated to the governance and management of urban services and assets. Such legal microsystem shall build on new polycentric

¹⁰⁷ T. Scholtz, *Platform Cooperativism. Challenging the Corporate Sharing Economy*, Report of the Rosa Luxemburg Foundation, in <http://www.rosalux-nyc.org/platform-cooperativism-2/>, (January 2016) (last visited 30 October 2018).

¹⁰⁸ FairBnB offers bedrooms for short-term visits. Half of the commission charged by the platform is retained by Fairbnb.coop and used to fund local community projects. See <https://fairbnb.coop/it/>.

¹⁰⁹ The legal entity owning the platform is a Cooperative Society of Collective Interest. Its founding members are three: French cooperatives, Hôtel du Nord, Ekitour and Point Carré, the Minga network and 5 physical persons. The work that the cooperative Hotel Du Nord conducted in the previous years in the city of Marseille implementing the principles of the Council of Europe Faro Convention on the Value of Cultural Heritage for Society (Far o2005) is the main inspiration for the platform. The Hotel du Nord is indeed a Faro Heritage Community. It proposes a network of hosts, mainly residents, offering visitors bedrooms and heritage walks to discover the natural and cultural heritage of the northern area of Marseille. See http://blog.lesoiseauxdepassage.coop/it_it/. See also M. E. Santagati, *Heritage communities within the Faro Convention framework: the case of “Hotel du Nord”*, February 27, 2017, <https://labgov.city/theurbanmedialab/heritage-communities-within-the-faro-convention-framework-the-case-of-hotel-du-nord/>.

modes of management and ownership of urban technological infrastructures and networks.

The first dimension is a policy dimension. The policy dimension has a twofold profile. The first profile is rooted in an international policy framework. The 2030 Agenda for sustainable development¹¹⁰ envisions as a sustainable development goal “end poverty in all its form everywhere”, operationalized, *inter alia*, through the sub-goal “ensure that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance”¹¹¹. The link between technology and justice emerge clearly from the 2030 Agenda, for instance in goal 5, “achieve gender equality and empower all women and girls” that at sub-goal 5.b build a connection between technology and gender equality “enhance the use of enabling technology, in particular information and communications technology, to promote the empowerment of women”¹¹² as well as access to clean energy as stated in goal 7 “ensure access to affordable, reliable, sustainable and modern energy for all”¹¹³. The second profile is rooted in the duty of the European Union to ensure a universal access to technology, ensured through multiple policies¹¹⁴ and reinforced by recent initiatives recognizing the citizens’ role in providing fair access to technology and its connected benefits. An example of this approach (mentioned earlier in the article) is the recognition by the European Commission of the role of *citizens’ energy communities*¹¹⁵ as

¹¹⁰ S. C. Valencia, D. Simon, S. Croese, J. Nordqvist, M. Oloko, T. Sharma, N. T. Buck & I. Versace, *Adapting the Sustainable Development Goals and the New Urban Agenda to the city level: Initial reflections from a comparative research project*, 11 Int’l J. Urb. Sustainable dev. 4, 4-23 (2019).

¹¹¹ *Transforming Our World: the 2030 Agenda for Sustainable Development*, sustainabledevelopment.un.org A/RES/70/1, goal 1.

¹¹² *Ibidem*.

¹¹³ *Transforming Our World: the 2030 Agenda for Sustainable Development*, sustainabledevelopment.un.org A/RES/70/1, goal 7.

¹¹⁴ <https://ec.europa.eu/digital-single-market/en/broadband-strategy-policy>.

¹¹⁵ Directive (Eu) 2019/944 Of The European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast).

efficient and economically sustainable platforms to respond to citizens' needs in terms of energy provisions, services and local participation.

The second dimension is an institutional dimension. The model of co-governance described in this article foresees a leading role of the public actor by reinterpreting its role not as a mere partner of private actors but rather as an enabling platform of different actors through economic or technical support as well as capacity building and reskilling or upskilling processes on social, economic, technological innovations. The relationship between technologies and regulations in the framework of co-governing approaches needs to be integrated. To accompany the implementation of a co-governance approach, innovation brokerage and advisory hubs should be structured as multidisciplinary missions-oriented units that work alongside local public administrations, local communities, the local private, knowledge and social sector, and tech companies to adapt these new formulas to local ecosystems of innovation and experiment them after defining terms and working methods useful to govern these experiments in a way that generates social and local added value.

The third is a legal dimension. To support public action in the context of collaborative dynamics with new types of private actors (including investors not interested in mere speculation but committed to a vision of sustainable and inclusive economic development) and social (including universities, civil society organizations, the inhabitants themselves), it is necessary to develop, test and implement innovative partnerships models centered on public-private-community cooperation that strengthens the role of general interest and make it the object of forms of experimental projects for sustainable innovation. The "tech justice" approach demonstrates how these development, testing and implementation of complex levels of co-governance in the tech sector can take place. It requires the co-planning as much as co-definition and co-implementation of partnerships for deployment social and technological or digital innovations. Such should be engineered first as public-community partnerships and then as public-private-community partnerships. Although some of the experiments analyzed in this article go in this direction, they are still in an embryonic state and have yet to demonstrate

the ability to activate and support real, sustainable and lasting forms of tech infrastructure governance capable of producing social, economic, environmental, urban, cultural impact.

The fourth dimension is financial. Co-governance arrangements impose the need to consequently involve patient or long-term investors (e.g. pension funds) to strengthen existing infrastructures and go beyond the real estate fund system through a model that guarantees the profitability of the investments, but also the social and environmental sustainability thus minimizing risks normally related to this type of projects. The 2018 Boosting Investment in Social Infrastructure Report prepared by a High-Level Task Force (HLTF) chaired by Romano Prodi and Christian Sautter, in collaboration with DG ECFIN and the European Long-Term Investors Association (ELTI)¹¹⁶ estimated at around 57 billion the financial gap in Europe for social infrastructure in euros per year. The report also pointed out that the investment in social infrastructure has decreased by 20% since 2009.

The fifth dimension is the design and urban dimension. From the first point of view, the city should promote urban planning formulas that allow hybridization between different actors and different use of technology and that increase the sustainability of several urban policy silos (i.e. transportation; housing) by carrying out mixed profit and non-profit activities in common areas and in relation to common services. The final aim should be to trigger, through urban planning tools a robust, homogeneous and universalistic spread of a pool of innovative tech solutions, above all from the point of view of the implementation, financing and management model. An accurate monitoring and evaluation system should test the effectiveness of these strategies.

Finally, the technological dimension itself which requires the need to invest in innovation and sustainability as urban and architectural design principles, but above all as a work base to transform urban public spaces or buildings into urban living labs to generate institutional, economic, technological, digital, energy

¹¹⁶ L. Fransen, G. del Bufalo & E. Reviglio, *Boosting Investment in Social Infrastructure in Europe*. Report of the HLTF Force on Investing in Social Infrastructure in Europe, Discussion Paper, 074, January 2018.

innovations. This implies the need to contemplate spaces to generate and incubate these innovations, as well as guarantee the brokerage function between inhabitants, users, local innovation players aimed at creating public-community and public-private-community partnerships for sustainability¹¹⁷. This would also allow investing in the reskilling of many vulnerable city residents as well as activating incubation processes for community enterprises and cooperatives. This mechanism would allow a broader access to the opportunities offered by technological modernization of buildings (e.g. home automation, the internet of things, distributed production of energy and other technological services, etc.) and infrastructure (transport, heating, broadband, etc.).

In the end many problems remain unsolved in terms of how to design and implement the necessary innovations in urban policies and laws to face the social, economic and climate crisis factors that will put an increasing pressure on cities in the 21st century¹¹⁸. A chapter of urban law dedicated to networks and infrastructure should be based on this injection of innovation and sustainability and on the recognition of the right of community of users to manage services of general interest as well as services of general economic interest. These public-private-community partnerships at least bear the promise to spread the response to the challenges that digital transition on one hand and climate change on the other pose to cities, its inhabitants and in particular the most vulnerable groups of urban populations¹¹⁹.

¹¹⁷ J. Evans, A. Karvonen & B. Raven, *The Experimental City* (2016); K. Steen & E. van Bueren, *The Defining Characteristics of Urban Living Labs*, 7 *Technology Innovation Management Rev.* 21-33 (2017); M. Keith & N. Headlam, *Comparative International Urban and Living Labs*, *Urb. Transformation* (2017).

¹¹⁸ C.F. Sabel & J. Zeitlin, *Experimentalist Governance*, in D. Levi-Faur (eds.), *The Oxford Handbook of Governance* (2012), at 1-8.

¹¹⁹ C. Iaione, E. De Nictolis & A. Berti Suman, *The Internet of Humans (IoH): Human Rights and Co-Governance to Achieve Tech Justice in the City*, 13 *L. and Ethics of Human Rights* 263, 299 (2019); N. Davidson, *Affordable Housing Law and Policy in an Era of Big Data*, *Fordham Urb. L. J.* (2017).

FROM THE “DEMOCRATIC CRISIS” TO THE “PARTICIPATORY DEMOCRACY”. THE FRENCH *DÉBAT PUBLIC* AS AN INSPIRING MODEL

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Abstract

“Participatory democracy” could be the key word to contribute to the resolution of administrative conflicts - with a prominent effect with a view to implementing the “good governance” - in systems characterized by a strong crisis in the political-electoral circuit and, in general, by the lack of trust in democratic institutions which are no longer adequate to solve the challenges of modernity. The international and European guidelines seem to go in this direction and the comparative law offers a key turning point which may offer a functional example that could be adopted in the Italian system. Particularly, the French *débat public* appears to be a more advanced model compared to the Italian *dibatto pubblico*: through this lens the characteristics of both models will be specifically analyzed.

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1. Introduction to the problem: the “democratic crisis” of the legal systems**

In this paper I identify, in the tools of “participatory democracy”¹, a suitable solution for the resolution of administrative conflicts, in systems characterized by a strong crisis in the political-electoral circuit and, in general, by the lack of trust in democratic institutions which are no longer adequate to solve the challenges of modernity.² In fact, phenomena such as the globalization of the market and of legal relationships³, the increasing “liquidity”

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¹ See U. Allegretti, *Democrazia partecipativa: un contributo alla democratizzazione della democrazia*, in U. Allegretti (ed.), *Democrazia partecipativa. Esperienze e prospettive in Italia e in Europa* (2010). See also U. Allegretti, *Democrazia partecipativa*, Enc. dir., annali, 295 (2011). The term “participatory democracy” is accompanied by that of “deliberative democracy” (or of the deliberative democracy, according to the vast Anglo-Saxon literature on the subject), which provides that public decisions are preceded by a public discussion, to which interested parties can take part; according to some “participatory democracy” and “deliberative democracy” would be synonymous, according to other authors, however, it would be different models because the latter would indicate not only a quantitative increase in democratic participation, but also a qualitative increase, aimed at allowing public discussions informed, rational and aimed at the “impartial pursuit of truth”; see G. Manfredi, *Il regolamento sul dibattito pubblico: democrazia deliberativa e sindrome nimby*, in Urb. e app. 604 (2018); R. Bifulco, *Democrazia deliberativa*, Enc. dir., ann., IV, 271 (2011); D. Held, *Modelli di democrazia* 401 (2007); B. Faure, *Les deux conceptions de la démocratie administrative*, RFDA 709 (2013); J.B. Auby, *Droit administrative et démocratie*, Dr. adm. (2006); J. Rivero, *A propos de la métamorphose de l'administration aujourd'hui; démocratie et administration*, in *Mélanges Savatier* (1965); B. Plessix, *Décision administrative et démocratie administrative*, in *Collected papers of the Law Faculty of the University of Split*, 56, 1 (2019).

² See A. Giddens, *The consequences of modernity*, Stanford, SUP 1 (1990).

³ Said Adam Smith, how is written in P. Rosanvallon, *Le libéralisme économique - Histoire de l'idée de marché* (1989); see also R. Bin, *Ordine giuridico e ordine politico nel diritto costituzionale globale*, Conference *Ordine giuridico e ordine politico: esperienze lessico e prospettive*, Trento, 24-25 November (2006).

Whether this is a pathological or necessary aspect of the legal system, is another thing: in fact, there are those who believe that the democratic deficit found, for example, in international and European authorities, far from being an accidental problematic of functioning, is instead a “project element” without which the project of a European or international system would not be in any way achievable: the non-democratic character of the institutions and the crisis of political

of the legal system (to use the words of Bauman)⁴ and the society of risk⁵, have led to an ever decreasing prescriptiveness of modern constitutionalism (which is qualified today, as “descriptive constitutionalism”), to an incapacity, on the part of the legislator, to provide criteria to be applied in highly technical decisions, and, consequently, to the necessary assignment of the burden of composing social conflicts to a different representative circuit, which operates at the administrative level on the specific case.

The crisis of representativeness is the necessary consequence of a complex, pluralist and multi-structured society, where there is a continuous emergence of new interests, according to the socio-economic changes. The constitutions are no longer able to offer a predetermined criterion on the basis of which to operate the balances between different values, nor the legislator is able to meet this function. The latter, in fact, can determine standards and indicators for the management of conflicts between interests, but remains unable to appreciate situations of high complexity and tends not to offer solutions and criteria to be applied in the balancing of heterogeneous interests, but to leave, instead, with open clauses, wide discretion to Public Administrations. And this, with obvious consequences in terms of legal certainty. In fact, especially in environmental matters, decisions need a highly technical appreciation that requires the intervention of experts, whose decision-making power is, inevitably, higher than the discretion of other parties involved in the decision-making process. In fact, the

representation, would be, for these authors, the necessary prerequisite for a coexistence of states in supranational institutions, in order to leave the market the possibility of producing rules independently of politics. To learn more about that point, see F. Zakaria, *Democrazia senza libertà in America e nel resto del mondo*, 317 (2003); G. Majone, *Deficit democratico, istituzioni non-maggioritarie ed il paradosso dell'integrazione europea*, SM 3 (2003). On this same programmatic line there would be, for example, the independent administrative Authorities, which would have the aim of removing the politics from the regulation of the market, subtracting these authorities, by means of their "independence", from the political-representative circuit, and making them neutral. See on this F. Merusi, M. Passaro, *Le autorità indipendenti*, 20-98 (2003); A. Baldassarre, *Globalizzazione contro democrazia*, 20 (2002); U. Beck, *Risk Society: Towards a New Modernity* (1992); U. Beck, *What is globalization?* (2000); M. Luciani, *L'antisovrano e la crisi delle costituzioni*, Riv. Dir. Cost. 171 (1996).

⁴ See Z. Bauman, *Liquid Modernity* (2000).

⁵ See U. Beck, *Risk Society: Towards a New Modernity*, cit. at 3, 1 ss.

risks to health and environment often completely escape to the human capacity for direct perception;⁶ these are decisions with a high degree of technocracy, because the which can be faced by the administrations that are in charge of evaluating the specific case and, thus, to carry out the real weighting between conflicting interests.⁷

As a consequence, the need for a concrete management of social conflicts led to the transfer of the real selection of interests from a regulatory level to an administrative level, following the phenomena of delegation and depoliticization⁸ of the legal system. In this context, however, the high technicality of the assessments assigned to the Public Administration, far from being a neutral instrument, is an exclusionary tool, in a relationship of total information asymmetry between administrators and administrators, with the effect of increase exponentially the discretionality in the face of an ever diminishing responsibility.

Furthermore, the methods of determining environmental risks require a mixture of natural sciences and human sciences, between the rationality of everyday life and the rationality of the experts, between interests and facts. And this because, as Beck wrote in 1986, “the side effects have voice, eyes, faces and tears”, and while the farmer’s cows near to the new chemical plant turn yellow, the children suffer from pseudo-croup in areas where is present the sulfur dioxide in the air, people suffer from DDT or formaldehyde poisoning, risks that are not scientifically recognized still do not exist (“the imperative insensitivity of science”). While the “latency” of risks is being lost - public perception of risks is always increasing - the legitimacy of technical sciences to hold the monopoly of rationality in terms of risk perception also falls; this is called “the dynamic of the reflective politicization” that produces risk awareness and conflict. This leads to a crisis of the authority of science: the crisis, therefore, is not only economic, democratic and institutional, as these phenomena are accompa-

⁶ U. Beck, *Risk Society...*, cit. at 3, 34.

⁷ See C. Ham, M. Hill, *The Policy Process in the Modern Capitalist State*, 178 (1993); H. Wade, *Administrative Law*, Oxford 1 (1967); J. Jowell, *The legal control of administrative discretion*, Pub. L. 20 (1973).

⁸ P. Pettit, *Depoliticizing democracy*, Ratio Juris, 17, 52-65 (2004).

nied by a loss of the sovereignty of science in the evaluation of the dangers to which one is exposed in such a direct way.

If, accordingly, we recognize that “scientific rationality” and “social rationality” can no longer be separated, the methods of determination (and management) of the risks presuppose a co-operation between expert technicians, groups of citizens, businesses, administration and politics, in order to avoid falling into a form of “scientific-bureaucratic authoritarianism” that manages - according to its own standards of rationality often linked to market opportunities - the most democratic thing of all: the environmental damage. Moreover, as has been said, “scientific rationality without social rationality remains empty, but social rationality without scientific rationality remains blind”.⁹

2. A suitable solution: the emergence (and the emergency) of the instruments of participatory democracy

If, therefore, the administrative procedure becomes the forum for dialogue and selection of interests, which can't longer be carried out effectively at the political level, it is questionable whether the coordination tools available to the public administrations are adequate to a social system characterized by a high complexity, from the unavailability of stakeholders to resolve the ever-marked conflict of interests (the meeting between the bearers of different interests often seems to substantiate in an “all against all”), as well as the aversion of the social group (regardless of the effective opportunities) towards infrastructural interventions near the place of residence, which is well described by the American acronyms “Nimby” (not in my back yard) and “Niaby” (not in anybody's back yard). With the consequence that, in the end, the moment of composition is not resolved in the resolution of the conflict, but qualifies, substantially, as one of the phases of an unsolvable conflict.

In many countries the strategy aimed at overcoming this problem, traditionally was (or still is) the one known as DAD (De-

⁹ U. Beck, *Risk Society...*, cit. at 3, 40.

cide, Announce, Defend)¹⁰, where the approach is to limit the informational dynamics and participatory moments, in order to avoiding oppositions upstream: and this, on the conviction that the adversity of private individuals is insurmountable *a priori*.¹¹ However, that approach has been criticized because it would have the opposite effect: that of exasperating the problems related to the impact of large infrastructural works, rather than resolving them, as opposed to the procedures which provides a greater involvement of the administrated. That depends on the fact that - how it has frequently been pointed out - the motor of protest by citizens is often neither the environment nor health, but rather the fact itself of a lack of participation: due to the deficiency of trust in the State and in those who administer, the citizen wants today, as never before, to feel part of the decisions that directly involve themselves. This is, in fact, one of the consequences of the pluralism, where associations and committees, stakeholders of collective and widespread interests, become increasingly central, both legally - because the protection in favor of their interests has been progressively and generally increased - and mediatically - as has significantly increased the potentialities for the dissemination of informations and scientific knowledge. The “conflictual pluralization of the risks of civilization” has led to a situation where each party is trying to defend itself with its own definitions of risk, in a struggle of all against all to give the definition of risk most advantageous according to the interests.¹² In this way individuals, especially through the associations in which they organize themselves, have increasingly demanded an active role in the decision-making processes concerning environmental issues, and this request can’t

¹⁰ For an in-depth analysis of the critical aspects of the DAD method, see D. Ungaro, *Eco-Governance. I costi della non partecipazione*, in R. Segatori (ed.), *Governance, democrazia deliberativa e partecipazione politica*, 175-188 (2007); on how the DAD method aggravates NIMBY syndrome, see W. Sancassiani, *Gestire i processi deliberativi: problemi e soluzioni*, in L. Pellizzoni (ed.), *La deliberazione pubblica*, 205 (2005); Research center “Avanzi”, *Introduzione ai conflitti ambientali*, in *La mediazione dei conflitti ambientali - Linee guida operative e testimonianze degli esperti*, 19.

¹¹ On the impossibility of resolving *a priori* conflicts in Italy see A. Macchiati, G. Napolitano (eds.), *È possibile realizzare infrastrutture in Italia?* (2009).

¹² U. Beck, *Risk Society...*, cit. at 3, 40-41.

be ignored where the public opinion exerts an ever-increasing pressure (also) with reference to environmental policies.

If, therefore, the will of the State no longer coincides with the will of the people - because of this great and widespread "crisis of democracy"¹³ - every kind of choice, especially those concerning the installation of buildings and infrastructures having a great impact on the environment and on the territory, needs a greater direct involvement of the citizens, directly interested, not to be opposed *a priori*. In order to cope with these problems, the international and European tendency is to introduce increasingly open and democratic participatory tools to be used in the mechanisms for the selection of interests, in order to foster a dialogue between administrations and stakeholders and to achieve transparency and symmetry of informations: thereby, after having explored the various alternatives, will be possible an optimal composition of interests.

Some European countries, such as France and England, have provided themselves with such tools since many decades - in this they have been pioneers - by driving to the consolidation both in international and in Europe. Even some European countries, that traditionally have given little space to the instruments of participatory democracy, such as Italy, have - albeit with great delay - recently adapted to the new requirements. The Italian example¹⁴,

¹³ On the relationship between the crisis of representation and the development of new participatory modalities, see. F. Robbe, *Démocratie représentative et participation*, in *La démocratie participative*, 18 (2007); L. Cataldi, *Promesse e limiti della democrazia deliberativa: un'alternativa della democrazia del voto?*, Centro Einaudi, Laboratorio di politica comparata e filosofia pubblica, Working Papers - LPF, 3, 23-25 (2008).

¹⁴ The Italian procedural administration model consists of two levels: the general state model identified by law 241/1990; and the decentralized, regional and local, which may derogate from the first, only without any prejudice to the minimum levels of protection. In fact, the derogation regime may provide enhanced protection, but in any way can empty the minimum guarantees, the standards and principles contained in Chapter III of the Proceedings Law. Therefore, between the two disciplines there is a relationship of integration, in a double sense: on the one hand, as stated above, the statutory discipline can only contain an increase in participation; on the other hand, in the event that a local authority remains inert from exercising its statutory authority, in any case the general rules on the procedure will apply. The adoption, by regional laws, of models that differ from law n. 241/1990 is not a widespread phenomenon be-

in particular, is interesting: in the stubbornness of the national legislator not to provide for this tools, some regions, autonomously, have equipped itself with advanced and suitable participatory modules, to be able to dialogue with citizens; from this, in the full implementation of the principle of subsidiarity, the local authority closest to the social stratum has, even before the national legislator, felt the strong need to identify procedural modules capable of inducing the dialogue among the stakeholders and thus allow the identification of more informed and better accepted administrative decisions, precisely because they are based on the necessary meeting between conflicting heterogeneous stakeholders. Only later, and very recently, the Italian legislator, has finally decided to fill the legislative gaps in terms of participation and adapt to what has now become a global need (in 2017 it reformed the institute of public inquiry and in 2018 introduced the public debate for major works that, however, still presents considerable criticality and has a narrow scope of application).

Especially in the last decades, more and more attention has been paid to ensure the adoption of instruments of “participatory democracy”, first of all by supranational provisions - international and European - and then also in the legal systems of EU member states. Thus, the 1992 Rio De Janeiro Declaration, at the conclusion of the United Nations Conference on Environment and Develop-

cause, on the contrary, the regions tend to conform to the general discipline. However, the fact that the statutory or regulatory discipline can derogate from the general one only by way of reinforcement, leads to the existence of a series of participatory modules at local level of great interest and, sometimes, more evolved than those provided for by the general regulations. Therefore, not only the foreign examples - and in particular the French one - but also the regional legislation was, for the Italian national legislator, as inspiring as the foreign experiences, since the Regions and other local authorities first, in the shortcomings of the legal system, they have met the needs of modern society by accepting, independently, institutions of participatory democracy. However, a great novelty - which denotes a tendency towards the recognition of more democratic forms of participation, open and voted for orality - is represented by the introduction of the general public debate on major infrastructural works, in the wake of previous experiences, between first of all the French experience of the *débat public* and, in Italy, that of the Genoa gutter, then those provided for by the Tuscan and Apulian regional laws, which can't fail to recognize the fundamental contribution.

ment¹⁵, provided for the states' duty to encourage the participation of interested citizens, at different levels, in decision-making procedures;¹⁶ thus, the 1998 Aarhus Convention¹⁷ established the criteria concerning the modalities and timing, in observance of which the participatory processes must be implemented.¹⁸ Afterwards, the European Union emphasized its favor towards an expansion of participatory dynamics both with reference to general policies and, more specifically, with reference to environmental policies. In general, it is noted that although the EU establishes the importance of participation, it merely states the principle, but does not specify the implementation models for the principle itself: in July 2001 the Commission adopted the White Paper on the European governance that, among the strategic lines, defines the participation as a suitable instrument to bring the Union closer to the citizens; with the Treaty of Lisbon, participatory democracy becomes an integral part of the European model of society, and an open, transparent, democratic and regular dialogue between insti-

¹⁵ Reference is made here to the United Nations Conference on Environment and Development held from 3 to 14 June 1992.

¹⁶ L. Pineschi, *Tutela dell'ambiente e sviluppo: dalla conferenza di Stoccolma alla conferenza di Rio*, Riv. Giur. Amb., 3-4, 493-513 (1994). Consider, in particular, the principle n. 10 of the Rio Declaration, available on www.unep.org.

¹⁷ The 1998 Convention was signed at the International Conference on Freedom of Information and Participation in Environmental Matters, promoted by the United Nations Economic Commission for Europe, and is composed of three pillars related respectively to the right of access to environmental information, the right of public participation in decision-making processes and the right of access to justice in environmental matters. It is available in www.unep.org. To learn more see J. Harrison, *Legislazione ambientale e libertà di informazione: la Convenzione di Aarhus*, Riv. Giur. Amb., 1, 27-36 (2000); R. Montanaro, *La partecipazione ai procedimenti in materia ambientale*, in P. M. Vipiana (ed.), *Il diritto all'ambiente salubre: gli strumenti di tutela. Lo status quo e le prospettive*, 192 (2005); A. Crosetti - F. Fracchia, *L'ambiente e i nuovi istituti della partecipazione* (2002); M. Feola, *Ambiente e democrazia. Il ruolo della governante ambientale* (2014); M. Prieur, *Le convention d'Aarhus, instrument universel de la démocratie environnementale*, RJ envir. (1999).

¹⁸ In particular, in art. 6 provides that: a reasonable time must elapse between the procedural steps, which allows participants to be informed and prepared; participation must take place before the decision has been taken; the institution that will have to make the final decision must necessarily take into account the results of the participation and, if it intends to depart from it, must justify its choice.

tutions and citizens is encouraged, as well as extensive consultations and the possibility of publicly exchanging views in all sectors of EU action.¹⁹

With reference to environmental matters, instead, the European discipline on participation is not limited to the enunciation of principles, but is more developed and more meaningful, and this, first of all, because the EU, by adhering to the Aarhus Convention, has incorporated the second pillar with directive 2003/35/EC that, in particular to the art. 3, provides for the effective participation of the public in order to increase responsibility and transparency in decision-making and public awareness of environmental issues. In fact, it should be noted that the sectors in which participatory democracy has developed more are those of the environment and urban planning, both with reference to the supranational systems and in the national laws; think, in particular, of the examples of France and of England, where, as already mentioned, a special attention towards the participatory theme already emerged and that, following the implementation of the Aarhus Convention, they developed new and effective instruments aimed at to an ever greater involvement of private individuals in the decisions of the institutions. In particular, the “public inquiry” was born in England, and a later was established also in France, where it found a greater success (the so-called *enquête public*).²⁰

¹⁹ In particular, the art. 11 on the Treaty on European Union, provides that “1) The institutions give citizens and associations representative, through appropriate channels, the opportunity to make known and to publicly exchange their views in all areas of Union action. 2) Institutions maintain an open, transparent and regular dialogue with representative associations and civil society. 3) In order to ensure the consistency and transparency of the Union's actions, the European Commission is conducting wide-ranging consultations with stakeholders. 4) Citizens of the Union, at least one million in number, having the citizenship of a significant number of Member States, may take the initiative to invite the European Commission, as part of its powers, to present an appropriate proposal on subjects on which these citizens deem a legal act of the Union necessary for the implementation of the Treaties. The procedures and conditions necessary for the submission of a citizens' initiative shall be established in accordance with the first paragraph of Article 24 of the TFEU”, on <https://eur-lex.europa.eu>.

²⁰ On the topic see R. N. Abers, *Reflections on what makes empowered participatory governance happen*, in A. Fung - E. O. Wright (eds.), *Deepening Democracy* (2003); C. Fraenkel, P. Haeberle, S. Kropp, F. Palermo, K. P. Sommermann, *Citizen Participation in Multi-level Democracies* (2015); M. Zinzi, *La democrazia partecipativa in*

Consider that, the public inquiry was established in England already in the XI century, but this was a mere means of knowledge for the Public Administration, until, with the Inhibition Act of 1801, it became a real participatory tool, aimed at the hearing of the owners landfills before a special commission, before they were expropriated. Subsequently, the scope of application of this investigation tool was expanded, and this entailed a significant application in the area of territory management. However, the Committee on Tribunals and Inquiries Report (also known as the "Franks Committee")²¹, in 1957, took over the problems and inefficiencies of public inquiries - as slow and formal procedural tools - and subsequently introduced new tools and corrective measures, such as for example, the "examination in public"²²: this, in particular, although it was more effective, did not have the typical characteristics of participatory democracy, since there was no right of those involved to take part in the procedure (participation took place at the invitation of the inspector or minister) and that, moreover, triggered an already advanced procedural phase.²³

Francia alla luce delle recenti riforme legislative, Dir. Pub. Comp., 2, 822-843 (2004); T. Zittel, D. Fuchst, *Participatory Democracy and Political Participation: Can Participatory Engineering Bring Citizens Back In?* (2006); C. Harlow, R. Rawlings, *Law and Administration*, 273 (2003); H. W. R. Wade, C. F. Forsyth, *Administrative Law*, 938 (2000); B. Benoist, *La mise en place de la Commission National de Débat Public*, Dr. env. 18 (1998); J. L. Boussard, *L'enquête public en Angleterre*, PUF 1 (1969); J. B. Auby, H. Perinet-Marquet, *Droit de l'urbanisme et de la construction*, L.G.D.J 59 (2001).

²¹ About the *Franks Committee* see H. W. R. Wade, *Administrative Law*, 2^a ed., (1967).

²² Procedural instrument established in 1971. To deepen on the point, see: L. Casini, *L'inchiesta pubblica. Analisi comparata*, Riv. trim. dir. pub., 1, 43-92 (2007); G. Pizzanelli, *La partecipazione dei privati alle decisioni pubbliche. Politiche ambientali e realizzazioni delle grandi opere* (2010); Camera dei Deputati, *La realizzazione delle opere infrastrutturali in Francia, Germania e Regno Unito. Aspetti normativi e partecipazione dei cittadini al processo decisionale*, dossier available on <http://www.camera.it>.

²³ M. Loughlin, *Lo sviluppo del sistema della pianificazione urbanistica in Gran Bretagna*, in E. Ferrari, N. Saitta, A. Tigano (eds.), *Livelli e contenuti della pianificazione ambientale*, 20 (2001); P. Birkinshaw, N. Parry, *La flessibilità nella pianificazione urbanistica, nello sviluppo edilizio e nel controllo sugli edifici*, in E. Ferrari (ed.), in *La disciplina pubblica dell'attività edilizia e la sua codificazione*, Conference proceedings AIDU 2001, Milan, 29 (2003); I. Galli, *Recenti sviluppi della normativa urbanistico - edilizia in Gran Bretagna*, Riv. Giur. Urb. 3, 331-368 (1998).

Since 1990²⁴, particularly in the procedures relating to the adoption of urban plans, the English legal system provides for the examination in public, for the adoption of the structure plans, and the local inquiries, for the adoption of the Unitary Development Plus related to the areas metros, as well as local plans.²⁵

In the French excursus, the *enquête public*²⁶, previously provided exclusively with reference to the expropriation procedures as a mere cognitive tool, with the *loi Bouchardeau* (*loi 83-630 du 12 juillet 1983*)²⁷, became a real participatory tool which was manda-

²⁴ Reference is to the 1990 Town and Country Planning Act - TCPA, partly modified by the Planning and Compensation Act of 1991, to be read in conjunction with the Planning and Compulsory Purchase Act of 2004, the Planning Act of 2008 and the Localism Act of 2011, all available in www.legislation.gov.uk.

²⁵ L. Casini, *L'equilibrio degli interessi nel governo del territorio*, 102 (2005).

²⁶ L'*enquête public*, first introduced in the French legal system by the law 8th march 1810 “sur l'expropriation” (modified later by the *loi paysages* n. 93-24 of 8 January 1993 and the financial law n. 93-1352 of the 30th dicembre 1993, article 109; *loi* n. 2002-276 du 27 février 2002 about “*démocratie de proximité*”; *loi* n. 2004-1343 del 9 dicembre 2004, art. 60 “*de simplification du droit*”), finds today discipline in the article L123-1 del *Code de l'environnement*, and it was last modified by the *Ordonnance* n. 2016-1060 of 3 August 2016, art. 3, and states that “*L'enquête publique a pour objet d'assurer l'information et la participation du public ainsi que la prise en compte des intérêts des tiers lors de l'élaboration des décisions susceptibles d'affecter l'environnement mentionnées à l'article L. 123-2. Les observations et propositions parvenues pendant le délai de l'enquête sont prises en considération par le maître d'ouvrage et par l'autorité compétente pour prendre la décision.*” In www.legifrance.gouv.fr.

About *enquêtes publiques* see: M. Ceruti, *L'esperienza francese delle inchieste pubbliche per la tutela dell'ambiente*, in *Riv. Giur. Amb.*, 2, 215 (1996); J. L. Autin, *Inchieste pubbliche e dubat public nell'ordinamento francese*, in *Dir. gest. ambiente*, 1, 67 (2001); Camera dei Deputati, *La realizzazione delle opere infrastrutturali in Francia, Germania e Regno Unito. Aspetti normativi e partecipazione dei cittadini al processo decisionale*, dossier available in <http://www.camera.it>; D. Anselmi, *Il dibattito pubblico: profili giuridici*, in *Astrid Rassegna*, 21, 1-38 (2016); L. Casini, *L'inchiesta pubblica. Analisi comparata*, in *Riv. Trim. dir. pub.*, 1, 43-92 (2007); G. Pizzanelli, *La partecipazione dei privati alle decisioni pubbliche. Politiche ambientali e realizzazioni delle grandi opere* (2010); Y. Jégouzo, *La réforme des enquêtes publiques et la mise en oeuvre du principe de participation*, *AJDA*, 1812 (2010); Y. Jégouzo, *L'enquête publique en débat*, in *Etudes offertes au professeur René Hostiou* (2008).

²⁷ *Loi* n. 83-630 du July 1983, cd. *loi Bouchardeau* “relative à la démocratisation des enquêtes publiques et à la protection de l'environnement”, than repealed by *Ordonnance* n. 2000-914 of the 18th September 2000 “relative à la partie Législative du code de l'environnement”, established of the *Code de l'environnement* that encom-

tory in proceedings aimed at the realization of works or having an environmental impact. The institute has been modified with more interventions, up to the *loi Grenelle I* (*loi* 2009-967 du 3 août 2009), *loi Grenelle II* (*loi* 2010-788 du 12 juillet 2010)²⁸ - which harmonized the discipline on public investigations, and extended the scope of application to environmental matters, since up to that moment they were only foreseen in urban planning, accepting the principles established by the Aarhus Convention - the *Code de l'expropriation* of 2015 (*ordonnance n.* 2014-1345 du 6 novembre 2014 and *décret n.* 2014-1635 du 26 décembre 2014) and, finally, the *Code des relations entre le public et l'administration* of 2015 (or CRPA: *ordonnance n.* 2015-1341 du 23 octobre 2015 and *décret n.* 2015-1342 du 23 octobre 2015).

Therefore, the *enquête publique* finds today a fragmented discipline: the special provisions contained within the meaning of the *Code de l'environnement* which, in art. 123-2 specifies that *plans, schémas* and *programmes* and other planning documents, subject to environmental assessment, must be submitted to a *enquête publique* for approval; the special provisions contained in the articles 121-10 to 121-15 of the *Code de l'Urbanisme*²⁹; all the others special provi-

passes and rules relating to environmental law (last edit occurred the 2th November 2018), all available on www.legifrance.gouv.fr.

²⁸ *Loi n.* 2009-967 du 3 août 2009, *loi Grenelle I* "de programmation relative à la mise en œuvre du Grenelle de l'environnement" (last edit 1th January 2017), and *loi n.* 2010-788 du 12 juillet 2010, *loi Grenelle II* "portant engagement national pour l'environnement" (last edit 1th March 2017), both available on www.legifrance.gouv.fr.

²⁹ *Code de l'urbanisme*, adopted by the *décret n.* 54-766 du 26 juillet 1954, than divided, in 1973, between the *Code de l'urbanisme* (*décrets nn.* 73-1022 e 73-1023 du 8 novembre 1973) and the *Code de la construction et de l'habitation* of 1978, finally completely modified by the *loi Grenelle II*. In particular, the articles referred to have been modified with the *ordonnance n.* 2015-1174 du 23 septembre 2015 (articles from L121-10 to L121-12 and L121-14) and with the *loi n.* 2016-1888 du 28 décembre 2016, art. 71 (L121-13 e L121-15). See in www.legifrance.gouv.fr. See L. Casini, *L'equilibrio degli interessi nel governo del territorio*, 102 (2005). For more information on the concertation see J-C. Hélin, *Participation du public aux décisions d'urbanisme*, in AJCT, 5, 1 (1994); J-C. Hélin, *L'évolution récente du droit des enquêtes publiques*, RDI 179 (1994); J-C. Hélin, *La loi "paysages" et le droit des enquêtes publiques*, AJDA 776 (1993); more recently see A. De Laubadère and Y. Gaudet, *Traité de droit administratif*, II. *Droit administratif des biens*, XV° éd., 311 (2014); J. C. Hélin, R. Hostiou, *Traité de droit des enquêtes publiques* (2014); see also M. Boutelet, *La démocratie environnementale: participation du public aux décisions et*

sions contained in the *Code de l'expropriation*, in the *Code général des collectivités territoriales*, in the *Code de la voirie routière* and in the *Code rural et de la pêche maritime*. The already mentioned CRPA today provides the new regime of *enquêtes publiques*³⁰ and aims to harmonize the multitude of existing special provisions.³¹ However, as is clarified in the art. 5 of the *ordonnance n. 2015-1341 du 23 octobre 2015 cit.*, the provisions of the CRPA relating to the *enquête publique* have not replaced those provided in the *Code de l'environnement* and in the *Code de l'expropriation*: rather, the art. L 134-1 expressly excludes those special regimes from the scope of application of the CRPA, which, on the contrary, generally refers to all the other cases disciplined by special sector regulations (as the ones envisaged by the *Code des collectivités territoriales*, the *Code de l'Urbanisme*, the *Code de la voirie routière* and the *Code rural et de la pêche maritime*) and also establishes common rules which are applicable in case of atypical public inquiries.³²

Moreover, with the *loi Barnier (loi 95-101 du 2 février 1995)*³³, the *débat public*³⁴ was introduced, following the affirmation of the

politiques environnementales (2009); M. Prieur, J. Bétaille, M. A. Cohendet and others, *Droit de l'environnement* 165 (2016).

³⁰ The general discipline about the *enquête publiques* is thus contained in Book III, Chapter IV, Art. L-134-1 et seq. where five legislative provisions and twenty-nine regulatory provisions are dedicated to the institute; in particular, for what especially concerns the activation of the inquiry and the competent authority, the nomination and compensations of the *Commissaire enquêteur* and the members of the *Commission d'enquête*, the preparation of the *dossier* which has to be presented to citizens, and the conclusion of the inquiry, including the drafting of the final report by the *Commission* and its publication. On this theme see M. De Donno, *The French Code "Des relations entre le public et l'administration"*, in *IJPL*, 9, 2, 237 (2017).

³¹ As it has been said, a first important rationalization of the legislation about the institute of the *enquête publiques* has been achieved by the *Loi 2010-788 du 12 juillet 2010 cit. (Loi Granelle II)*. After this, another attempt at rationalizing that rules has been made by the *Code de l'expropriation of 2015 (ordonnance n. 2014-1345 du 6 novembre 2014 and décret n. 2014-1635 du 26 décembre 2014)*, especially for what concerns the *enquêtes publiques préalables à une déclaration d'utilité publique* and the *enquêtes de droit commun*.

³² For a broader discussion, see M. De Donno, *The French Code "Des relations entre le public et l'administration"*, cit. at 30, 237.

³³ *Loi n. 95-101 du 2 février 1995* regarding the « *renforcement de la protection de l'environnement* » (last edit the 21th of September 2000), on www.legifrance.gouv.fr.

principle of participatory democracy in international and European legal systems (and unlike the *enquête public*, whose institution it was, however, very prior to the development of a supranational attention to participation). Therefore France, where there was already a special sensitivity towards the issue of participation, represented in this respect an *avant-garde* example in Europe, having always been attentive to the evolution of participatory instruments, also through the adoption of increasingly effective adaptations and modifications.

The *débat public*, today finds discipline, in France, in *Section III, Titre II, Chapitre I* of the *Code de l'environnement*³⁵ and must necessarily be called in the case of major infrastructure projects of national interest, not only in environmental matters, but in general in the matter of territorial governance³⁶, thus representing a moment of dialogue between the parties concerned and under the guid-

³⁴ Following this, it has been amended several times (see, for example, Law 2010-788, *Ordonnances* Nn.: 2013-714 du 5 août 2013, art. 1; 2014-1345 du 6 novembre 2014 art. 5; 2015-948 du 31 juillet 2015 art. 14; 2015-1174 du 23 septembre 2015 art. 9) until today it is disciplined, following the *Ordonnance* n. 2000-914 du 18 septembre 2000, in the *Code de l'environnement*. With reference to *débat public* see *Codificazione e norme tecniche nel diritto ambientale. Riflessioni sull'esperienza francese*, Dir. gest. ambiente, 9 (2002); P. Marsocci, *Consultazioni pubbliche e partecipazione popolare*, Rass. Parl., 1, 29-68 (2016).

³⁵ *Code de l'environnement*, introduced by *Ordonnance* n. 2000-914 cit. "*relative à la partie Législative du code de l'environnement*", which includes the rules relating to environmental law (last modification occurred on 2 November 2018), available in www.legifrance.gouv.fr. In particular, art. L121-8, about the *débat public*, has been last edited by the *loi* n. 2018-148 du 2 mars 2018, art. 2, which states that "*La Commission nationale du débat public est saisie de tous les projets d'aménagement ou d'équipement qui, par leur nature, leurs caractéristiques techniques ou leur coût prévisionnel, tel qu'il peut être évalué lors de la phase d'élaboration, répondent à des critères ou excèdent des seuils fixés par décret en Conseil d'Etat; Pour ces projets, le ou les maîtres d'ouvrage adressent à la commission un dossier qui décrit les objectifs et les principales caractéristiques du projet entendu au sens de l'article L. 122-1, ainsi que des équipements qui sont créés ou aménagés en vue de sa desserte. Il présente également ses enjeux socio-économiques, son coût estimatif, l'identification des impacts significatifs sur l'environnement ou l'aménagement du territoire, une description des différentes solutions alternatives, y compris l'absence de mise en œuvre du projet. Lorsqu'un projet relève de plusieurs maîtres d'ouvrage, la commission est saisie conjointement par ceux-ci*".

³⁶ The scope of application of the *débat public* has been extended by the *loi* n. 2002-276 du 27 février 2002, following the entry into force of the Aarhus Convention.

ance of the *Commission nationale du débat public* (CNDP).³⁷ With complete affirmation of the centrality of the participatory theme, the constitutional reform of 2005 (*loi constitutionnelle n. 2005-205 du 1 mars 2005*) has equated the Charter of the Environment - *Charte de l'environnement*³⁸ - to the Constitution and, in this way, the extended right to participate in the elaboration of public decisions relevant to the environment has taken on constitutional dimension³⁹; moreover, the *loi 2012-1460 du 27 décembre 2012*⁴⁰ in the art. 1 provided that everyone should be informed of the procedures relevant to the environment and subject to public decision, so that they can make their own observations.

With reference to the French evolutionary process regarding the ever more intense assertion of the principle of participation and the strengthening of the guarantees of citizens⁴¹, it cannot fail

³⁷ The *Commission Nationale du Débat Public* is governed by Section I-II of the *Code de l'environnement*, in particular by art. L.121-1: “*La Commission nationale du débat public, autorité administrative indépendante, est chargée de veiller au respect de la participation du public au processus d'élaboration des projets d'aménagement ou d'équipement d'intérêt national de l'Etat, des collectivités territoriales, des établissements publics et des personnes privées, relevant de catégories d'opérations dont la liste est fixée par décret en Conseil d'Etat, dès lors qu'ils présentent de forts enjeux socioéconomiques ou ont des impacts significatifs sur l'environnement ou l'aménagement du territoire*”. For further informations see: J. F. Beraud, *Il caso della Francia: la Commissione Nazionale du débat public*, in A. Valastro (ed.), *Le regole della democrazia partecipativa* 387 (2010); B. Benoist, *La mise en place de la Commission Nationale de Débat Public*, *Dr. Env.*, 55, 18 (1998).

³⁸ Reference is made to the *Charte de l'environnement* adopted on June 24, 2004 during the Raffarin III Government, integrated into the so-called “*bloc de constitutionnalité du droit français*” today, therefore, constitutional value, through the *loi constitutionnelle n. 2005-205 du 1 mars 2005*. Available in www.legifrance.gouv.fr.

³⁹ In particular, reference is made to article 7 of *Charte de l'environnement*. See in www.legifrance.gouv.fr.

⁴⁰ *Loi 2012-1460 du 27 décembre 2012 “relative à la mise en oeuvre du principe de participation du public défini à l'article 7 de la Charte de l'environnement”*, in www.legifrance.gouv.fr.

⁴¹ On the theme, see: J. Rivero, *A propos de la métamorphose de l'administration aujourd'hui: démocratie et administration*, cit. at 1, 6 ss.; M. Prieur, *Le droit à l'environnement et les citoyens: la participation*, *RJ envir.*, 397 (1988); J.B. Auby, *Droit administratif et démocratie*, cit. at 1, étude 3; M. Moliner-Bubost, *Démocratie environnementale et participation des citoyens*, *AJDA* 259 (2011); B. Faure, *Les deux conceptions de la démocratie administrative*, cit. at 1, 709; S. Saunier, *L'association du public aux décisions prises par l'administration*, *AJDA* 2426 (2015); Y. Jégouzo, *La*

to mention the *Loi du 27 février 2002, relative à la démocratie de proximité*⁴² whose main purpose was to deepen local democracy, on the one hand through the development of the participatory democracy, in order to allow citizens to be better associated with local life⁴³, in the other hand by strengthening representative democracy, in order to provide elected local representatives with the best conditions for the exercise of their mandates.

Consacrated as much by the international law as by national law, the principle of participation in the environmental sector, as has already said, has been finally constitutionalized through the adoption of the *Charte de l'environnement* on march 1th, 2005, which, in its article 7, disposes that everyone has the right to access information relating to the environment held by public authorities and to participate in the preparation of public decisions having an impact on the environment. Moreover, in its *rapport public* of 2011, *Consulter autrement, participer effectivement*, le Conseil

réforme des enquêtes publiques et la mise en oeuvre du principe de participation, cit. at 26, 1812.

⁴² *Loi n. 2002-276 du 27 février 2002, relative à la démocratie de proximité*, on *legifrance.gouv.fr*.

⁴³ More specifically, the *Loi 276/2002* cit. has introduced an essential principle of "local democracy" and that is the right of the inhabitants of the municipality to be informed about its activities, as well as to be associated with the decisions the concern them. Although numerous legislative provisions already allowed the exercise of these rights, the law provided for an important step forwards as it guaranteed their effectiveness throughout the territory. In implementation of this principle, therefore, the law provided for the creation of neighborhood councils (the "*conseil municipal*") in the municipalities of at least 80,000 inhabitants, to also create specific positions for persons responsible for dealing mainly with one or more districts; the same possibility has been provided for the municipalities of at least 20,000 inhabitants who form neighborhood councils. The law also required municipalities with more than 100,000 inhabitants to create aggregated bodies to offer local services to one or more neighborhoods and meet user expectations more efficiently. In addition: the *Loi Paris, Marseille, Lyon* of 1982 has been modified, in order to increase the powers of the districts and their means of actions and functioning; the advisory commissions of local public services (*commissions consultatives des services publics locaux*) for municipalities of over 10,000 inhabitants, as well as the public institutions of inter-municipal cooperation (EPCI – *établissements publics de coopération intercommunale*) of over 50,000 inhabitants, departments and regions have been renewed and relaunched; the rights of officials elected in local assemblies were strengthened in order to strengthen pluralism of opinions and enrich the democratic debate; etc.

d’Etat considered that the value of this constitutionalization of the principle of participation is twofold: on the one hand the will to assert a human right to the environment justifies this constitutional protection, on the other hand it is important to guarantee the protection of the living environment by the appropriate implementation of procedures actually available to citizens.⁴⁴

Furthermore, in 2015 has been adopted the already mentioned CRPA with the aim of facilitate the dialogue between administrations and citizens through simplified relations, transparency and greater responsiveness of the administration.⁴⁵ Among the various provisions, those that are most interesting for the purposes of this discussion are the rules designed to enhance public participation in the rulemaking of the public administration, that is consecrated, in art. L131-1, as a general principle⁴⁶: with this provision the Code has allowed any atypical form of public participation in the preparation of any “reforms”, “acts” and “projects” of the public administration. Especially, these provisions are con-

⁴⁴ See *Conseil d’Etat, Rapport public du 28 juin 2011: “Consulter autrement, participer effectivement”*, available on conseil-etat.fr.

⁴⁵ See article 3 of *loi n. 2013-1005 du 12 novembre 2013* that charged the French Government with the duty of adopting, within two years, the Code containing the general rules of administrative procedures. See also *Exposé des motifs* of the *Projet de loi n. 664 du 13 juin 2013*. On the preparatory works of the law see *La simplification des relations entre l’administration et les citoyens* and, more particularly, see P. Gonod, *Codification de la procédure administrative. La “fin de l’exception française?”*, AJDA 395 (2014); M. Guyomar, *Les perspectives de la codification contemporaine*, AJDA 400 (2014); *La lex generalis des relations entre le public et l’administration*, especially M. Vialettes, AJDA (2015); C. Barrois de Sarigny, *Questions autour d’une codification*, AJDA 2421 (2015); S. Saunier, *L’association du public aux décisions prises par l’administration*, cit. at 41, 2426; Dossier 1 RFDA (2016) *Le Code des relations entre le public et l’administration*, and especially D. Labetoulle, *Avant propos*, 1; P. Bon, *L’association du public aux décisions prises par l’administration*, RFDA 27 (2016); P. Delvolvé, *La définition des actes administratifs*, RFDA 35 (2016); P. Delvolvé, *L’entrée en vigueur des actes administratifs*, RFDA 50 (2016).

⁴⁶ Especially, art. L131-1 provides that when the administration decides, apart from cases governed by legislative or regulatory provisions, to involve the public in the conception of a reform or in the preparation of a project or act, it makes public the terms of this procedure, makes the relevant information available to the persons concerned, ensures them a reasonable period of time to participate in it and ensures that the planned results or follow-up are made public at the appropriate time.

tained in Book I, Title III of the Code, headed “*L’Association du public aux décisions prises par l’administration*” (or “CRPA”)⁴⁷ and consist of: consultation via online procedures or *consultation ouverte sur internet*⁴⁸ (already provided in *loi n. 2011-525 du 17 mai 2011*); the *commissions administratives à caractère consultatif*⁴⁹ (already provided in *décret n. 2006-672 du 8 juin 2006*, as amended by *décrets n. 2009-613 du 4 juin 2009* and *n. 2013-420 du 23 mai 2013*); the already mentioned new regime of *enquêtes publiques*⁵⁰; the *référéndum local* and the *consultation locale*.⁵¹

⁴⁷ For a more detailed analysis, see S. Saunier, *L’association du public aux décisions prises par l’administration*, cit. at 41, 2426 ss.; P. Bon, *L’association du public aux décisions prises par l’administration*, cit. at 45, 35 ss.

⁴⁸ Especially, the chapter II, of Title III, Book I, is dedicated to the consultations via online, where section 1 (articles from L132-1 to R*132-7) is dedicated to the *consultation ouverte se substituant à la consultation d’une commission* and section 2 (articles from R*132-8 to R*132-10) is dedicated to *autres consultations ouvertes sur internet*. The discipline provides that When the administration is required to consult a consultative committee prior to the enactment of a regulatory act, it may decide to organize an open consultation allowing the comments of the persons concerned to be collected on a website. This open consultation replaces the compulsory consultation in application of a legislative or regulatory provision. The advisory committees whose opinion must be obtained in application of a legislative or regulatory provision may make their observations known within the framework of the consultation provided for in this article. Mandatory consultations with independent administrative authorities provided for by laws and regulations, assent procedures, those concerning the exercise of public freedom, constitute the guarantee of a constitutional requirement, reflect a power of proposal or implement the principle of participation.

⁴⁹ The *commissions administratives à caractère consultatif* constitute all committees whose vocation is to render opinions on draft texts or decisions even if they have other powers. Except when its existence is provided for by law, a commission is created by decree for a maximum duration of five years. This creation is preceded by the realization of a study allowing in particular to verify that the mission assigned to the commission meets a need and is not likely to be assured by an existing commission. The discipline is contained in Chapter III, Title III, Book I, where section 1 (article R*133-1) is dedicated to the application field of the institute, section 2 (article R*133-2) to the maximum duration of existence and section 3 (articles from R133-3 to R*133-15) to the actual functioning of the institute.

⁵⁰ The general discipline about the *enquête publiques* is thus contained in Book III, Chapter IV, Art. L-134-1 et seq. where five legislative provisions and twenty-nine regulatory provisions are dedicated to the institute; in particular, for what especially concerns the activation of the inquiry and the competent authority, the nomination and compensations of the *Commissaire enquêteur* and the

3. The French *débat public*

Among all, the French *débat public* appears, in the opinion of the writer, the most advanced and effective model of “deliberative arenas”, and this is shown by the fact that it was taken up by other European states - among which, for example, Italy - as an inspirational model. This institute was introduced in France after the great city protests regarding the construction of the high-speed line between Lyon and Marseilles in the early nineties, with the aforementioned *Loi Barnier*. Following the implementation of the Aarhus Convention, by *loi n. 2002-285 du 28 février 2002*, some important changes were made to the previous regulation, including the possibility of calling the public debate on issues of national interest in the field of the environment, sustainable development and spatial planning, as well as the transformation of the CNDP in an independent administrative authority.⁵² Subsequently, further legislative interventions reformed the institute.⁵³ Finally, the bitter protests that occurred in the recent years in relation to some important works, including the airport in Nantes (that led to the referendum on June 26, 2016, in which then, the majority of voters, expressed in favor of the project), the transfer of radioactive materials along the territory, as well as the construction of the Sivens Dam⁵⁴, have led to the emergence of some issues of the *débat public*. All these challenges were followed by the government’s awareness of a need to reform the subject, with the assignment of an *ad hoc* commission (the *Commission spécialisée du Conseil national*

members of the *Commission d’enquête*, the preparation of the *dossier* which has to be presented to citizens, and the conclusion of the inquiry, including the drafting of the final report by the *Commission* and its publication. On this theme see M. De Donno, *The French Code “Des relations entre le public et l’administration”*, cit. at 30, 237 ss.

⁵¹ The discipline of the *référendum local* and the *consultation locale* are contained in the Chapter V, Title III, Book I, about “*Participation du public aux décisions locales*”, respectively in section 1 (article L135-1) and section 2 (article L135-2).

⁵² See V. Molaschi, *Le arene deliberative*, 244 (2018).

⁵³ Particularly, the *Loi Grenelle II*, n. 2010-788 du 12 juillet 2010, which modified the CNDP, and the *loi n. 2012-1460 du 27 décembre 2012*.

⁵⁴ The *Barrage de Sivens* or Sivens Dam was a dam which was planned for construction in the Southern France, across the Tescou (near Toulouse); the works started in 2014 and then halted after the killing of young protester Rémi Fraisse by the police; after the protests arose, the project was closed in 2015 by the Minister of Ecology Ségolène Royal.

de la transition écologique sur la démocratisation du dialogue environnemental) and the appointment of a *consultation du public* pursuant to the art. L 120-1 of the *Code de l'environnement*, which resulted in *Ordonnance no. 2016-1060 du 3 août 2016*, then implemented by *décret n. 2017-626 du 25 avril 2017*: it identified the national plans and programs, subject to environmental assessment, which must necessarily be submitted to the CNDP.

Entering into the merits of the French procedure, first the CNDP - which, as we said, is now an independent authority and has a composition aimed at ensuring neutrality and impartiality⁵⁵

⁵⁵Art. L 121-3 *Code de l'Environnement*: The *Commission Nationale du débat public* is composed of 25 members appointed for five years or for the duration of their term. In addition to its president and two vice-presidents, it includes: 1) A deputy and a senator appointed respectively by the President of the National Assembly and the President of the Senate; 2) Six local elected representatives appointed by decree on the proposal of the representative associations of the elected officials involved; 3) member of the Council of State, elected by the General Assembly of the Council of State; 4) member of the Court of Cassation, elected by the general meeting of the Court of Cassation; 5) member of the Court of Auditors, elected by the General Assembly of the Court of Auditors; 6) Member of the organ of the members of the administrative tribunals and of the administrative tribunals of appeal, appointed with decree on the proposal of the Superior Council of the administrative courts and of the administrative tribunals of appeal; 7) Two representatives of environmental protection associations, approved pursuant to article L. 141-1, who carry out their activities throughout the national territory, appointed on the order of the Prime Minister on the proposal of the Minister responsible for the environment; 8) Two representatives of consumers and users, appointed respectively by order of the Prime Minister on the proposal of the Minister of Economy and the Minister of Transport; 9) Two qualified persons, one of whom acted as investigative commissioner, appointed on the order of the Prime Minister respectively on the proposal of the Minister of Industry and the Minister responsible for the Equipment; 10) Two representative trade union representatives of employees and two representatives of companies or consular chambers, including a representative of agricultural enterprises, appointed by order of the Prime Minister on the proposal of the respective most representative professional organizations. The two vice presidents are a woman and a man. The members appointed on proposal of the same authority in application of the 2nd, on the one hand, and of all the members nominated under the 7th, 8th and 9th, on the other, include an equal number of women and men. Each of the authorities appointed to nominate, propose or elect a member of the commission in application of the 1st, 3rd to the 6th and 10th guarantees that, after this nomination, proposal or election, the difference between the number of women and the number of men among all committee members must not be greater than one, or be reduced when it is

- has the task of ensuring respect for public participation in the process of drawing up projects and works of national interest that have significant impact on the environment. This authority guarantees information and public participation throughout the development phase of a project, plan or program.⁵⁶ The CNDP may decide to hold a public debate or a preliminary consultation in order to discuss opportunities, objectives and characteristics of a project that falls within certain economic value thresholds - fixed by decree by the *Conseil d'État* - even in the eventuality of identifying alternative solutions or to deny its implementation.⁵⁷ It follows that recourse to the CNDP is mandatory for some projects⁵⁸ and optional for others;⁵⁹ it is always mandatory for plans and programs for which an environmental assessment is required.⁶⁰

greater than two. The president and vice-presidents are appointed by decree. Subject to the rules established in the twelfth paragraph, the term of office of the members is renewable once. The president and vice-presidents are full-time and paid. When occupied by public officials, the jobs of president and vice president of the National Commission of Public Debate are jobs leading to retirement according to the Civil Pensions and Military Retirement Code. The duties of the other members give rise to compensation.

⁵⁶ Art. L 121-1, *Code de l'Environnement*.

⁵⁷ More Particularly, the article L.121-8-1 of the *Code de l'environnement* says that the CNDP is seized of all projects of fittings or equipment which, by their nature, their characteristics, techniques or their estimated cost, as it can be assessed during the development phase, respond to criteria or exceed thresholds set by decree in Council of State. Article R.121-1 also specifies that operations concerned are the creation of highways, railway lines, tracks navigable, nuclear facilities, airport infrastructure or aerodrome runways, dams hydroelectric or reservoir dams, oil and gas pipelines, river basin water transfer, industrial, cultural equipment, sports, scientific or tourist.

⁵⁸ For a project that its characteristics are located above the upper threshold, the referral is compulsory by the contracting authority or the responsible public person of the project. These must then send to the National Commission a file setting out the objectives and the main features of the project, as well as the socio-economic issues, the estimated cost and identifying significant impacts of the environmental project or land use planning.

⁵⁹ Based on the table provided pursuant to art. R 121-2 of the *Code de l'Environnement*. In particular, recourse to the CNDP is mandatory for projects whose economic value exceeds 300 million euros, even if the economic value is not the only index, as it is supplemented by other indices such as size, length of roads, highways, railway lines, the power of some plants, etc. For example, the creation or extension of airports are among the projects to be compulsorily subjected to CNDP over a much lower threshold of 300 million, that is if over 100

More specifically, pursuant to article L121-8 of the *Code de l'environnement*, for all infrastructure or management projects which, by nature, technical characteristics or estimated cost, meet criteria or exceed certain thresholds established by Prime Minister's decree, subject to the opinion of the *Conseil d'Etat*, the *maître d'ouvrage* (the public or private client of the work) must send a *dossier* to the CNDP (the so-called *dossier de saisine*) in which the objectives and main characteristics of the project, its socio-economic implications, the estimated cost, the identification of significant impacts on the environment or on the management of the territory and a description of the alternative solutions, including the failure to carry out the work, are indicated. This submission must necessarily also be made in the case of national plans or programs which are subject to an environmental assessment. The Prime Minister's decree also establishes a second threshold, lower than the one whose exceeding makes the sending of the dossier mandatory. For works falling between the two thresholds, sending the *dossier* to the CNDP is optional. The *maître d'ouvrage* must however make the project public, publish its objectives and essential characteristics, express his will to appeal, or not, to the CNDP, specify the methods of consultation that he undertakes to carry out in the event that he does not deem to send the *dossier* to CNDP, informing the latter. Within two months from the date on which the *maître d'ouvrage* makes this information public, a request for activation of the public debate procedure can be sent to the CNDP by the following subjects: 10,000 EU citizens of the European Union residing in France; ten MPs; a regional, departmental or municipal council or a public body of inter-municipal cooperation with territorial management responsibilities, whose territories are affected by the project; an environmental association operating at national level. In this case, the *maître d'ouvrage* will have to prepare the *dossier* and send it to the CNDP.

million euros; for port infrastructures whose "mandatory" threshold is 150 million euro. Thus, always in principle, the optional projects include those worth between 300 million and 150 million euros, with the necessary exceptions, also here, for airport and port infrastructures. See V. Molaschi, *Le arene deliberative*, cit. at 52, 247.

⁶⁰ Artt. L 121-8, c IV, e L 122.4, listed at the art. R 121-1-1, *Code de l'Environnement*.

In its judgments, the *Conseil d'Etat* specified that the CNDP has no capacity for “*auto-saisine*” (self-referral), nor for expanding the subject of the *saisine*.⁶¹

Within two months of receiving a *dossier de saisine*, the CNDP pronounces on the need or not of the public debate, with a concrete “filter effect” for the discretionary power involved in the decision about which are the territorial impact of the project, its socio-economic implications and its impacts on the environment or on the management of the territory (article L121-9 of the *Code de l'environnement*). Two articles of the law define the criteria according to which the CNDP assess whether or not the project should be the subject of a public debate: the art. L. 121-1 defines the projects which fall within its competence as “development or equipment projects of national interest [...], falling within the categories of operations whose list is fixed by decree in Council of State, as soon as they present strong socio-economic challenges or have significant impacts on the environment and regional planning”⁶²; the art. L.121-9 indicates that “the National Commission assesses for each project whether the public debate should be organized according to the national interest of the project, its territorial impact, the socio-economic issues attached to it and its impacts on the environment or territory planning”.⁶³

The law lists the criteria cumulatively and not alternative: a project is the subject of a public debate if it is of national interest and if it involves strong socio-economic issues or has a strong impact on the environment or the territory. Despite this clarity, its

⁶¹ See *Conseil d'Etat*: 13th December 2002 n. 229348 (*Association pour la sauvegarde de l'environnement et la promotion de Saint-Léger-en-Bray*); 2th June 2003 n. 249321 (*Association Bouconne-Val de Save*); 28th December 2005 n. 277128 (*Syndicat d'agglomération nouvelle Ouest-Provence*); 24th may 2006 n. 280372 (*Jean-Louis M. et Marie-Jo Z.*).

⁶² The art. L.121-1 of the *Code de l'environnement*: “...projets d'aménagement ou d'équipement d'intérêt national [...], relevant de catégories d'opérations dont la liste est fixée par décret en Conseil d'État, dès lors qu'ils présentent de forts enjeux socio-économiques ou ont des impacts significatifs sur l'environnement et l'aménagement du territoire”.

⁶³ Art. L.121-9 of the *Code de l'environnement*: “...la Commission nationale apprécie pour chaque projet si le débat public doit être organisé en fonction de l'intérêt national du projet, de son incidence territoriale, des enjeux socio-économiques qui s'y attachent et de ses impacts sur l'environnement ou l'aménagement du territoire”.

application can be difficult, in particular with regard to the first criterion of national interest. Indeed, as regards to the concept of national interest of a project, the law contains no definition. It is therefore necessary to make an assessment on a case by case basis.⁶⁴

The CNDP's decision to organize or not a public debate is subject to appeal: this has been stated by the decision *Association France Nature Environnement* of the *Conseil d'Etat* in 2002, that annulled a decision by which the Commission rejected a request for the organization of a public debate, and stated that "the contested decision of the CNDP for public debate does not have the character of a preparatory measure for the decisions taken by the competent administrative authorities for the implementation of the projects and constitutes a decision adversely affecting, susceptible of being referred to the judge of the excess of power".⁶⁵

If the Commission deems it necessary to hold a public debate (it has two months from the investiture, within which to decide how to participate in the public), it can organize it in itself or entrust it to a *commission particulière*, indicating, in this case, the modalities for a proper conduct of the debate. Once the debate for

⁶⁴ See CNDP 2002-2012 "La pratique du débat public: évolution et moyens de la Commission nationale", on debatpublic.fr 20 (2012).

⁶⁵ See *Conseil d'Etat*, 10/9 SSR, 17th May 2002, n. 236202 (*Association France Nature Environnement*) stated that "la décision attaquée de la Commission nationale du débat public n'a pas le caractère de mesure préparatoire des décisions prises par les autorités administratives compétentes pour la réalisation des projets et constitue une décision faisant grief, susceptible d'être déférée au juge de l'excès de pouvoir." This principle has been confirmed by the administrative judge with the decision of the *Conseil d'Etat*, *Section du contentieux*, 14th June 2002, n. 241036 (*Projet A32*). In another decision, the *Conseil d'Etat* reaffirmed the principle mentioned above, in relation to a request to interrupt and postpone the debate: "Les différentes décisions que la Commission peut être appelée à prendre après qu'elle a décidé d'ouvrir un débat public et qui peuvent notamment porter sur ses modalités, le calendrier et les conditions de son déroulement ne constituent pas des décisions faisant grief; qu'il en va en particulier ainsi du refus de la Commission d'interrompre le débat ou de le reporter à une date ultérieure" (*Conseil d'Etat*, 6^{ème} et 1^{ère} sous-sections réunies, 5th Avril 2004, n. 254775 (*Inter-municipal citizen association of the populations concerned by the Notre-Dame airport project -Landes - ACIPA*)). For a reconstruction on the theme, see the already mentioned CNDP 2002-2012 "La pratique du débat public: évolution et moyens de la Commission nationale", cit. at 64, 20 ss.

a project is called, the *maître d'ouvrage*⁶⁶ will have six months to prepare the dossier - containing all the information, characteristics, reasons, opportunities, variations, environmental impact and socio-economic implications of the project - which will be evaluated by the CNDP which may request additions and, only when it considers it appropriate, will authorize its dissemination⁶⁷ and the observations subsequently received by the public will be collected in the *cahiers d'auteurs*, also then disseminated. The debate lasts for four months - extendable for two additional months on motivated decisions by the CNDP - during which public meetings and thematic round tables are held for the exchange of information and the confrontation between the *maître d'ouvrage* and citizens. Within two months of the conclusion of the public debate, the CNDP will draw up a report of the positions that emerged⁶⁸ and, within three months of its publication, the *maître d'ouvrage* will have to communicate its intentions regarding the realization, variation or withdrawal of the project.⁶⁹

For the plans and programs the public debate follows the same procedure, with a variation in the times, whose meshes widen, as in this case it can last six months, extendable for another two months by the CNDP's decision.⁷⁰ Furthermore, the Government can also appeal to the CNDP, asking it to hold a *débat public* on general options of national interest relating to policies, plans and programs that may have significant impacts on the environment, sustainable development and territory.⁷¹ Finally, the CNDP will be able to contact even sixty parliamentarians or 500,000 EU citizens residing in France.

Among the strengths of the *débat public*, which make it one of the best models of “deliberative arenas” among those tested, there is certainly the fact that it is designed to offer participatory guarantees to citizens for each work that meets predetermined objective criteria, whereas, in other countries, the scope of applica-

⁶⁶ It is the subject that proposes the project and can be both public and private, unlike the provisions of Italian law.

⁶⁷ Artt. L 121-11, c. II e III, *Code de l'Environnement*.

⁶⁸ Artt. L 121- 11, c. III, *Code de l'Environnement*.

⁶⁹ Artt. L 121-13, c. I, *Code de l'Environnement*.

⁷⁰ Artt. l 121-11, c. I, *Code de l'Environnement*.

⁷¹ Artt. L 121-10, *Code de l'Environnement*.

tion of the participative tools is delimited on the basis of subjective criteria (for example, in Italy, the public debate applies only to cases in which the proponents are “the contracting authorities and entities contractors”, so as to leave out the cases in which the project is proposed by private individuals). It is therefore important to provide an instrument of participatory democracy that does not apply any unjustified discrimination between works proposed by public administrations and, instead, works proposed by private individuals.

Again, and not less important, is the presence of a third party (the CNDP), independent and impartial, which leads the work and has in assignment important functions: such institution, in fact, not only it is capable of guaranteeing a substantial protection, but also of allowing the overcoming of that aversion *a priori* which often characterizes the citizens (the aforementioned “Nimby” and “Niaby” effects) thanks to the trust more easily placed towards a neutral subject, rather than towards a subject who is coordinating the procedure in an evident impartiality due to a conflict of interests.

However, it is considered that an efficient tool should not be limited to projects characterized by excessively high size thresholds, so as not to end up minimizing the recourse to that institute, which, if well used, is also a valid deflation tool for litigation. On this point, however, the French legislation not only provides for mandatory recourse to the *débat public* in certain cases, but also for its optional use when, the subjects to whom the initiative is delegated, request it (even the private, if it will proceed at its own expense).

4. The Italian *dibattito pubblico*: a “participatory oligarchy”

The Italian model of public debate has been recently introduced by the national legislation (with the *d.lgs. 50/2016*, art. 22, implemented by the decree of the President of the Council of Ministers 76/2018) to make up for a gap in the law that has long required an intervention in this regard. In fact, the need to adopt the public debate for major works at national level in Italy, was felt for a long time, as this juridical institution appeared (and appears) as

a suitable solution to the administrative conflicts from which the Italian infrastructural policy is certainly characterized.⁷²

There is no doubt, in fact, that the discipline of the Italian *dibattito pubblico* is adequate to guarantee the participatory needs where it is applied. The Constitutional Court (which ruled on the question of legitimacy of the art. 7 of the regional law of Puglia on participation, as it would produce interference with the prerogatives of the State) it considered that “a reasonable point of balance between the requirements of participation and those of efficiency” has been reached since it configures “a fundamental step in the journey of the culture of participation, represented by a model of administrative procedure that has, among its unavoidable steps, the comparison between the proposing public administration at the work and the subjects, public and private, interested and involved by its effects, thus fueling a dialogue that, on the one hand, allows any more satisfactory solution to emerge and, on the other hand, defuses the potential conflict that is implicit in any intervention that has a significant impact on the territory”.⁷³

The criticalities of the institute, however, have to be individualized, precisely, in its field of application, since the implementing regulation has identified excessively high dimensional thresholds, as a condition of application of the public debate.⁷⁴ In this sense, in fact, the *Consiglio di Stato* (with the opinion n. 359/2018 having as object the draft decree of the president of the Council of Ministers) on the one hand gave a positive judgment, where it considered that the decree has reached a “reconciliation between the need not to lengthen too long the times of realization of the great infrastructural and architectural works of social importance, thanks to the involvement of citizens, stakeholders and adminis-

⁷² *Ex multis*, see A. Averardi, *Amministrare il conflitto: costruzione di grandi opere e partecipazione democratica*, Riv. trim. dir. pubbl., IV, 1174 (2015).

⁷³ *Corte costituzionale*, decision n. 235 of 9th October 2018, in the judgment of constitutional legitimacy on the article 7, comma 2, 5 e 12, of the regional law of Puglia 13th July 2017, n. 28 (Law on the participation), promoted by the President of the Council of Ministers on the violation of articles 97, 1° comma, and 117, 2° comma, lett. m), and 3° comma, and 118 Cost., accepted only in part, where it provides that the regional public debate also takes place on national works.

⁷⁴ See U. Allegretti, *Un caso di attuazione del principio costituzionale di partecipazione: il regolamento del dibattito pubblico sulle grandi opere*, Riv. Aic, 3 (2018).

trations interested in the realization of the work”;⁷⁵ on the other hand, however, it stressed that the size thresholds identified by the decree “are such of a high amount as to end up making the use of this institute minimal, which instead represents one of the most important innovations of the new already mentioned *Codice dei contratti* and that, if well used, could also constitute a valid deflationary instrument of the dispute”. As well as a precious instrument upstream, for the resolution of eternally unresolved social conflict, often because of a perpetual and not always justified lack of confidence on the part of private individuals with regard to any type of infrastructural intervention in the area of residence (the aforementioned “nimby” syndrome).⁷⁶ The *Consiglio di Stato*, therefore, suggested an intervention that modifies the level of the indicated dimensional thresholds, which, if not resolved, “could frustrate the operation of the institution of the public debate” in Italy.

It would seem that the *Corte costituzionale* also appears inclined to favor a greater extension of the public debate, since, with the decision n. 235/2018 (about the legitimacy of the regional law of Puglia which provides for an alternative public debate with respect to the regional regulation that would affect state prerogatives) has sanctioned the constitutional illegitimacy of the provision censured only in the part in which it provides that the regional public debate will also take place on the national work, offering an interpretation aimed at saving the regional legislation on

⁷⁵ See *Consiglio di Stato*, Special Commission of 7th February 2018, Opinion n. 359 of 2018 on the Decree of the President of the Council of Ministers with methods of carrying out, types and thresholds of the works subject to public debate, pursuant to article 22, 2, of the legislative decree 18 April 2016, 50, 2, in www.giustizia-amministrativa.it.

⁷⁶ F. Benvenuti, *Il nuovo cittadino. Tra libertà garantita e libertà attiva* (1994), today in *Scritti giuridici*, I, 896 (2006); G. Manfredi, *Il regolamento sul dibattito pubblico: democrazia deliberativa e sindrome nimby*, cit. at 1, 605; see also A. Averardi, *La decisione amministrativa tra dissenso e partecipazione. Le ragioni del dibattito pubblico*, *Munus* 129 (2018); T. Nichols, *La conoscenza e i suoi nemici. L'era dell'incompetenza e i rischi per la democrazia*, it. Transl., (2018). See also K.E. Portney Siting, *Hazardous Waste Treatment Facilities: The NIMBY Syndrome*, *AH* (1991); W. A. Fischel, *Why Aere There NIMBY's?*, *Law and economics*, 77, 1, 144 (2001); H. Hermanson, *The Ethics of NIMBY Conflicts, Ethical Theory and Moral Practice*, 10, 1, 23 (2007).

the subject of public debate, as it considered that the contested norms should be linked to the hypotheses in which it is a regional public work, and not to the cases concerning a national work, of which the Region does not hold.⁷⁷

Moreover, it is important to highlight another difference - which leads to important consequences - of the “Italian-style” public debate, compared to the French inspiring model. In fact, the former refers, on the basis of a subjective criterion, only to the cases in which the proponents are the “contracting authorities and contracting entities”, excluding projects that are proposed by private parties from the application of the participation tool. Thus, while the *débat public* offers participatory guarantees to citizens for every work that meets the predetermined objective criteria, in Italy an unjustified distinction is applied between works proposed by public administrations and work proposed, instead, by private individuals. Still, and of not less importance, in the Italian model of public debate there is not a third, independent and impartial party that conducts the work as is provided in the French model. In fact, in the *Codice dei contratti* is provided the *Commissione Nazionale per il Dibattito Pubblico* at the Ministry of Infrastructure and Transport, but it is not in the same way independent, nor does have the important functions assigned to the French CNDP.⁷⁸

On the basis of what has been said so far, the Italian model resembles, rather than an instrument of participatory democracy, an instrument of participatory oligarchy. This shows how the European states have a heterogeneous situation in the implementation of these instruments, and not very satisfactory, where perhaps - as one would hope - the French model should be adopted, homogenizing the administrative tools of the different European states, to face a common crisis of “incommunicability” between administrators and administrated.

5. Conclusions

We have seen, therefore, how, in the democratic and institutional crisis, the citizens’ aversion grows, above all towards in-

⁷⁷ See *Corte costituzionale*, decision n. 235 of 9th October 2018, cit. at 73, §9.

⁷⁸ See V. Molaschi, *Le arene deliberative*, cit. at 52, 262.

frastructural works that have a great impact on the environment and on the territory; in this way the conflicts appear insurmountable with the recourse to ordinary procedural tools, because the lack of trust of represented in representatives and of the administered in administrators, causes a continuous obstacle, both in a procedural-decisional phase and in a contentious phase. The only possibility to curb this perpetual stall mechanism is to allow the collaboration of those who are most affected by the interventions on the territory (the citizens!); in fact, these conflicts emerge at the local level, as the "resident" perceives costs (risks) much more easily than the benefits. In fact, using the opposite approach, minimizing the participatory moments with the DAD method, does nothing but exacerbate the conflict, aggravating the situation of citizens' lack of confidence in the State.

Furthermore, the participation constitutes an achievement not only for the citizens, but also for the administration itself; in fact, it not only has a guaranteed purpose, as it protects the interests and claims of the private, but also, and even more, has a collaborative purpose, where it allows public administrations, at a stage of the initial process, to be able to come aware of information that would otherwise not have been known, to evaluate interests that otherwise would not have been introduced into the proceeding, and so as to make a more targeted and appropriate weighting. Therefore, participation does not only mean a defense of the private sector, but also a good performance of the public administration, according to the principles of efficiency, effectiveness and even economics (where, for example, a work that is the result of a participatory choice, it is less subject to contentious appeals).⁷⁹

⁷⁹ On the dual function - guaranteeing and collaborative - of participation, see *ex multis*: G. Berti, *Procedimento, procedura, partecipazione, Studi in memoria di Enrico Guicciardi* 780 (1975), in the new edition G. Berti, *Scritti scelti*, 571 (2018). On this point, it should be noted that at the terminological level the Nigro's Commission used the term "contradictory" meaning with it the participatory intervention, meaning "para-jurisdictional", hence the interpretations that highlight the guarantee and "anticipated protection" function of the procedural participation. On point see the *d.d.l.* containing "*Disposizioni dirette a migliorare i rapporti fra cittadino e pubblica amministrazione nello svolgimento dell'attività amministrativa*", in F. Trimarchi (ed.), *Il procedimento amministrativo fra riforme legislative e trasformazione a cura dell'amministrazione*, 182 (1990); see also M. C. Romano, *La partecipazione al procedimento amministrativo*, in A. Romano (ed.) *L'azione amministrativa*,

While the administration becomes an instrument aimed at satisfying a public interest that no longer coincides with the "common good", but which is enriched with any other interest, of a public or private nature, which can be detected in order to achieve a more satisfactory possible weighting. An administration, therefore, that uses the procedural forms not in order to form an authoritarian and unilateral will, but with the intention of achieving the maximum agreement between the various stakeholders, in the implementation of the principle of collaboration. On the other hand, "participatory democracy" means interaction, within public procedures - above all administrative, but also normative - between society and institutions, which aims, through both collaboration and conflicts, to produce a unitary result each time, attributable to both of these subjects and to which the extension of the democratic method is foreseen also to the administrative functions, as well as to the representative institutions, through the direct participation of private individuals.

However, speaking of participatory democracy as a magic formula doesn't make sense, since any principle needs to be translated into rules that make it effective and efficient. Therefore, we cannot blame the principle itself for the failure of some models of participatory democracy; but, *vice versa*, it is necessary to identify

310 (2016); and, on the ambivalence of the functions attributable to participation, see A. Massera, *Il diritto del procedimento amministrativo tra vocazione alla protezione delle libertà e pressioni verso la democraticità delle decisioni*, in G. Falcon (ed.), *Il procedimento amministrativo nei diritti europei e nel diritto comunitario*, 78 (2008); S. Battini, B. Mattarella, A. Sandulli, *Il procedimento*, in G. Napolitano (ed.), *Diritto Amministrativo Comparato*, 107-121 (2007). On the role of adversarial in participation see F. Figorilli, *Il contraddittorio nel procedimento amministrativo (dal processo al procedimento con pluralità di parti)* 184 (1996); F. Trimarchi, *Considerazioni in tema di partecipazione al procedimento amministrativo*, *Dir. proc. amm.* 634 (2000); G. Ghetti, *Il contraddittorio amministrativo*, 73 (1971); G. Berti, *Procedimento, procedura, partecipazione*, cit. at 79, 799; A. Carbone, *Il contraddittorio procedimentale: Ordinamento nazionale e diritto europeo-convenzionale*, 230 (2016). Even in the interpretation of administrative jurisprudence, the ambivalence of participation, between protection and collaborative functions, is known. About this see: TAR Lazio, Section III, 15th March, 2011, 2352, giustizia-amministrativa.it; Consiglio di Stato, Section V, 10th January, 2007, 36; Consiglio di Stato, Section II, 23th Maggio 2007, 413. On the triple function guaranteed, democratic and collaborative, see A. Ferrari Zumbini, *La regolazione amministrativa del contratto*, 324 (2016).

the most efficient mechanism to decline the principle so as to make it as effective as possible, aware of the difficulty of the social and structural challenges which it is supposed to cope with, and without forgetting that there is an inseparable connection between democracy and social conflict.

In fact, there are various procedures that provide for moments of information and participation which, however, appear to be late and insufficient in order to prevent and resolve the conflict. Participation, therefore, must be conducted according to certain criteria, under a responsible and coordinated governance, in order not to translate itself into a means of mere absorption of the conflict. According to Luhmann's⁸⁰ conception, in fact, a margin of uncertainty of the outcomes is necessary to induce the holders of the various interests at stake to pursue the satisfaction of these within the institutionalized procedures, in order to allow a better social control of the tensions and the final achievement of a consensus (i.e. a legitimization) of the choice; therefore, procedures that, despite being participated, are characterized by a substantial certainty of the outcomes, prove to be absolutely problematic in terms of the legitimacy of the decision. If in an authoritarian system the principle of certainty can be synonymous with efficiency, effectiveness, coercivity and unavoidability, the same can't be applied to a model inspired by canons of democracy and pluralism, where certainty does not present itself as a factor of efficiency and stabilization.⁸¹

The dialogue among stakeholders cannot be just a formal issue. The non-negotiability of the interventions promoted by the proposers is one of the main reasons for conflict, the lengthening of time, and the waste of resources. To promote negotiability, interventions and projects must take on a territorial value, intervening on the mitigation of environmental impacts and on ecological compensations, but not only. Integration stems not only from in-depth studies, but also and above all from the interaction with local actors, often holders of knowledge that otherwise would not be

⁸⁰ Refer to N. Luhmann, *Procedimenti giuridici e legittimazione sociale*, it. Transl. 112 (1995); N. Luhmann, *Organizzazione e decisione* (*Organisation und Entscheidung* - 2000), it. Transl. (2005).

⁸¹ L. Mengoni, F. Modugno, F. Rimoli, *Sistema e problema. Saggi di teoria dei sistemi giuridici* 172 (2017).

taken into consideration. Furthermore, to strengthen trust, it is necessary to limit conflicts of interest, make decision-making processes transparent, starting from the definition of plans, programs, up to the projects, making credible assessments.

On this point, it appears that the institute of the French *débat public*, where it respects the aforementioned guarantees (such as an area of application not restricted by too high thresholds, or from discriminatory provisions that resort to the use of subjective criteria, and the assignment of the functions of coordination and guarantee to a third *super partes* subject) constitutes a reasonable balance between the requirements of participation and those of efficiency, in a model of administrative procedure that has, among its unavoidable passages, the confrontation between the proposing public administration and the subjects (both public and private) that are interested and involved in its effects.

The same efficiency cannot be attributed, instead, to the Italian *dibattito pubblico*, given that it does not possess any of the three characteristics that have been identified as fundamental for the effectiveness of a deliberative arena.

The hope of the writer, therefore, is not only a broad and global diffusion of the institute of the *débat public*, but furthermore that the same approach could be also used to arrive at a sort of co-decision between the parties, not having to be relegated to an exclusively pre-decisional phase. The moment seems favorable for identifying new and additional forms of composition that are flexible and not very proceduralized, which allow the participation of all the parties involved, be they public or private, not only in an initial participatory phase, but also in the decision-making phase, and this in order to cool the conflicts, to direct the choices constructively in confrontation tables with informal discussions before an authoritative, impartial and high-profile technical legal person, who is able to reduce the information asymmetry by making stakeholders aware, to mediate and give more confidence, in the light of transparent decision-making procedures that are based on an “organized and assisted search for compromise”.⁸²

⁸² C. Dupont, *La négociation: conduite, théorie, applications*, 3rd ed. (1990); L. De Lucia, *La conferenza di servizi nel decreto legislativo 30 giugno 2016, n. 127*, Riv. Giur. Urb. 39 (2016); M. G. Imbesi, *Il valore sociale della mediazione ambientale*, Giureta, X, 1 (2012); see also Camera arbitrale di Milano, *La mediazione dei conflitti ambientali. Linee guida operative e testimonianze degli esperti* 3 (2016).

THE CATALAN AFFAIRE IN A CONSTITUTIONAL PERSPECTIVE.
FROM REASONABLE ARGUMENTS TO IDENTITY-BASED
CLAIMS: SQUANDERING LEGITIMACY RESOURCES

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Abstract

The Catalan issue has come again to perturb the Spanish institutional and sociopolitical environment. It seems to follow constant historical patterns referring to the manifold matrix of the Catalan movement and leading to a radicalisation of opposite nationalist claims. The most serious crisis of the last decades has brought the King and the Constitutional Court into the scene. However, increasing institutional complexity has been of little help in smoothing out plausible solutions to the problems arisen; to the contrary, it has brought about a dissipation of institutional resources, as those organs have been incapable of preventing the radicalisation of the conflict.

The article looks at the recent controversies in a threefold perspective – the political debate, the King’s sovereign stance, and the position of the Constitutional Court – in light of the multifaceted composition of the Catalan movement. It argues that the reiterated confrontation of identity-based claims has suffocated the negotiations on the merits by replacing rational arguments with emotional ones based on *non-dialogable* identity claims; this has squandered the legitimacy resources of the Spanish constitutional system, which is now in urgent need of a new begin.

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1. Introduction. The Catalan *affaire*: patterns of continuity¹

Within the vast landscape of European resurgent nationalisms, the Catalan *affaire* displays peculiarities of a 'Spanish thing' that is nevertheless worth to look at in a broader perspective². Both the historical grounds and the narrative that undergirds the pro-independence positions, as well as the responses coming from the other side, reveal certain clues as a *fil rouge* from past to present, which locate the Catalan *affaire* within its own evolutionary framework and paint the picture of an ever-returning plot³. Along this trajectory, the consumption of legitimacy resources for the Spanish political-constitutional system is a regular, inexorable consequence, which today urges to a new start the political bargaining⁴.

¹ The author wishes to acknowledge the valuable comments and suggestions this work received from the participants in the European Junior Faculty Forum for Public Law and Jurisprudence, 10-11 June 2019, at London School of Economics, particularly from Professors Iyiola Solanke and Thomas Poole, who took the trouble to comment on an earlier version of this article. All errors are his own.

² The peculiarity of the Spanish history, with special regard to the XIX century, has always been a *topos* for Spanish scholars; see, nonetheless, M. Santirso Rodríguez, *España en la Europa liberal (1830-1870)* (II ed., 2012) at 39f., giving a well-detailed comparative account of the liberal political movements around Europe, as well as of the changes in the national social structures and in the constitutional arrangements concerned.

³ See M. Iacometti, *La "questione catalana": un passato che sempre ritorna?* 4 Dir. pubb. comp. eur. 909-937 (2018) part. 910-911.

⁴ The exhaustion of the 'institutional frame of government' (J. Pinheiro, *What is Sub-National Constitutional Law?*, 7 Sant'Anna Legal Studies Working Paper, 1-11 (2010) 7) terminates the possibilities for a relationship between the State and the Autonomies. Spain is traditionally not listed as a federal country, but as an '*Estado de las Autonomías*' (see P. Biglino Campos, *Cataluña, Federalismo y Pluralismo político*, 37 Teoría y Realidad Constitucional 449-459 (2016) 451-452,

For the sake of clarity, it seems opportune to enter *in medias res* and to anticipate what these clues highlight.

One: political-economic matters lie at the core of the identity claim. Such a claim is purposely used to create a nationalist narrative capable of fostering a new cleavage, *alternative* to political and economic ones. In other words: it is moulded to push Catalans to cluster as a single people and combat the existing unitary order⁵. This claim conceals and is supported by a multifaceted array of interests, chief among which are those of a key part of a dynamic and enlightened Catalan *élite*⁶; yet, it overcomes class cleavages, for it does not cease to enjoy the favour of the masses.

Two: the political-economic order that the Catalan nationalist claim challenges invariably reacts by construing an opposed, specular nationalist claim based on a sense of *Spanishness*; which, on its own side, is hardly a simple identity claim, but rather conceals the interests of some groups, including Catalan ones. Both claims are raised in defence of mundane interest – nationalism being the last resource when political

and M. Iacometti, *La dottrina spagnola in tema di forma di Stato*, 2 Dir. pubb. comp. eur. 579-596 (2008). However, T. Ginsburg and E. A. Posner, *Sub-Constitutionalism*, in Chicago Law & Economics Working Paper 507/2010, wonder whether Spain (as well as Italy) may be incorporated (at 2, fn. 1; p. 27-28; 35). In Spain, the debate on the possibility to turn federalist has been reignited by the documentary ‘*Federal*’ by Alberto Solé, presented at the Atlanta Film Festival 2018: see J. Zurro, *¿Es el federalismo la única solución para el conflicto entre España y Cataluña?*, *El Español*, 1 July 2018. Yet, it is underlined that ‘the spirit’ that has animated political negotiations may not favour such an evolution: J.C- de Ramón, *Federalismo o catalanismo*, *El País*, 9 April 2019: ‘Desde esta actitud hipocondriaca y recelosa no puede construirse la identidad dual, resuelta y robusta, necesaria para producir una lealtad federal, del tipo que acepta sin problemas que una parte del poder se ejerce por uno mismo y otra en común’.

⁵ See A. Jutglar, *Els burgesos catalans* (1966); in Spanish, ed. by J. Doménech and L. Crispí, *Historia crítica de la burguesía catalana* (1984) at 41. J. Solé y Tura, *Catalanismo y revolución burguesa* (1970) at 35f., pursuant to a detailed analysis of the origins and developments of the *Catalanisme*, highlights that economic protectionism is one of the three lines that nurtured the Catalan claim – the others being federalism in politics, traditionalism stemming from the *Carlismo* and cultural renaissance; he quotes J. Pla i Casadevall, *Francesc Cambó: Materials per una història d’aquests últims anys I* (1928), 15.

⁶ Even those of a driving upper class that takes pride of being the powerhouse of Spain and pretends to accumulate credits over Madrid and the rest of the country: see G. Tortella (ed.) *Cataluña en España. Historia y mito* (2017), at 183f.

dialogue is deemed impossible or inconvenient for either party – and *then* radicalise as nationalist, encroaching on a constantly sensitive issue of the Spanish constitutional history.

Three: the Catalan cultural narrative has grown up independently of politics and has only occasionally unleashed its political potential. Thus, to support the inclusion of the identity roots of *Cataluña* within a Spanish State is not inconsistent with the Catalan claim; rather the opposite. Even in recent history, a self-proclaimed Republic of *Cataluña* stayed within, the frame of a Federal Republican Spain; independence was deliberated in reaction to monarchic and fascist imminent threats.

As a consequence of that, one may take account of the similarities in the Spain's governmental response from late 1800's to 2000's. Differences are obvious; Spain is committed to the constitutional framework of a parliamentary monarchy bound by fundamental rights since 1978 only. However, the way of countering the Catalan independence claim seems to unfold along lines of continuity from old to contemporary times.

The continuity patterns of the story look more or less as follows. As a result of stark political dissent, a nationalist Catalan claim turns political and is raised to threaten the political counterpart; the reaction is, invariably, the raise of another, specular nationalist claim, aiming to deny any sort of political relevance to the Catalan one and producing a counter-threat. Then, if no political solution is timely found, what was initially a simple political struggle on specific points turns to an ideological, identity-based conflict between two *non-dialogable* claims, to which reasonable solutions are unfeasible; and this is precisely what consumes the legitimacy resources of the constitutional system⁷.

In fact, such mutation of the political struggle has a specific implication: it pre-empts all the debates on the merits of the issue concerned, as priority is granted to the opposite nationalist

⁷ 'Incompatible' in the sense that they are unlikely to communicate within the pathways of a discursive reason, for they do not share a common rationality nor do they ensure mutual rational argumentation; therefore, they fall short of the law's 'procedural' moral substrate. See J. Habermas, *Moral Consciousness and Communicative Action* (1990) 43-115; a critical survey in M. Deflem, *Law in Habermas Theory of Communicative Action*, 20-4 Philosophy and Social Criticism 1-20 (1994).

narratives called on to support or discredit each identity-based claim respectively⁸.

In this vein, the present work suggests to look at today's Catalan *affaire* as a process that develops on a threefold stage.

First, political negotiations on specific issues are dragged to a dead end, and no solution appears practicable on either side. Then a Catalan independence claim acquires a political substance and is threatened, if not openly raised, against the Spanish Government, who condemns it and ignores its political substance.

Second, a specular identity-based claim, phrased in the language of national sovereignty, is raised in opposition to the Catalan one; this claim, supported by the parliamentary majority and by the Government, eventually comes to underpin a King's ultimate stance in defence of national unity.

Third, the judiciary is continuously called on by the Government and is forced into an increasingly awkward position. Its task is, first, to draw the constitutional boundaries of the identity-based debate; then, it turns into outlawing the *rebels* and paving the ground to their penal prosecution in order to ensure the survival of the State as a whole.

The work aims to proceed along this tripartite path. In the next section, a short, necessarily incomplete historical overview of the Catalan claim is sketched out in order to follow the clues anticipated above and to account for the continuity patterns just indicated. In the successive three sections, the most recent events are recalled in a logic-chronological order that replicates the three stages mentioned. First, the failure of political negotiations entails the rise of a nationalist Catalan claim ignored and discredited by a specular claim raised by the Government. Second, the King fully endorses the Government's claim and, in spite of his reportedly *inclusive* position as Head of State of a parliamentary monarchy, declares the Catalan claim illegal and in betrayal of the Spanish State. Third, the *Tribunal Constitucional* (TC), while vainly attempting to reanimate the political game, is prompted to gradually *shrink* the constitutional spaces for debate, which it does

⁸ Such a drift in the use of public reason would signpost from a State-framed perspective the decline of Europe as the place in which 'the alien' is dealt with in her *alienship*: see the well-known J.H.H. Weiler, *In Defence of the Status Quo: Europe's Constitutional Sonderweg*, in J.H.H. Weiler and M. Wind, *European Constitutionalism beyond the State* (2003), 7-23, 19.

by re-defining the concepts of 'right to decide' and 'national sovereignty' to the detriment of the Catalan position.

Conclusively, the work underlines the consumption of political and constitutional legitimacy resources that the Catalan *affaire* implicates, and exposes the wounds inflicted to the Spanish society.⁹ What was, is and should be a thorough debate on the merits – even constitutional merits, touching upon the very form of the Spanish State – and, as such, would require the highest possible grade of *inclusiveness* and *openness*, turns to an identity-based struggle, where rational arguments are ultimately to yield to emotional statements among which little dialogue is possible¹⁰.

2. Multiple roots: federal republicanism and anti-colonialism *vis-à-vis* the rise of a Barcelona-based modern bourgeoisie

During the 1860's the Kingdom of Spain faced a severe economic crisis¹¹; which was soon to be followed by a political one¹². As a result, Queen Isabel II Bourbon got ousted by a

⁹ See P. Kingsley, R. Minder, *A la par del independentismo catalán, en España revive el nacionalismo*, The New York Times (Spanish ed.) 5 October 2017; on the 'Spanish wound' that the Catalan *affaire* represents, see I. Camacho, *Cataluña, la herida de España. Mitos y claves de la Revolución independentista* (2017).

¹⁰ On the fallacy entailed by the so-called 'Appeal to Emotion' argument in logics, see A. Brinton, *Pathos and the "Appeal to Emotion": An Aristotelian Analysis*, 5-3 History of Philosophy Quarterly 207-219 (1988).

¹¹ The breakdown of cotton imports, due to the civil war blown up in North America, caused the collapse of the textile sector that was listed among the most crucial industries of Cataluña (A. Jutglar, cit., 153f). From 1862 onwards, the crisis became general and invested the financial branch. The mounting fear in the most dynamic layers of the Spanish society and the decreasing trustworthiness of the credit system coupled with the 1867-1868 terrible performance of the agricultural sector in the whole country, which directly affected the peasants' life conditions and the rural economy. See J.F. Fuentes, *El fin del Antiguo Régimen (1808-1868), Política y sociedad* (2007) at 227f.

¹² Queen Isabel II had to confront repeated insurrections and constantly renovated the composition of the Cabinet; eventually, she replaced General Leopoldo O'Donnell with General Ramón Narvaez, who adopted a policy of severe repression of political dissent – against democrats and progressists, as well as against genuine liberals like O'Donnell himself. As repressions turned harsher with Narvaez' successor Luis González Bravo, the other political factions – liberals, democrats and progressists – convened to a pact in Ostende (Belgium: 16 August 1866) under the direction of the Progressists' leader

threefold coalition of liberals, progressists and democrats that inaugurated what was called the *Sexenio Democrático* or *Revolucionario*¹³. At the same time, the colonies *Puerto Rico* and *Cuba* raised in revolt. *Cuba*, particularly, proclaimed both independence and the end of the slave-driven regime, which still had resilient ties with the motherland *Spain* – not least with the provinces of North-East, *Valencia* and *Cataluña*. As a result, a 10-year long Cuban War of Independence was waged on the whole island¹⁴.

Consequently, an intricate set of institutional and social issues came at debate at the dawn of the *Sexenio*. The abolition of slave-labour and the colonial question intertwined with the constitutional debate on the form of the State¹⁵.

After *Cortes Constituyentes* (Constituent Assembly) were elected (15 January 1869) Liberals and Progressists formed a *Provisional Government* and opted for a parliamentary monarchy under King Amadeus I Savoy¹⁶. Such a compromise excluded two groups: Democrats – who changed their name into *Federal Democrats* and committed to a 'Federal Republic of Iberian Peoples'¹⁷ – and reactionary monarchists, who had already

General Juan Prim. Prim landed in Cádiz on 18 September 1868 and was joined by Admiral Juan Bautista Topete in the revolt known as The Glorious (*La Gloriosa*). See P. Farías García, *Breve historia constitucional de España (1808-1978)* (1981) at 44f.; J. Vilches, *Progreso y libertad. El Partido Progresista en la Revolución liberal española* (2001) at 21f. J. Claret, M. Santirso, *La construcción del catalanismo. Historia de un afán político* (2014) at 66f.

¹³ The decisive battle took place in Alcolea, near Córdoba, on 28 September 1868; on 29 September Madrid was taken and the Queen left the country. See F. Marhuenda and T. Zamora, *Historia político-constitucional de España* (2015) 317f.

¹⁴ The Cuban 10-year War started by the so called *Grito de Yara* held by Carlos Manuel de Céspedes – proclaiming on 9-10 October 1868 the *Manifiesto de la Junta Revolucionaria de la Isla de Cuba*. See D. B. Wood, *The Long Revolution: Class Relations and Political Conflict in Cuba, 1868-1968*, 34-1 *Science & Society* 1-41 (1970); in general, J. Fontana, R. Villares (eds) *La época del liberalismo. Vol. 6 - Historia de España*, (2007) 343f.; J. Piqueras Arenas, cit., 259f.

¹⁵ F. Martí Gilabert, *La Primera República Española 1873-1874* (2007), 79f.

¹⁶ F. A. Martínez Gallego, *Democracia y República en la España Isabelina. El caso de Ayguals de Izco*, in M. Chust (ed.) *Federalismo y cuestión federal en España* (2004), 45-90, speaks of the republican movements arising in the provinces of the Peninsula. Cfr. J. Piqueras Arenas, *La Revolución democrática (1868-1874). Cuestión social, colonialismo y grupos de presión* (1992), 49f.

¹⁷ The Democrats changed their name into Federal Democrats and committed to a "Federal Republic of Iberian Peoples" as their prime political objective. See F.

sustained Carlos María Isidro Bourbon as a pretender to the throne against Isabel in the first two *Guerras Carlistas* (1833-1840; 1846-1849); they relied on the exploitation of the colonies and favoured an absolute monarchy supported by corporative representation in Parliament¹⁸.

The 1869 Constitution was thus opposed by both sides. On one hand, insurrections in *Navarra*, *País Vasco* and *Cataluña* were driven by reactionary forces - including a large part of Catalan aristocracy - aiming to restore a traditional Catholic *anti-liberal* Kingdom¹⁹. On the other hand, federal-republican oppositions gained increasing support. Eventually, in 1873 King Amadeus I abdicated and new constituent elections gave majority to a Republican-Federal Democrat coalition²⁰. However, fragmentation of political groups, personal rivalries among leaders, tenacious resistance from regions such as Andalucía, Murcia and Valencia and lack of agreement on the social measures to be implemented made the *Primera República* fragile and unstable. The *golpe* promoted on 3 January 1874 by General Manuel Pavía, a military commander in Madrid, paved the way to an autocratic regime premiered by General Francisco Serrano²¹; monarchy was soon

Bonamusa, *Republicanisme i federalisme. Catalunya, 1830-193*, in M. Chust (ed.) cit., 91-113, at 96-97.

¹⁸ See M.V. López-Cordón, *La Revolución de 1868 y la I República* (1976), 74f. J. Solé Tura, cit., 60f., traces back to the work of Jaime Luciano Balmes y Urpiá the first detailed account of the conflict between '*Cataluña rural*' and '*Cataluña industrial y urbana*' that he aimed to solve by '*una síntesis the clarividencia burguesa y de paternalismo social*' mixing up the dynamism of the urban bourgeoisie and the '*rural common sense*'. The works that Solé Tura referred to are articles published in *La Sociedad* (1843) and available in J.L. Balmes y Urpiá, *Cataluña*, in *Obras completas de Jaime Balmes* (1949), 923-953.

¹⁹ The revolt was primarily based in Navarra, Valencia, País Vasco and Cataluña, and took a few years before being tamed; it is known under the name of *Tercera Guerra Carlista*; *Carlismo* grew up in the 1830's as a strong political movement in the Spanish provinces, aiming to restore a Middle-Age like monarchy under the motto '*Dios, Patria Rey*'. See G. Tortella, cit., 127f.; F. Martí Gilabert, cit., 70f.; see also the dossier '*El rompecabezas carlista*' 77 *La Aventura de la Historia* 2005 (contributions by J. Canal, A.M. Moral Roncal, J.R. de Urquijo y Goitía, P.V. Rújula López) 45-66.

²⁰ F. Marhuend, T. Zamora, cit., 387f.; P. Farías García, cit., 57f.; F. Martí Gilabert, cit., 51. On the evolution of the Democrats, see also J. de Felipe Redondo (ed.) *Pensamiento utópico, republicanism y socialismo en España en el Sexenio Democrático: la obra de Elías Zerolo* (2018), 45f.

²¹ F. Marhuenda, T. Zamora, cit., 389f.; F. Martí Gilabert, cit., 112.

restored under Alfonso XII Bourbon (29 December 1874) and the consolidation of a conservative social block put an end to any republican-federal democrat ambition²².

In this turbulent political landscape, Catalan movements mainly arose from two grand channels.

First, the link between federal discourses and anti-colonialism: in Cuba and *Puerto Rico*, new-born political movements hugely benefitted from the impulse of many Catalans who lived or moved there due to the wars and the multiple crises, and wished to take part in the campaign against the same Spanish reactionary aristocracy that had forced them out of their native land²³. Such movements took inspiration from the cultural themes of *Cataluña's* origins and historical legacy as opposite to the absolutist, strongly centralistic claims of their rivals²⁴; they came to share the ideal of a Catalan Republic that could have enjoyed a certain degree of independence from a suffocating centralist State. Federalism and to some extent Republicanism merged in the

²² For an account of the consolidation of some bourgeoisie between Madrid and Barcelona at the end of the XIX and in the beginning of the XX century in support of the restauration of the monarchy, see A. Jutglar, cit., 273f., 282-285. J. Solé Tura, cit., 78f., refers to the Bishop Torras y Bages the most structured attempt to oppose the federal-liberal thought summarised in V. Almirall, *Lo Catalanisme. Motius que 'l' l'legítiman, fonaments científics i solucions pràctiques* (1886). The ideal counterpart to the urban-driven liberalism relying on political federalism from a traditional, rural-based and Catholic viewpoint was J. Torras y Bages, *La tradició catalana: estudi del valor ètic i racional del regionalisme català* (1892).

²³ See C. Llorens, *Els cent anys d'independentisme català en 10 punts*, in www.sapiens.cat, 15 July 2019 [17 July 2019].

²⁴ Such origins remounted back to the Early Middle Age *Catalan Counties* encompassing territories that today belong to South-West France and North-East Spain; these themes included the mythical "*Pau i Treva de Déu*", a reported *zone franque* created by the local peasants with the consent of Bishop Berenguer d'Elna to protect the area from continuous incursions by several mercenaries and other armed groups, and to establish a domestic jurisdiction (the Catalan Court: Roussillon (next to Avignon, France, 1207) which a few decades later gave rise to the reunification of Barcelona's County with the Kingdom of Aragon. It was under such a political compound that institutions such as the *Generalitat* developed as key political bodies of the region and adopted the yellow and red striped flag as a symbol of Aragon's crown. See G. Tortella, cit., 11f. and more bibliography.

rebellion against Spanish colonial *élites*, and became powerful vectors of a Catalan thought²⁵.

Second: in the last decades of the XIX century, the accomplishment of a *Révolution bourgeoise* in Spain combined with technological developments to decisively impulse the industrialization of *Cataluña*²⁶. The rapid economic growth of the region furthered the rise of a modern bourgeoisie, especially based in Barcelona²⁷, who abandoned the traditional, old-colonialist *Carlismo*'s moorings for a more dynamic worldview. Such rampant self-made men perceived Madrid's monarchy as somehow archaic, stagnant, hindering their social and economic ascension in the Catalan society²⁸.

²⁵ See J. E. Ruiz-Domenèc, *Informe sobre Cataluña. Una historia de rebeldía (777-2017)* (2018), 195f. For a more detailed analysis of the federal theories at debate during those years, see J. Cagiao y Conde, *Tres maneras de entender el federalismo: Pi i Margall, Salmerón y Almirall. La teoría de la federación en la España del siglo XIX* (2014) at 65f., on the Pi i Margall's theory as a philosophical effort to reconcile the Nation and the State, and 170f. on the purely juridical attempt led by Almirall to draw a *Union of States*. From a constitutional viewpoint, republicanism and federalism were not necessarily tied (*ibid.*, 231) although politically they often aligned with each other.

²⁶ J. Piqueras Arenas, *cit.*, 16f.; an account of the scientific progress along the whole XIX century is in J.M. de Luxán Meléndez, *Una política para la ciencia en el reinado de Isabel II* (2016) at 89f.

²⁷ The ancient division between *pequeña burguesía* and *alta burguesía*, and the respective evolution of the relationships with the Madrid's regime, is in A. Jutglar, *cit.*, 346f. See the overall account in J. Solé Tura, *cit.*, 66f.; J. Claret and M. Santirso, *cit.*, 49f.

²⁸ This feeling is visible at the beginning of the century. J.L. de la Granja, J. Beramendi and P. Anguera, *La España de los nacionalismos y las autonomías* (2001) 24-26 account for the debate in the Barcelona-based press during the *Primera Guerra Carlista* (1833-1840). In November 1836 Pedro Mata y Fontanet, a Catalan liberal, politician and surgeon, wrote in the newspaper *El Vapor* that if Cataluña declared independence from the Madrid's government "it would commit an economic suicide as the whole Spanish market would be lost"; which proves that ideological and historical grounds for autonomy were shared by a significant part of the Catalan society. It is worth noting that in the same year Domingo M. Vila, a Catalan member of the Spanish Parliament, construed the 'parallelism' between the Cádiz Constitution of 1812 and the ancient Catalan Laws, as both had been abrogated by "a foreign power", the French Kingdom, respectively in 1823 and 1714. Therefore, as the former had come again in force, 'nobody could see as unfair' that the latter may claim to be equally seen as valid. See also M. Ferrer, D. Tejera and J.F. Acedo, *Historia del Tradicionalismo Español*, IX (1947) at 63f.

Barcelona's vivid economic and cultural life conflated the Catalan cultural identity into increasing Catalan political awareness²⁹; newspapers such as *La Renaixença*, published since February 1871, made themselves vehicles of this flow³⁰. Countering Madrid's *conservatorism* led to igniting a Catalan nationalist cleavage which would have accelerated the modernisation of the Catalan *élite* to the detriment of the more conservative, mainly pro-unity factions³¹.

This is why Catalan pro-independence groups have arisen in a scattered fashion as a result of their multiple social, political and economic roots, ranging from liberal bourgeoisie to radical republicanism³². Nonetheless, their sense of compactness increased as they all suffered harsh persecutions under the dictatorship of Primo de Rivera, whose *manifesto* proclaimed the necessity of "*neutralizar la des-españolización de Cataluña*" to recover a sort of common "*Spanishness*" (18 September 1923).³³ In October 1926 one of the most charismatic Catalan leaders, Francesc Macià,

²⁹ As described in Enric Prat de la Riba i Sarrà, *La nacionalitat catalana* (1906). See J. Solé Tura, cit., 137f., 195f.

³⁰ A. Jugtlar, cit., 286-288; J.L. de la Granja, J. Beramendi and P. Anguera, cit., 28f., account for the activity of the *Jove Catalunya*, of Mazzini-like ancestry, who added a political pro-independence layer to the Cataluña's cultural claims (1870-1875: p. 30) voiced through the review *La Gramalla*. J. Claret and M. Santirso, cit., 81f., report that, despite the fragmentation of the Catalan opposition, vivid cultural movements led to the blossoming of 'Catalan' publications in the fields of history and sociology as a ground for the debate on federalism (*supra*, n. 24), which proved conducive to 'politic Catalanism' (100f).

³¹ J.L. de la Granja, J. Beramendi and P. Anguera, cit., 27, report that in 1856 Juan Mañé y Flaquer, an influential Catalan conservative liberal, blamed the 'lack of cohesion' among 'brother peoples' on Madrid's '*uniformismo castellanizador*' which testifies to the cleavage between a pro-unity *élite* and a pro-independence more dynamic movement aiming to seek new social arrangements based on the independence issue. Leader of the Catalan movement was a Catalan residing in Cuba, Vicenç Albert Ballester, who designed the so called "*Estelada*", i.e. the Catalan flag with red and yellow alternate horizontal stripes and a white star on the left within a blue triangle – a quote from Cuba and Puerto Rico revolutionary flags. See C. Llorens, cit.; E. Ucelay-Da Cal, *Breve historia del separatismo catalán* (2018) at 43f.

³² See A. Balcells, *El projecte d'autonomia de la Mancomunitat de Catalunya del 1919 i el seu context historic* (2010), 11f., 79f.

³³ See S. Julià, *Las Constituciones Españolas. VIII: La Constitución de 1931* (2009) at 125 and E. González Calleja, *La España de Primo de Rivera. La modernización autoritaria (1923-1930)* (2005), 338f.

tried to promote a *golpe* against the dictatorship: his plan was to invade Spain from Catalan France, but he was smoked out, arrested in Prats de Molló and brought to Paris to face trial³⁴. On that occasion, his emotional speech in defence of the Catalan cause gained him the sympathies of most leftist parties around Europe; once free, Maciá travelled to Cuba and launched the *Constitución Provisional de la República Catalana*, to promptly come back to Spain when the *Segunda República* was being set in motion³⁵.

As in the municipal elections of April 1931 the party Maciá had founded, *Esquerra Republicana* (Republican Left) was the most voted, he declared *Cataluña* an “Independent State within either an *Iberian Republican Federation*, or a *Confederation of Iberian Peoples*”³⁶. The republican-federal democrat ideal seemed to turn real. Maciá agreed with the left-wing Cabinet to quit the independence path and to form a Catalan Government within the Republic of Spain under the historical name ‘*Generalitat*’ with the power to enact its own Statute. This compromise was not supported by the totality of the pro-independence groups, and more radical views prevailed when a more conservative block (CEDA) rose to government in Madrid: the new *President* Luis Companys took initiative and proclaimed the independence of *Cataluña* as a consequence of the ‘fascist and monarchic reaction taking place in Madrid’³⁷. However, the incapacity to join forces with the *Revolución Obrera* (Working Class Revolution) that was agitating the whole *Península*, as well as the energetic intervention by State forces, caused the end of the independence experiment and the restoration of the Spanish unity. Yet, victims in battle were

³⁴ E. Ucelay-Da Cal, cit., 114f.

³⁵ *Ibid.*, 84f.

³⁶ See E. Ucelay-Da Cal, cit., 122f.; G. Tortella, cit., 227f.; E. González Calleja, cit., 355f.; J.L. De la Granja, J. Beramendi and P. Anguera (eds.), cit., 124f. See also A. Ossorio y Gallardo, ‘*Discurso en el Congreso de los Diputados sobre el Estatuto de Cataluña – 19 de mayo de 1932*’, 90 *Cuadernos Republicanos* 101-12° (2016).

³⁷ The *Confederación Española de Derechas Autónomas* (CEDA) presided by José María Gil-Robles took power after the elections of 19 November 1933. See J. Gil Pecharromán, *La Segunda República. Esperanzas y frustraciones* (1997) 70f., and J. Casanova, *República y Guerra Civil*, in J. Fontana and R. Villares, *Historia de España – Vol. 8* (2007) 100f. Cfr. J. Claret and M. Santirso, cit., 154f.

reduced to a minimum, and pardon was promptly granted to virtually all the leaders implicated³⁸.

The restoration of a centralised power, as well as the relentless struggle among the diverse Catalan groups, exposed the lack of unity within the pro-independence forces. Likewise, when Franco seized power,³⁹ the fragmentation among Catalan political groups and the internal rivalries caused the breakdown of the Catalan resistance, which led to the execution of *President Companys* straight after the end of the *Guerra Civil* (15 October 1940)⁴⁰.

During Franco's dictatorship all Catalan movements remained clandestine, mostly settling out of the Spanish boundaries; the regime secured a solid social compromise with part of the most conservative Catalan *élite* and persecuted all opponents⁴¹. As contrary to what happened in *País Vasco*, *Cataluña's* violent insurrectional movements were marginal even in the *Transición* and the region undertook a process of constitutional integration after the approval of the New Catalan Statute of Autonomy (1979)⁴². The Barcelona Olympic Games of

³⁸ E. Ucelay-Da Cal, *cit.*, 160f.; see D. Ruiz, *Insurrección defensiva y revolución obrera. El octubre español de 1934* (1988), 25f.

³⁹ See J.L. Martín Ramos, *La batalla de Cataluña*, in A. Reig Tapia, J. Sánchez Cervelló (eds.) *La Guerra Civil española, 80 años después: un conflicto internacional y una fractura cultural* (2019), 313-328.

⁴⁰ C. J. Villarejo, *El proceso militar contra el President Companys. Un paradigma de la barbarie*, 1 Quaderns de Memorial democràtic 23-33 (2010). See F. Vázquez Osuna, *L'anihilació de la República del general Franco i l'administració de justícia de Catalunya (1936-1939)*, 16 Revista de Dret Històric Català 297-319 (2017).

⁴¹ According to A. Jutglar, *cit.*, at 528-529, 'Mientras vivía Franco, existió un número importante de burgueses que eran franquistas (Franco 'les había liberado'; Franco les había devuelto sus fábricas) pero sería un craso error y una injusticia meridiana afirmar que, durante el franquismo, no existieron amplios núcleos burgueses acomodados que no compartían la realidad franquista y que incluso, muchos de ellos, lucharon contra ella'. See G. Tortella, *cit.*, 275f.; J.L. De la Granja, J. Beramendi and P. Anguera (eds.), *cit.*, 165f.

⁴² Adopted by a *Ley Orgánica 4/1979, de 18 de diciembre, de Estatuto de Autonomía de Cataluña*'. See L. Cappuccio, *Los modelos de articulación territorial de los poderes públicos. Reconstrucciones (teóricas) y tendencias (concretas) en la jurisprudencia de los jueces constitucionales: el caso del Tribunal constitucional español*, in J. Cagiao y Conde, G. Ferraiuolo (eds.), *El encaje constitucional del derecho a decidir. Un enfoque polémico* (2016), at 93. See also F.J. Díaz Revorio, *Proceso constituyente y proceso descentralizador: ¿de dónde venimos y adónde vamos?*, in J.O. Araujo (ed.), *El*

1992 and the years leading to the European constitutional process were marked by relative political quietude⁴³; Catalan claims remained within the cultural-historical domain⁴⁴, and turned back to the political realm when the *Partido Popular Español* led by José María Aznar rose to the government at the beginning of 2000's – especially in occasion of the adoption of the new Catalan Statute (2006)⁴⁵. However, the Cabinet presided by the Socialist José Luis Zapatero engaged in negotiations to avoid a fracture; whereas the 2011 landslide victory of the centre-right opened the doors of *La Moncloa* to Mariano Rajoy, who had regularly blamed Zapatero for being too soft in bargaining with *Cataluña*⁴⁶.

Conclusively, the origins of Catalan pro-independence movements can be traced back to the 1800's, as republican-federal democrat groups collaborated with moderate forces in deposing the Spanish absolute monarchy but eventually remained excluded from the political compromise. It is rooted in the anti-slavery, pro-independence insurrections blown up in Cuba and *Puerto Rico*

futuro territorial del Estado Español (2013) and J. Amat, *La conjura de los irresponsables* (2017).

⁴³ On the long-lasting mayorship of the Socialist Pasqual Maragall i Mira (1982-1997) and on his mandate as a President of the *Generalitat* (2003-2006) after the durable presidency of the CDC 'Convergencia Democrática Catalunya' nationalist leader Jordi Pujol (1980-2003) see P. Maragall i Mira, *Mil dies que han canviat Catalunya* 13 FRC Revista de debat polític 7-17 (2006) and J. Rodríguez Teruel, *La rectificació o el futur tampoc no és ja el que era per al catalanisme*, *ibid.*, 40-45; cfr. E. Ucelay-Da Cal, *Catalonia Dreaming. The Rise of Catalan Mass Secessionism* (2010-2015) 3 *Tiempo Devorado. Revista de Historia Actual – Número monográfico: Processing the 'process': on the pro-independence Catalan surge* 328-372 (2015) at 339f.

⁴⁴ The Catalan movements kept hinging on the diffusion of the Catalan language and the consolidation of Catalan traditions as a specificity of Spain – sometimes with a zeal that was perceived as a forced 'catalanization': see G. Tortella, *cit.*, 305f.; but also E. Ucelay-Da Cal, *Breve historia del separatismo catalán*, *cit.*, 225f.

⁴⁵ The Statute was approved on 18 June 2006 by a referendum with a very low rate of participants, whereas on 18 February a huge manifestation had been celebrated in Barcelona which for the first time evoked the "right to decide of Catalans as a consequence of Cataluña being a nation". See J. Amat, *cit.*, 50-51; E. Ucelay-Da Cal, *cit.*, 254f.

⁴⁶ See U. Mezcuca, *La frase de Zapatero que acabó dando alas al independentismo*, *ABC Cataluña*, 26 September 2015.

and, at the same time, it has to do with the rise of a Catalan modern bourgeoisie in search of political hegemony⁴⁷.

This is why Catalan movements have affinity with radical leftists, on one side, and with more moderate groups, on the other; unsurprisingly, they have been continuously following what have been called “group-based logics” and have hardly managed to act as a single entity, bound by both a political programme and a plan on how carry it out⁴⁸. In principle, their ideological background refers to a progressist-like worldview infused with elements of *anti-monarchy* rhetoric and supports a narrative of a free *Cataluña* in a federal, often republican Spain or in a Europe of free nations⁴⁹. No surprise that dialogue is easier when Madrid’s political game is ruled by centre-left governments⁵⁰.

This brief history may perhaps highlight the peculiarities of the Catalan claim. It is a nationalist claim that meets with equal nationalism from its counterpart; it *does not* forcefully aim to secession, as independence is structurally *minoritarian* and only raised in reaction to alleged threats; it stems from political-economic conflicts and is fuelled by the most modern, dynamic bourgeoisie of Spain, but paints itself as left-winged by origin, social-democrat in inspiration, cosmopolitan in nature, supportive of a united Europe of peoples and nations⁵¹; it has blossomed in Barcelona and is nurtured by the city’s vitality but gains a consensus that reaches its peak in the neighbouring provinces⁵².

⁴⁷ Adde A. J. López Estudillo, *Federalismo y mundo rural en Cataluña (1890-1905)* 3 Historia Social 17-32 (1989).

⁴⁸ E Ucelay-Da Cal, cit., 77f.

⁴⁹ J. Claret and M. Santirso, cit., 188f., recall the times (since the first government that was sworn in by the restored Monarchy) ‘*cuando ser opositor era ser de izquierdas y catalanista*’; J.L. De la Granja, J. Beramendi and P. Anguera, cit., 214f., speak of a ‘*Cataluña de izquierdas*’ since the constitutional debate in the ‘70s and the construction of the Catalan Statute.

⁵⁰ L. Mayor Ortega, *El ascenso de Vox habla catalán*, La Vanguardia, 18 February 2019; see E. Ucelay-Da Cal, cit., 276f.

⁵¹ G. Tortella, cit., 472f.; A. Jutgar, cit., 533f.; J. E. Ruiz-Domènec, cit., 229f.; see also M. Mateu Vilaseca, *El Parlament de Catalunya, la representació d'un poble millenari*, 13 *Revista de Dret Històric Català* 177-187 (2014).

⁵² As it appears from the 10 November 2019 elections, whilst in Barcelona the Socialists (PSOE) prevailed on the nationalist party ERC (*Esquerra Republicana de Catalunya*) albeit with a 20.000 vote margin (0.7%, 8 to 7 seats) the opposite is true for the other provinces. In Girona ERC thrashed PSOE (25.84% to 14.81%) battling with *Junts per Catalunya* (a more moderate list: 24.78%) as the most

In the next paragraphs, the three stages on which the Catalan claim develops will be dealt with to highlight the squandering of legitimacy resources that has once again hit Spain's political-constitutional system.

3. Catalunya's independence today: a dialogue of the deaf

Against the backdrop of the Western economic-financial crisis, early protagonists of a renewed, somehow unexpected episode⁵³ of the Catalan saga were the Prime Minister Mariano Rajoy (*Partido Popular*) the President of the Government (*Generalitat*) Artur Mas, leader of the moderate pro-independence force 'Convergence and Union' (*Convergència i Unió*) and the *Tribunal Constitucional* (TC)⁵⁴. The failure to reach an agreement on *Cataluña* fiscal-budgetary autonomy⁵⁵ led to the awakening of several pro-independence civic movements⁵⁶; the 2012 celebration of the *Cataluña*-day⁵⁷; orchestrated by a newly assembled pro-independence civic organisation (*Assemblea Nacional Catalana*) gave further impulse to the Catalan ambitions⁵⁸. Mas worked to anticipate elections on 25 September 2012, when he openly presented the question of autonomy in terms of a 'transition

voted list (both obtain 2 seats). Other nationalist lists perform well, too: *Candidatura d'Unitat Popular – Per la Ruptura* (more radical) 8.9%; *En Comú Podem–Guanyem el Canvi* (a leftist coalition for *Cataluña*) 9.48%. In Lleida, ERC largely doubles PSOE (31.46% v 14.44%) *Junts per Catalunya* coming second by a comfortable margin (22.59%). Only in Tarragona PSOE manages to be the second most voted list (19.1%) while ERC comes first (25.64%) and *Junts* third (13.35%).

⁵³ Mas in 2008 declared independence to be a 'rusty and out-of-fashion concept' (*'un concepto oxidado y pasado de moda'*). See R. Cotarelo, *La República Catalana* (2016), 148.

⁵⁴ For a detailed account of the events as occurred in those years, see G. Ferrajuolo, *La via catalana. Vicende dello Stato plurinazionale spagnolo* 18 *Federalismi.it* 1-40 (2013); cfr. the literature cited thereafter.

⁵⁵ J. Trigo Portela, *El año de las decisiones discutidas*, in O. Amat et al., *La cuestión catalana, hoy* (2013) 133-139.

⁵⁶ An account of the various social groups participating in the manifestation features in M. Candel and S. López Arnal, *Derechos torcidos. Conversaciones sobre el derecho a decidir, la soberanía, la libre determinación y la España federal* (2017) at 29.

⁵⁷ See J. Pi I Bofarull, *Cataluña para marcianos* (2018), 358-364.

⁵⁸ R. Cotarelo, cit, p. 153.

process'⁵⁹ (*Procès*) toward the 'building-up of State-like structures'⁶⁰. Pro-independence forces secured a majority in the Catalan Parliament (*Parlament*)⁶¹ and passed a Resolution on the 'Sovereignty of the Catalan People and their right to decide'⁶² that the Government submitted for annulment to the TC⁶³.

That judgment marked the battlefield of a political game, harsh but still feasible, both parts negotiating under a mutual extreme threat⁶⁴: the claim for independence, on one side, and the legitimate use of force against rebellion, on the other⁶⁵. These two extremes stood to persuade the negotiators to make mutual concessions. Therefore, if one wishes to borrow the Hirschman's categories that Weiler has famously deployed to explain Europe's *transformation*, she may say that the Catalan *Exit* was an only abstract possibility that concretely worked to strengthen the reciprocal *Voice* options⁶⁶.

But, absent any improvement on the diplomatic side, Mas took the issue a step ahead: he signed an *Order* calling for 'public consultations about *Cataluña's* future'⁶⁷ relying on a *Ley de*

⁵⁹ Which is in itself a slippery concept: see E. Ucelay-Da Cal, *La transición como concepto en la ciencia política y la historia: Un juego de palabras*, in A. Reig Tapia, J. Sánchez Cervelló (eds.), *Transiciones en el mundo contemporáneo* (2016), 17-54.

⁶⁰ *Mas pone rumbo a la autodeterminación*, Editorial, El País-Cataluña, 26 September 2012; see also P.A. Navarro, *La cuestión catalana le estalla a Rajoy: Mas adelanta los comicios al 25 de noviembre y anuncia referéndum independentista*, 987 El Siglo de Europa 16-18 (2012).

⁶¹ A. Barrio López, J. Rodríguez Teruel, 'Pour quelles raisons les partis politiques en Catalogne se sont-ils radicalisés ? Le système des partis et la montée du souverainisme (1999-2012)', 40 *Pôle Sud* 99-120 (2014).

⁶² Resolution 5X of 23 January 2013 containing the *Declaración de Soberanía y del derecho a decidir del Pueblo de Cataluña*. See F. Rubio Llorente, *Un referendun para Cataluña*, El País, 11 February 2003.

⁶³ For an account of the Catalan institutional setting, see M. Barceló i Serramalera, J. Vintró i Castells (eds.), *Derecho público de Cataluña* (2008) at 269-426.

⁶⁴ E. Roig i Molés, *Proces sobiranista i Tribunal Constitucional. Anàlisi d'un impacte recíproc*, 54 *Revista Catalana de Dret Públic* 24-61 (2017).

⁶⁵ Judgment 42/2014 – *infra*.

⁶⁶ J.H.H. Weiler, *The Transformation of Europe*, 100:8 *Yale Law Journal*, 2403-2483 (1991); the reference is A.O. Hirschman, *Exit, Voice, and Loyalty* (1970) at 3-4, 19-20, *passim*.

⁶⁷ Decreto de Convocatoria de la Consulta sobre el futuro político de Cataluña, n. 129/2014.

Consultas adopted *ad hoc* by the *Parlament*⁶⁸. This was a political act of some relevance, although both the title and the content of the acts denied the *referendum*-like nature of those consultations; however, Madrid saw it as a challenge⁶⁹ and resorted again to the *Tribunal* that suspended and partially annulled the *Ley*, the *Order* concerned turning inapplicable⁷⁰. The conflict rapidly intensified⁷¹; Barcelona's answer was the celebration of a huge political manifestation on 9 November 2014⁷². A new list 'Together for the Yes' (*Junts pel Si*, whose confirmed objective was the Catalan independence) asked and obtained new elections, which it won; once entered the *Parlament*, it formed a coalition with another pro-independence list (*Candidatura d'Unitat Popular*, 'Popular Unity Candidacy') to secure absolute majority⁷³.

Negotiations on fiscal and budgetary issues gradually yielded to arguments speculating on concepts such as people's identity, right to self-determination and the like, the competing claims gradually turning *non-dialogable*. Notably, the Government refused to deal with such claims and denied political relevance to the Catalan arguments yet put forward with undeniable gravity – as a fully-fledged independence process was being set in motion⁷⁴.

Mas was prompted to leave his presidential office; his successor Carles Puigdemont soon abandoned his predecessor's 'moderate' approach to promulgate a *Ley* expressly calling for a *referendum* on 1 October 2017⁷⁵. The objective was unequivocal: to let Catalans decide whether to turn *Cataluña* an 'independent

⁶⁸ *Ley 10/2014, de 26 de septiembre, de consultas populares no referendarias y otras formas de participación ciudadana*. See *Masivo apoyo para la consulta*, Editorial La Vanguardia, 20 September 2014.

⁶⁹ M. Iceta, *¿Y ahora qué?*, *El País*, 23 September 2014.

⁷⁰ Á.-L. Alonso de Antonio, *Análisis constitucional de la Ley catalana de consultas populares no referendarias y otras formas de participación ciudadana* (2015) at 15.

⁷¹ F. de Carreras Serra, *La astucia como valor jurídico*, *El País*, 29 October 2014; cfr. Id., *La escandalosa impunidad de Mas*, Editorial ABC, 1 November 2014.

⁷² El '9-N': see S. Gordillo, *Votar el 9-N es lo responsable*, *El Periódico*, 15 September 2014; E. Marín, *El 9-N ya ha ganado*, *El Periódico*, 6 November 2014; V. Gutiérrez Calvo, *La inaceptable vía de hecho*, *El País*, 28 October 2014.

⁷³ After the General Prosecutor (*Fiscalía General*) announced an enquiry on the Catalan independence process, Mas replied that it was going to occur in 18 months and, in that respect, the elections of 27 September 2015 had a 'plebiscitary character'. See C. Gil del Olmo, in *El País*, 14 January 2015.

⁷⁴ J. Ramoneda, *La negació de la realitat*, *Ara*, 28 November 2015.

⁷⁵ *Ley 19/2017 del Referéndum de autodeterminación*, 6 September 2017.

republican State'⁷⁶. Against that *Ley*, the Government brought another successful constitutional action; yet Puigdemont, in a speech at the National Council of the Catalan European Democratic Party⁷⁷, announced that in any case he was going to proceed with the organization and celebration of the *referendum* according to the *Ley* just suspended. That *Ley* – he affirmed – ‘protects rights of peoples such as self-determination’ and ‘cannot be buried by any de-legitimised Constitutional Court associated with the Government in this sort of conspiracy’⁷⁸.

This overt rupture exposed the lack of mutual political recognition and displayed tensions within the *Parlament* itself, leading the pro-independence majority to audacious interpretations of parliamentary rules of procedure to have the acts concerned quickly approved⁷⁹. Open conflict became unavoidable. The Government kept bringing successful actions before the *Tribunal Constitucional*, but this obviously did not persuade Puigdemont and his supporters to step back; rather it undermined the independence of the judges in the eyes of the Catalans leaders and people themselves.

⁷⁶ That *Ley* was included in a package of ‘*leyes de desconexión*’ (laws of disconnection) that epitomized the rupture between Cataluña and Spain while setting the bases for the legal transition towards an independent Catalan State. See F.M. Caamaño Domínguez, *Del Estatut a las leyes de desconexión: el dedo que escribe las tablas de la ley*, in X.M. Rivera Otero, J.M. Pereira and N. Lagares Díez (eds.) *Cataluña en proceso: las elecciones autonómicas de 2015* (2017), 17-33, and A. Torres Gutiérrez, *La larga marcha hacia la independencia en Cataluña: declaración de inicio del proceso político, leyes de desconexión y jurisprudencia del Tribunal Constitucional*, 36 *Civitas Europa* 227-240 (2016).

⁷⁷ On 9 September 2016: www.deia.eus [21 November 2018].

⁷⁸ In Spanish, from www.abc.es [22 November 2018]: “*La Ley catalana del Referéndum «sigue vigente», pese a haber sido suspendida por el Tribunal Constitucional, porque ampara «derechos de los pueblos como es el de autodeterminación, y este último se ampara en los derechos humanos». Entonces, esa ley «no puede ser tumbada por ningún Tribunal Constitucional deslegitimado y conchabado con el Gobierno del Estado».*”

⁷⁹ Parties that voted against it left the *Parliament* to protest against the infringement of their political rights, the *Tribunal* being addressed *en amparo* (Case 10/2018). See J. de Miguel Bárcena, *El proceso soberanista ante el Tribunal Constitucional*, 113 *Revista española de Derecho constitucional* 133-166 (2018) at 152-153 and J.C. Nieto Jiménez, *Los derechos de las minorías parlamentarias en el procedimiento legislativo: análisis del ‘ius in officium’ en la tramitación de las ‘leyes de desconexión*, 67-1 *Estudios de Deusto* 293-314 (2019).

The '1-O referendum' took place on the established date. As predictable, it saw an overwhelming majority of 'Yes' and left a major trail of quarrels on the veracity of the results as announced by the Catalan authorities⁸⁰. The reaction from Madrid was not to be waited for long: policemen and armed forces were sent to stop what was held a 'crime'. Footages of the *Guardia Civil* acting against the voters, yet causing no cruel events, instantly spread out all over the world⁸¹.

On 3 October 2017, under increasing pressure from both institutional officials and the general public to intervene in a controversy which had become ungovernable, the King took over to formulate what looked like the ultimate position of the Spanish State⁸².

4. The speech of King Felipe VI: an autarchic re-assessment of national sovereignty

Before analysing the King's speech, it is fit to briefly recall the constitutional framework in which the Spanish Constitution locates the Crown.

Being Spain a parliamentary monarchy, powers of political directions are embedded in the Parliament-Government circuit⁸³. According to Art. 56 Const., the King is 'Head of the State and symbol of its unity and permanence; he arbitrates and moderates the regular functioning of the institutions'⁸⁴. Under Art. 56.3 and Art. 64.1, all his acts are invalid unless provided with the counter-

⁸⁰ The Catalan authorities aired the following data: 90% 'Yes' on 42% of voters, 2,2millions https://elpais.com/ccaa/2017/10/02/Cataluña/150689-8063_586836.html [22 November 2018].

⁸¹ See <http://www.catalannews.com/news/tag/Guardia%20Civil> [22 November 2018] for various contributions.

⁸² See https://elpais.com/politica/2017/10/03/actualidad/15070-58161_929296.html [22 November 2018] for the chronicles of those days.

⁸³ G. de Vergottini, *Diritto costituzionale comparato*, I (IX ed., 2014) at 545; M. Herrero de Miñón, *Las funciones interconstitucionales del jefe del Estado parlamentario*, 110 Rev. española de Derecho constitucional 13-42 (2017) at 38f.

⁸⁴ P. Gonzales-Trevijano, *Art. 56*, in P. Perez Tremps, A. Saiz Arnaiz (eds.) *Comentario a la Constitución Española – 40º Aniversario 1978-2018*, I (2018) 981-992; E. González Hernández, F.J. Terrasa Ortuño, *El régimen de responsabilidad del Jefe del Estado en la Constitución española de 1978*, in A. Villanueva Turnes (ed.) 40 años de monarquía parlamentaria (2019) 65-86.

signature (*refrendo*) of the President of the Cabinet or, in case, of the competent Ministers⁸⁵.

Therefore, it can be held that the Crown's authority flows along two different channels and leans on two sources of legitimacy, both pointing to the people's sovereignty as 'the source of all legitimate powers' under Art. 1.2 Cost⁸⁶.

As arbiter and moderator amidst institutions, the King acts as a magistrate to ensure compliance with constitutional rules and practices in the inter-institutional game. In this light, he acts as Head of the 'State-apparatus' (or 'State-government'): the complex of organs and bodies exercising power under the Constitution's framework⁸⁷. Accordingly, the legitimacy of his action rests on the persuasive value of the rational arguments supporting his interpretation of the constitutional law ruling the interaction of such organs and bodies⁸⁸.

As 'symbol of its unity and permanence', the King directly communicates with the Spanish community⁸⁹: his Crown allows him to be the interpreter of the most profound voices of the Spanish society⁹⁰. In this case, he speaks to Spaniards as Head of

⁸⁵ C. Fernández-Miranda Campoamor, *La irresponsabilidad del Rey: Evolución histórica y regulación actual*, 44 *Revista de Derecho Político* 225-256 (1998) at 244f.; E. González Hernández, *El refrendo de los actos del Rey: evolución histórica*, in *La monarquía parlamentaria (título II de la Constitución)* (Congreso de los Diputados, 2011) 689-714; I. Torres Muro, *Refrendo y Monarquía*, 87 *Revista Española de Derecho Constitucional* 43-70(2009) at 57. For a comparison, see R. Blackburn, *Monarchy and the personal prerogatives*, 3 *Public Law* 546-563 (2004); M. Cavino, *L'irresponsabilità del Capo dello Stato nelle esperienze italiana (1948-2008) e francese (1958-2008)* (2008) at 59f. and A. Sperti, *Responsabilità presidenziale e ruolo costituzionale del Capo dello Stato* (2012), 30-33.

⁸⁶ M. Aragón Reyes, *Dos estudios sobre la Monarquía parlamentaria en la Constitución Española* (1990), 62.

⁸⁷ F.J. Díaz Revorio, *La monarquía parlamentaria, entre la historia y la Constitución*, 20 *Pensamiento Constitucional* 65-106 (2015) at 87f.

⁸⁸ For useful comparison, cfr. G. Scaccia, *Espansione di ruolo del Presidente della Repubblica e funzione di rappresentanza dell'unità nazionale*, 3 *Lo Stato* 101-115 (2014); M. Luciani, *La gabbia del Presidente*, 2 *Rivista AIC* 1-10 (2013).

⁸⁹ As a consequence of his prestige and moral authority: J.L. Cascajo Castro, *Materiales para un estudio de la figura del Jefe de Estado en el ordenamiento español*, 5 *Anuario de derecho constitucional y parlamentario* 44-45 (1993).

⁹⁰ Cfr. Y. Gómez Sánchez, *Art. 64* in P. Perez Tremps, A. Saiz Arnaiz (eds.) *Comentario a la Constitución española*, cit., 1061-1071.

the State-community⁹¹ and his actions are measured against a social benchmark for legitimacy – a feeling of ‘acceptable justice’ that they generate within the overall society⁹².

No need to underline that such channels must be well-balanced⁹³. If she did nothing more than strictly applying rules, the Crown would be nothing more than a pompous duplicate of the jurisdiction; if she did everything he wished on the ground of her majestic tutorial function toward ‘her’ people, she would act as an absolute monarch, i.e. in breach of the Constitution⁹⁴. Her powers are substantively limited by constitutional rules, and her responsibilities are, too, as a general discharge is provided by the *refrendo*. Consequently, she has narrow margins of manoeuvre, for all her acts need the Government’s assent⁹⁵; she may not overtly counter the majority’s position, though her stances can in no case be seen as a mere reiteration of the Government’s one⁹⁶.

The King’s *exordium* is blunt as for addressing all Spaniards directly, given the extreme gravity of the circumstances:

Estamos viviendo momentos muy graves para nuestra vida democrática. Y en estas circunstancias, quiero dirigirme directamente a todos los españoles.

⁹¹ This distinction is fully elaborated in V. Crisafulli, *La sovranità popolare nella Costituzione italiana*, in Id., *Stato popolo governo. Illusioni e delusioni costituzionali* (1985), 99.

⁹² A parallel with the idea of a Constitution as normative, historical and sociological concept can be drawn: M. García Pelayo, *Derecho constitucional comparado* (II ed. 2002), 33.

⁹³ J.J. Solozábal Echavarría, *La problemática constitucional de la formación del Gobierno y la intervención del monarca en nuestro régimen parlamentario*, 109 *Revista Española de Derecho Constitucional* 35-61 (2017).

⁹⁴ J.A. Sánchez Moreno, *El Parlamento en su encrucijada: Schmitt versus Kelsen, o la reivindicación del valor de la democracia*, 162 *Revista de Estudios Políticos* (2013) 113-148.

⁹⁵ J. M. Vera Santos, *Art. 62 y Art. 63*, in P. Perez Tremps, A. Saiz Arnaiz (eds.), *Comentario a la Constitución española*, cit., 981-992.

⁹⁶ In fact, notably, a year later, it was aired in the press that it was the King to urge the Prime Minister to let him make the speech. See P. Santos and J. Ruiz Sierra, *El Rey pronunció el discurso del 3-O pese a las dudas del Gobierno*, *El Periódico*, 3 October 2018; R. Piña, *3-O: El día que el Rey se impuso a Rajoy para serenar al país*, *El Mundo*, 3 October 2018; *Felipe VI fue por libre en el discurso del 3-O (Rajoy no pintó nada)*, *elnacional.cat*, 30 September 2018, and *Rajoy no quería que Felipe VI hablara el 3-O porque le debilitaría: así se gestó el discurso del rey sobre Cataluña*, in *lasexta.com*, 3 October 2018 [all: 22 February 2019]

It is not by chance that the King begins by an openly emotional statement: he wishes to present himself as speaking for the overall Spanish people, light of the symbolic force of his prerogative. Straight afterwards, he expresses his stance: the Catalan claim is illegal and in betrayal of the institutions of the State, and this judgmental attitude – in his own words – stems ‘from the events’ themselves, as ‘witnessed by all Spaniards’. Therefore, it’s clear that King’s interpretation of the relevant constitutional norms is not backed by legal arguments; it rather follows what looks like his ‘pre-comprehension’ of the facts, on which no discussion is allowed⁹⁷.

Evidence in support of this reconstruction is abundant in the speech. While calling all Spaniards as witnesses, he tends to present events in an ‘objective’ fashion, as to let facts ‘speak for themselves’ by virtue of their alleged self-evident nature⁹⁸. Notably, amid the institutions of the State the King includes the ‘historical institutions of *Cataluña*’: the *de-legitimation* of legitimate leaders as separated from the institutions they run comes close to a ‘replacement’ of who ‘failed’ to represent their community – a ‘classic’ of representation in absolute governments⁹⁹. Furthermore, evocations of a link between the Crown and the Spaniards are numerous, including a final, highly-emotional statement addressing the Catalans – which sound as another replacement addressing what Catalan leaders allegedly failed to do¹⁰⁰. In this line, the King accounts for the twofold infamous label attached to the Catalan claim; but his account has little argumentative background, for it sound more like a reprimand:

Han pretendido quebrar la unidad de España y la soberanía nacional, que es el derecho de todos los españoles a decidir democráticamente su vida en común.

⁹⁷ See S. Borutti, *Models and Interpretations in Human Sciences*, in D. Batens and J.-P. van Bendedem (eds.), *Theory and Experiment: Recent Insights and New Perspectives on their Relation* (2002), 229.

⁹⁸ P. Grossi, *L'ordine giuridico medievale* (1995; III ed. 2017), 56.

⁹⁹ H. Hofmann, *Repräsentation. Studien zur Wort-und Begriffsgeschichte von der Antike bis ins 19. Jahrhundert* (1974) ed.it. *Rappresentanza-rappresentazione: parola e concetto dall'antichità all'Ottocento* (2003), 206.

¹⁰⁰ E.H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Theology* (1963 – II ed. 2016), 87.

The tie between the sovereignty argument and the claim to represent national unity appears in a gleaming fashion; however, it is hard to deny that the King's position, as for the arguments brought to debate, is a tautology, due to the biased approach he endorses. What he takes as a fact – that the Catalans aimed to destroy (*quebrar*) the unity of the State and the national sovereignty – is precisely what the Catalans strive to question: for they argued that they, too, are a 'sovereign' people, and/or that they, too, have the 'right to decide' for their own destiny. In this vein, the second part of the sentence displays a slight, unintentional irony: if national sovereignty is the right of all Spaniards to *democratically decide* on their own life *in common*, they cannot decide otherwise than to have a life in common – even if they were to decide democratically. Therefore, no procedure, even the most *democratic* one, may question the State's unity as protected by the Crown's sovereign prerogative.

This assumption, yet backed by a poor legal argumentative support, simply buries any debate on the independence issue and cast a definitive shadow on the actual points of political conflict, which eventually fallen into oblivion as *non-dialogable* nationalist claims occupy the whole table.

5. National sovereignty and the 'right to decide' in the case-law of the *Tribunal Constitucional*

The *TC*'s case-law aims to furtherly elaborate on the rules that have been left implicit in the King's speech¹⁰¹. Yet, overwhelmed by the fast-mounting political sensitivity of the *affaire*, constitutional judges have hardly been able to embed into coherent, well-defined borders these *per se* slippery concepts¹⁰².

After the Catalan Statute *affaire* settled years prior¹⁰³, the leading case on the issue is No.42/2014¹⁰⁴ on the abovementioned

¹⁰¹ J.M. Castellà Andreu, *Tribunal Constitucional y proceso secesionista catalán: respuestas jurídico-constitucionales a un conflicto político-constitucional*, 37 *Teoría y Realidad Constitucional* 561-591 (2016).

¹⁰² J. J. Solozábal Echavarría, *La autodeterminación y el lenguaje de los derechos* 46 *Revista Vasca de la Cultura y de las Ideas* 216-230 (2014).

¹⁰³ The judgment (Case 31/2010) was widely criticised from both sides (including in the *votos particulares* of distinct constitutional judges): J. Pi, *Los artículos declarados nulos, uno a uno*, *La Vanguardia*, 28 June 2010. C. Vidal,

*Parlament's Resolution of 23 January 2013. It dwells upon three points: the admissibility of the action, the concept of sovereignty and the right to decide*¹⁰⁵.

Reescribir el Estatuto de Cataluña, La Razón, 11 October 2010, affirmed that the Tribunal had re-written the Statute, i.e. had made it say what the Tribunal itself aimed to say. As for the Italian scholarship, R. Ibrido, *Il rebus dell'interpretazione conforme alla luce della recente sentenza sullo Statuto catalano*, 1 *Diritto pubblico comparato ed europeo* 54f (2011). assumes that the judges had pushed to the edge the consistent interpretation canon despite the high political sensitivity of the matter. The Spanish literature on the topic is immense: see L. Díez Bueso, *Bibliografía sobre el Estatuto de Autonomía de Cataluña* 13 *Revista General de Derecho Constitucional* (2011 – entirely devoted to the Catalan Statute after the judgment, edited by J.J. Solozábal Echevarría and C. Aguado Renedo) at 12. The Review *Teoría y Realidad Constitucional* also published a special number (27/2011) edited by R. Blanco Valdés, R. Canosa Usera, F. de Carreras Serra, M. Carrillo López, J. Corcuera Atienza, J. García Roca, L. Parejo Alonso – cfr. the *Repertorio Bibliográfico* edited by E. Gómez Corona, at 519-544. The same did the *Revista de Estudios Autonòmics i Federals* (n. 12/2011) while the *Revista de Estudios Políticos* dedicated n. 151/2011 to 'El Estado Autonómico en cuestión. La organización territorial del Estado a la luz de las recientes reformas estatutarias (2006-2010)' edited by A. López Castillo and J. Tajadura Tejada. Scholars from other disciplines also intervened: see *ex multis* M. Yzquierdo Tolsada, *¿Qué fue del artículo 149-1.8.ª de la Constitución? Diálogo entre tres civilistas a propósito de la Sentencia del Tribunal Constitucional sobre el Estatuto de Autonomía de Cataluña*, *Diario la Ley* 7649/2011, and A. Zabalza Martí, *Una Nota sobre la Sentencia del Tribunal Constitucional sobre el Estatuto de Autonomía de Cataluña, con referencia a los artículos 206.3 y 206.5*, 95 *Revista Española de Derecho constitucional* 407-433 (2012). On the political consequences of that judgment, see C. Viver Pi-Sunyer, *La voluntad de transformación del Estatuto de Autonomía de Cataluña*, in *Jornadas de Fundación del Estado Autonómico. La autonomía aragonesa treinta años después*, 2012, 1-16, 6, and G. Martín Martín, *Sobre las consecuencias jurídicas de la Sentencia 31/2010, del 28 de junio, del Tribunal Constitucional sobre el Estatuto de Cataluña*, 81 *Revista de Derecho Político* 275-288 (2011). See also C. Viver Pi-Sunyer, *Los efectos vinculantes de las sentencias del Tribunal Constitucional sobre el legislador: ¿puede éste reiterar preceptos legales que previamente han sido declarados inconstitucionales?*, 97 *Revista española de Derecho constitucional* 13-44 (2013) and the interview of the then constitutional judge Manuel Aragón Reyes with C.E. Cué, *El grave error fue el Estatuto de Cataluña, no nuestra sentencia*, *El País*, 3 July 2014.

¹⁰⁴ Case 42/2014, 25 March 2014.

¹⁰⁵ V. Ferreres Comella, *Cataluña y el derecho a decidir*, 37 *Teoría y realidad constitucional* 461-477 (2016). Admissibility is as crucial as the merits, for it draws the conceptual framework where the relevant arguments unfold. Under Art. 161.2 Const. the Government appeals to the Tribunal against provisions and resolutions adopted by the organs and bodies of the *Comunidades Autónomas*; the appeal normally entails the automatic suspension of the

As for the first point, in light of established case-law, not all resolutions can be appealed before the TC, but only those meeting both the following conditions: I) being not procedural but definitive; II) producing legal effects¹⁰⁶. Whether the challenged Resolution fulfilled both these conditions was questionable. As for the condition *sub I*) it was meant to be definitive; but, as for the one *sub II*) it produced no immediate binding effect. However, in the TC's view, to associate the 'Catalan people' with 'sovereignty' has an impact on the theoretical elaboration of the latter¹⁰⁷. Relying on the difference between *legal* and *binding*¹⁰⁸, the TC held that linking 'sovereignty' with the 'Catalan people' does entail legal (yet not binding) effects; therefore, the case was held admissible¹⁰⁹. It is worth to note that such reading refers to a *plural* concept of law¹¹⁰: in short, the TC understands that law is made up of multiple arguments stemming from diverse sources¹¹¹. Such a construction coheres with a plural, cooperative, if not forcefully

contested acts until the Tribunal decides to withdraw it or delivers the final judgment.

¹⁰⁶ Order 134/2004, *Fundamento Jurídico* (FJ) 4-7-8; see R. Ibrido, *Il "derecho a decidir" e il tabù della sovranità catalana*, 14 *Federalismi.it* 4-5 (2014).

¹⁰⁷ M. Della Morte, *Derecho a decidir, representación política y participación ciudadana: un enfoque constitucional* in *El derecho a decidir. Un dialogo ítalo-catalán* (2014), 13-31.

¹⁰⁸ Case 42/2014, FJ 2.

¹⁰⁹ E. Fossas Espadaler, *Interpretar la política. Comentario a la STC 42/2014, de 25 de marzo, sobre la declaración de soberanía y el derecho a decidir del pueblo de Cataluña*, 101 *Revista española de Derecho constitucional* 273-300 (2014) at 282.

¹¹⁰ *Plurinationalism* can be regarded as an emerging stream of federal studies: see M. Caminal Badia, *El federalismo pluralista: del federalismo nacional al federalismo plurinacional* (2002) and R. Máiz Suárez, *Federalismo plurinacional: una teoría política normativa*, 3 *Revista d'Estudis Autònoms i Federals* 43-85 (2006); references in G. Ferrajuolo, *La via catalana*, cit., 35f. and fn.; see also F. Requejo Coll, M. Caminal i Badia (eds.) *Liberalisme polític i democràcies plurinacionals* (2009); by the same authors, in English, *Political Liberalism and Plurinational Democracies* (2011); lately, F. Requejo Coll, *Plurinational democracies, federalism and secession. A political theory approach*, 54 *Revista catalana de dret públic* 62-80 (2017). On the typical pluralism of law see M. Croce, *All Law is Plural. Legal Pluralism and the Distinctiveness of Law*, 65 *Journal of Legal Pluralism* 1-30 (2012).

¹¹¹ More extensively, N. McCormick, *Institutions of Law: An Essay in Legal Theory* (2007) Part I. An account of the links between this concept of sovereignty and the Catalan *affaire* is X. Eceizabarrena, *La necesaria relectura del concepto de soberanía*, 90 *Cuadernos de Deusto* 91-98 (2017); cfr. C.K. Connolly, *Independence in Europe: Secession, Sovereignty, and the European Union*, 24 *Duke Journal of Comparative & International Law* 51-105 (2013).

federal, concept of sovereignty¹¹²; it is in any event inconsistent with a monolithic one¹¹³.

The same approach could have affected the reading of national sovereignty and of the right to decide. In such case, the declaration holding the Catalan people 'sovereign' would have been found 'legally relevant' and yet in compliance with the Constitution for lack of binding effects¹¹⁴. Nonetheless, the TC annulled it for incompatibility with Art. 1.2 (recognising that sovereignty only lies in the Spanish people, from which all powers emanate) and Art. 2¹¹⁵ (claiming 'the indissoluble unity of the Spanish Nation, common and indivisible homeland of all Spaniards')¹¹⁶. As it stands, this assumption rather implies a monolithic conception of sovereignty; no further reason is provided to account for the abandonment of the non-monolithical concept of sovereignty previously endorsed¹¹⁷.

¹¹² N. Walker, *Late Sovereignty in the European Union*, in N. Walker (ed.) *Sovereignty in Transition* (2003) 3-32; see Id., *Sovereignty Frames and Sovereignty Claims*, in University of Edinburgh School of Law Working Paper 14 (2013) 1-26. On 'cooperative sovereignty' see I. Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, 15 *Columbia Journal of European Law* 349-407 (2009); a critique in G. della Cananea, *Is Multilevel Constitutionalism really "Multilevel"?*, 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 283-317 (2010). More generally, on the cooperative constitutional framework, R. Bifulco, *La cooperazione nello Stato unitario composto* (1995).

¹¹³ M. Poiares Maduro, *The Three Claims of Constitutional Pluralism*, in M. Avbelj and J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (2012) 67-84.

¹¹⁴ J. Corcuera, *Soberanía y autonomía. Los límites del derecho a decidir*, 86 *Revista Española de Derecho constitucional* 303-341 (2009).

¹¹⁵ J.A. del Real Alcalá, *Derecho a la autonomía del artículo 2 de la Constitución, autodeterminación y secesión*, in J.O. Araujo (ed.) *El futuro territorial del Estado Español* (2013) 197-220, at 203, underlines the 'ductility' of Art. 2 in many respects.

¹¹⁶ The *Tribunal* considered such statement as recognising, by virtue of a constituent-like power, the Catalan sovereignty – which looks contradictory with his assumed non-sovereign nature: E. Fossas Espadaler, *Interpretar la política*, cit., at 285.

¹¹⁷ The *Tribunal* quoted the Judgment 103/2008 (F.J.4) annulling a Basque Law (*Ley* 9/2008). It aimed to establish new relationships between the Basque Country (*Euskadi*) and Spain for it entailed a challenge to the established constitutional order (art. 2 Const.); although the challenged Resolution is 'only' a political declaration. In the same vein, it quotes the Canada Supreme Court (*Renvoi relatif à la sécession du Québec* [1998] 2 RCS 217, 20 June 1998) that was an opinion under request of the Federal Government (not a judgment) and

Eventually, the TC turned back again and declared the 'right to decide' compatible with the Constitution¹¹⁸. The judges resorted to a duty of 'consistent interpretation' to put that right within the appropriate constitutional pathways¹¹⁹ (a claim to sovereignty being excluded in *unilateral* terms)¹²⁰; the right to decide was legitimate as long as it resulted in a (mere) address to the Spanish Parliament (*Cortes Generales*, CG) that would be bound by 'a duty of constitutional loyalty' to 'consider' it¹²¹.

To recap: the judgment answered to the three points concerned – admissibility, sovereignty, right to decide – as follows: 1) the challenged resolution is a definitive act as it produces legal (though not binding) effects; 2) Catalan people's sovereignty is ruled out as sovereignty must be understood in a monolithic way; 3) the right to decide is compatible with the Constitution as long as it stays within the limits provided therein – *i.e.* resulting in a mere address to the CG.

However, set aside the dubious use of the consistent interpretation canon – duly criticised by some scholars¹²²– it appears that, conceptually, these assumptions hardly cohere in a single system.

The assumption *sub-1)* implies a pluralistic understanding of law entailing a non-monolithic, *quasi-federal* conception of sovereignty, pursuant to which powers are pooled among territory-based authorities endowed with some degree of political autonomy¹²³. Thus, as much as 1) enjoys a solid argumentative

declared unconstitutional the final act of secession without previous interlocution with the legitimate government (not the acts aiming to establish such interlocution). See X. Eceizabarrena, *Derecho de libre autodeterminación y derecho a decidir: nueva soberanía y derechos humanos en el siglo XXI*, 90 Cuadernos Deusto de Derechos Humanos 17-33 (2017).

¹¹⁸J. Vintrò i Castells, *El Tribunal Constitucional y el derecho a decidir de Cataluña: una reflexión sobre la STC de 25 marzo de 2014*, Blog de Revista Catalana de Dret Públic (2018).

¹¹⁹J. Tajadura Tejada, *La introducción del derecho a decidir en el ordenamiento jurídico español*, in *Instituciones de derecho parlamentario*, VIII - *La última jurisprudencia relativa al Parlamento*, Parlamento Vasco, 57-90 (2016).

¹²⁰F. de Carreras Serra, *El derecho a no decidir pero sí a salir del maldito embrollo*, 46-47 Cuadernos de álzate: Revista Vasca de la Cultura y de las ideas 99-110 (2013).

¹²¹Case 42/2014, FJ 4.

¹²²R. Ibido, *Il "derecho a decidir"*, cit., 7.

¹²³J.J. Solozábal Echavarría, *La autodeterminación y el lenguaje de los derechos*, cit.

background, 2) lacks it, for it supports a monolithic sovereignty at odds with 1).

As for 3), the right to decide obviously refers to self-determination¹²⁴— thus entailing political autonomy. As far as the TC is concerned, the exercise of such right cannot replace constitutional procedures but only prepare the ground for a political request to be addressed to the CG; such request would produce a ‘duty of loyalty’ as legal (non binding) effect.

Now, the alternative is twofold. If such duty is a merely political one, the assumption *sub* 3) would be consistent with 2) but not with 1): the process corresponding to a legitimate exercise of the right to decide would lack legal effects to the extent that it would have no impact on the constitutionally-compatible process, which alone leads to the ‘definitive’ act. Instead, if this duty of loyalty has legal effects, the right to decide meets 1) but violates 2) as resulting in legally-relevant activities challenging the CG’s monolithic sovereignty. Hence, if the right to decide generates no legal effect, according to 1) it would not be matter for the TC to decide; but if it does, it would contradict 2).

The conundrum reveals that the TC accepted to pay the price of inconsistent legal argumentation in the hope to prompt political leaders to further negotiations. Eventually, it was up to them to strike a balance between recognition of political autonomy and loyalty to the Constitution, as well as to seek an agreement on actual political conflicts. A passage of the judgment is adamant in this respect: the TC says that ‘the Constitution does not, and cannot, deal with all constitutional issues, particularly with those related to the legal *status* of a part of the State’ nor can ‘the Constitutional Court solve such problems’ that ‘must be solved by public powers through dialogue and cooperation’¹²⁵.

Nevertheless, as negotiations went nowhere, the Government decided to continue the jurisdictional path. Urged by such actions, the TC re-considered the right to decide to the detriment of the Catalan position.¹²⁶ This neatly emerges from the

¹²⁴ X. Eceizabarrena, *Derecho de libre autodeterminación y derecho a decidir*, cit., at 51. Cfr. M. Barcelò i Serramalera et al., *El derecho a decidir. Teoría y Práctica de un nuevo derecho* (2015) at 24.

¹²⁵ Case 42/2014, cit., FJ 5.

¹²⁶ J. De Miguel Bárcena, *El proceso soberanista ante el Tribunal Constitucional*, cit.

2015 judgments¹²⁷ on the *Ley de Consultas* and the consequent Order calling for public consultations on the *Cataluña's* future¹²⁸.

The TC was called to establish whether such acts provided for a *referendum* in breach, *inter alia*, of the State's exclusive competence laid down in Art. 149 Cost¹²⁹. It assumed that *consultas populares* as provided in the Spanish constitutional order can be divided into two categories: those having the character of a *referendum* and those lacking it¹³⁰. Then, it defined the requirements for a *consulta* to possess a *referendum*-like character: strictly referring to 'the people's opinions' and being organised 'by a public administration with due guarantees'¹³¹ the *consulta's* binding nature *vis-à-vis* the law-making competent bodies being held irrelevant in this respect¹³².

This obviously led to the rejection of the Catalan argument, which defended the legitimacy of the *Consulta* relying on the fact that it was non-binding¹³³. As the nuanced distinction between legal and binding effects elaborated in Case 42/2014 was abandoned, the State's exclusive competence on the overall *referendum* subject-matter could easily be maintained in light of the *Euskadi Case* doctrine¹³⁴. Finally, the way was paved to declare the *referendum*-like nature of the *Consulta* in light of 'objective criteria' and to annul the *Ley* concerned¹³⁵.

Solving the constitutional conundrum to the advantage of the Government entailed the suppression of the pluralist value attaching to the right to decide; yet on legal grounds that proved friable. The justification was political, and the TC made it very

¹²⁷ Cases 31-32/2015, 25 February 2015.

¹²⁸ Á. Alonso de Antonio, *Análisis constitucional de la Ley catalana de consultas populares*, cit., 123.

¹²⁹ Case 31/2015, FJ 2-3.

¹³⁰ *Ibid.*, FJ 5.

¹³¹ *Ibid.*, FJ 5, quoted from Case 103/2008, FJ 3.

¹³² See I. Villaverde Menéndez, *La sutil distinción entre consultar y referendar. A propósito de las sentencias del Tribunal Constitucional 31 y 32/2015*, 1-18 *Foro (Nueva época)* 425-442 (2015).

¹³³ J. Ridao Martín, *La oscilante doctrina del Tribunal Constitucional sobre la definición de las consultas populares por la vía de referéndum. Una revisión crítica a través de cuatro sentencias*, 63-1 *Revista Estudios de Deusto*, par. 2 (2015). See also F. Bilancia, *Il "derecho a decidir" catalano nel quadro della democrazia costituzionale*, 4 *Le Istituzioni del Federalismo* 985-997 (2014).

¹³⁴ Case 103/2008, 11 September, FJ 3.

¹³⁵ Case 31/2015, cit., FJ 8-10.

clear by a long quote from Case 42/2014¹³⁶ – the only quote from that judgment featuring thereby – reiterating the vigorous affirmation of the limits that a Court must respect when called on to disentangle such issues¹³⁷. Paradoxically, by that quote, the TC re-affirms the very same constitutional grounds for the right to decide that had virtually flattened one paragraph prior¹³⁸. If read in context, this looks like a ‘last call’ for political leaders to appropriately tackle the issue¹³⁹. A call that was issued in vain, as the events precipitated and criminal prosecution was carried out against the Catalan ‘rebels’.

6. Towards a conclusion. Identity-based, *non-dialogable* claims replacing reasonable arguments: a *lose-lose* deal

The overall picture of the events, as looked at from the threefold perspective hitherto elucidated, seems to match quite predictably the common patterns detected along the story of the Catalan claim.

In the middle of a failing negotiation, threatened by the raising Catalan claim, the Government hoped that a severe defence of constitutional orthodoxy would have stopped the *procès*; but its strategy failed and, crucially, squandered resources of political-constitutional legitimacy. In fact, by resorting to the TC to denounce what was labelled as an illegality, the Government forced the constitutional judges into a very uncomfortable position, as they felt they had no way out¹⁴⁰. In their view, to contradict the Government’s stance would have unleashed the *Cataluña*’s process of independence, which might have led to numerous similar claims threatening the integrity of Spain. Then, another approach prevailed, namely that it should not have been the task of a Court, yet of supreme dignity, to open the door to

¹³⁶ Case 31/2015, *cit.*, FJ 6 a).

¹³⁷ *Ibid.*, FJ 5.

¹³⁸ See T. Martines, *Governo parlamentare e ordinamento democratico* (1967) at 152.

¹³⁹ J. de Miguel Bárcena, *El proceso sobiranista*, *cit.*, 150; see S. Gambino, *Pretese sovranistiche della Catalogna e unità indissolubile della Nazione spagnola*, 3 *Diritto pubblico comparato ed europeo* 449-458 (2017).

¹⁴⁰ X. Antich, *Tres reflexiones sobre la Diada*, *La Vanguardia*, 15 September 2014, 21: ‘Se le pide al Tribunal que adopte una decisión que necesariamente es política y no jurídica. Es un error colosal... Insistimos en que el Constitucional no puede ser utilizado sistemáticamente como cuarta cámara...’.

what was perceived as a radical change in the constitutional *status* of the *Comunidades Autónomas* and of Spain as a whole¹⁴¹.

The TC initially sought to craft prudent solutions; but, failing to induce political leaders to successful dialogue, it found no better than shrinking the constitutional spaces for debate. However, this did not avoid the breakdown: and, although it tried not to, eventually it had to take a *political* stance – perhaps unavoidably, unfortunately for sure¹⁴². The price it paid, in terms of de-legitimation, was enormous¹⁴³: as the conflict exceeded the legal sphere, its judgments were openly repudiated and went regularly unaccomplished – not a negligible blow to its legitimacy and to the credibility of Spain's constitutional system¹⁴⁴. The successive fully-fledged denials of any form of right to self-determination of '*los pueblos de España*' were as severe as irrelevant, surpassed by the course of the events¹⁴⁵.

Contrarily to the Government's plans, the Catalan reluctance to 'surrender' caused a loophole in the Spanish constitutional order: a wound that only a supreme political level – the Head of State – could heal as a last resort of legitimacy. Nonetheless, the speech of the King was nothing more than the ultimate attempt to pursue the same strategy: to deny the Catalan claim *political* value, yet with poor *reasonable* argumentative background. It is worth noting that the King made no use of the legal reasoning put forward in the TC case-law: he preferred resorting to emotional arguments in light of the symbolic force of his prerogative. Perhaps, a deeper awareness of the political and

¹⁴¹ Yet, perhaps, legal, at least in its initial part: F. de Carreras Serra, interview at www.naciodigital.cat, 29 October 2013 [22 November 2018].

¹⁴² Several temporary measures (*medidas cautelares*) were taken *inaudita altera parte* against the pro-independence forces: *El Tribunal acorralla a Puigdemont y alivia al Gobierno*, *La Vanguardia*, 28 January 2018.

¹⁴³ G. Ferraiuolo, *Tribunal Constitucional y cuestión nacional catalana. El papel del juez constitucional español entre la teoría y la práctica*, in J. Cagiao y Conde and G. Ferraiuolo (eds.) *El encaje constitucional del derecho a decidir*, cit., 110-141, 122, ties it back to the Catalan Statute *affaire*. See J. Urías Martínez, *La peligrosa deriva del Tribunal Constitucional*, 110 *Éxodo* 20-26 (2011).

¹⁴⁴ M. Saralegui, *¿Puede solucionar el Tribunal Constitucional la crisis catalana?*, *Revista de Occidente* 27-40 (2018).

¹⁴⁵ See for instance Judgment 114/2017, 17 October 2017, on the *Ley Catalana de Referendum* 19/2017, FJ 2 b).

constitutional relevance of that claim¹⁴⁶ (as the TC repeatedly pointed out)¹⁴⁷ might have suggested the Crown a more inclusive approach.

What stands out is the replacement of rational arguments supporting each other's reasons on specific points with *identity-based* claims backed by *non-dialogable* arguments¹⁴⁸. Both claims resort to *incommunicative* narratives: the first clinging to the *mythical* origins of *Cataluña* and its enduring battle to be recognised as a nation, the second on the *venerable* concept of Spain's unitary sovereignty. Both are supported by few reasonable motives, as legal arguments look one-sided¹⁴⁹; both ill-conceal a troublesome political negotiation and well expose the mutual incapacity to carry it out successfully¹⁵⁰. All in all, this proves to be a *lose-lose* deal, one from which a way out must be sought as rapidly as possible to heal the wounds caused¹⁵¹.

¹⁴⁶ Á.-L. Alonso de Antonio, *cit.*, 52, reported that President Mas in a speech (20 December 2012) argued that 'the right to decide relates to sovereignty but to democracy first'.

¹⁴⁷ J. Ridao i Martin, *La juridificación del derecho a decidir en España*, 91 *Revista de Derecho político* 91-136 (2014); F. Spagnoli, *Il Tribunal Constitucional e la disputa sulla secessione della Catalogna*, 2 *Rivista AIC* 1-15 (2018) 6f.

¹⁴⁸ See I. Pardo Torregrosa with J. Cagiao y Conde, 'Cagiao, *El nacionalista siempre es el otro*, *La Vanguardia*, 22 October 2018; the same author detailed his position in J. Cagiao y Conde, *Micronacionalismos. ¿No seremos todos nacionalistas?* (2018).

¹⁴⁹ Which exasperated the tensions even among legal scholars: see M. Aragón Reyes, 'El desafío independentista en Cataluña: Comentario constitucional', 38 *Revista Electrónica de Estudios Internacionales* (2018) who qualifies as '*golpe de Estado institucional*' the 'disconnection process' culminating in the declaration of independence ratified by the *Parlament* on 27 October 2017 and annulled by the TC (Auto 144/2017); cfr. A. Mastromarino, *La dichiarazione di indipendenza della Catalogna*, 3 *Osservatorio AIC* 1-13 (2017) and B. Aláez Corral, *Constitucionalizar la secesión para armonizar la legalidad constitucional y el principio democrático en estados territorialmente descentralizados como España*, 22 *Revista d'estudis autonòmics i federals* 136-183 (2015).

¹⁵⁰ E. Albertí Rovira, *El conflicto de Cataluña como crisis constitucional*, 10 *Fundamentos* 301-341 (2019) speaks of (302f.) '*una crisis constitucional sin diagnóstico compartido*'.

¹⁵¹ C. Ruiz Rico-Ruiz, *Crisis territorial en Catalunya y apariencia jurídica: ¿Pos-verdad o pos-constitucionalismo?*, XVI Congreso de la Asociación de Constitucionalistas de España (2018).

What is coming next?¹⁵² The situation is utterly intricate¹⁵³. Catalan political leaders are being prosecuted and risk up to 20 years' imprisonment for rebellion and other minor crimes; it would be politically unfeasible – and, all things apart, plainly illegal – to stop prosecution in course without legal grounds¹⁵⁴. Yet, one may ask whether it is ethically acceptable that in a XXI century democratic State political leaders could face a 20 year-long sentence for *political* reasons. Be it as it may, it seems that responsibility for this situation – terribly *divisive* for the Spanish society – does not leave the Crown exempted either, despite the King being unaccountable under Art. 56 Cost¹⁵⁵.

The campaign for the 28 April 2019 general elections in Spain was infused with emphatic appeals to the 'unity of Spain' as a fundamental political issue, and the equally loud promises to trigger Art. 155 Cost.¹⁵⁶ against a neo-appointed *Govern* did not

¹⁵² It will not be attempted here to detail the reaction of the Spanish Government and the follow-up of the Catalan elections (21 December 2017) triggered by the actions undertaken pursuant to Art. 155 Const.: see B. Caravita di Toritto, *La Catalogna di fronte all'Europa*, 19 *Federalismi.it* 1-5 (2017); L. Frosina, *La deriva della Catalogna verso la secessione unilaterale e l'applicazione dell'art. 155 Cost.*, 3 *Nomos* 1-20 (2017); M. Cecili, *SPAGNA: L'investitura impossibile del Presidente della Generalitat catalana. Cronaca di una crisi istituzionale*, *ForumCostituzionale.it* 1-8 (2018). Cfr. M. Bak McKenna, *Spain's hard line on Catalonia is no way to handle a serious secession crisis*, <http://theconversations.com>, 24 October 2017 [10 May 2019].

¹⁵³ Declarations of the Generalitat's Vice-President Pere Aragones, *El Govern considera que la independència sólo llegará por la vía de la negociación*, in www.deia.eus, 9 September 2018 [28 November 2018].

¹⁵⁴ C.E. Cué, *Public Prosecutors uphold Rebellion Charge against Catalan Independence Leaders*, *El País-Cataluña*, 2 November 2018.

¹⁵⁵ See F.J. Díaz Revorio, *La monarquía parlamentaria*, cit., at 85; Y. Gómez Sánchez, *Art. 64*, cit.

¹⁵⁶ Art.155 empowers the Government, with the consent of the Senate's absolute majority, 'to take all the necessary measures' to avoid a serious prejudice to the Spanish interest or to compel a *Comunidad Autónoma* to fulfil its obligations. It was applied once (the Senate voted on 27 October 2017) until the *Govern* led by Quim Torra took office (2 June 2018). See J. Urías Martínez, *El artículo 155 CE: alcance y límites de una excepción constitucional*, 2(Extra) *Revista catalana de dret públic* 101-114 (2019); E. Vígala Foruria, *La coacción estatal del artículo 155 de la Constitución*, 73 *Revista española de Derecho constitucional* 55-110 (2015). In general, see E. González Hernández, *El control estatal sobre las Comunidades Autónomas: las reformas estatutarias y el supuesto de control extraordinario del artículo 155 CE. El control subsidiario del Tribunal Constitucional*, 11 *Parlamento y Constitución. Anuario*, 161-194 (2008). Most recently, see the collection of essays

contribute to easing a profoundly painful political and social conflict¹⁵⁷. In the polls, right/centre-right parties suffered a defeat and the Socialist leader Pedro Sánchez was the candidate to form a Government;¹⁵⁸ yet, his failure to reach an agreement with any of his interlocutors has led the country to new polls (10 November 2019)¹⁵⁹. The numerous elections that have been repeatedly called for in such a short time and the difficulties in appointing a solid Cabinet prove that Spain is undergoing a moment of profound socio-political change, perhaps of a structural nature¹⁶⁰; which prompts scholars to reflect about constitutional modifications that may strengthen governmental stability¹⁶¹ - in order to escape the trumps of what has been recently dubbed 'a *hyper-minoritarian*

El artículo 155 de la Constitución in XXIV Jornadas de la Asociación de Letrados del Tribunal Constitucional (2019).

¹⁵⁷ Meanwhile, most Catalan leaders were inflicted pre-trial detention, while a 'permanent 155' spectrum was on the table. See J. Casquero and A. Díez, *Casado y Rivera exigen el 155 y elecciones: "La aventura acabó"*, El País, 12 December 2018; J. Lamet, *Casado pide agrupar el voto útil de la derecha en los senadores del PP para poder aplicar un 155 duro*, El Mundo, 19 February 2019. Significantly, right-wing leaders blame each other for being too tolerant: N. Junquera, *El PP: "Ciudadanos provocó que el 155 fuera blandito"*, El País, 26 February 2019.

¹⁵⁸ See A. Díez, *La investidura de Pedro Sánchez fracasa y se activa la cuenta atrás para nuevas elecciones*, El País, 25 July 2019; M. Cruz, *El fracaso en la investidura de Pedro Sánchez condena a España a la paralización*, El Mundo, 26 July 2019; L. Mayor Ortega, *La investidura fracasa por la imposibilidad de Sánchez e Iglesias para ponerse de acuerdo*, La Vanguardia, 25 July 2019.

¹⁵⁹ On the rise of the right-wing nationalist Spanish party Vox and the fall of the moderate liberal centre-right formation Ciudadanos, E. Delgado Sanz, *Vox «fagocita» a Ciudadanos en una España vaciada que dominan PP y PSOE*, ABC, 11 November 2019.

¹⁶⁰ See R. Bermejo García, *La crisis catalana y el desgobierno de los Gobiernos de España*, 35 Anuario Español de Derecho Internacional 13-60 (2019); E. Aranda Álvarez, *El nuevo mapa de partidos en las Comunidades Autónomas y sus efectos en la forma de gobierno: «Mucho ruido y pocas nueces»*, 43 Teoría y realidad constitucional 257-283 (2019); in general, M. Azpitarte Sánchez, *El poder como retórica: Crónica política y legislativa del año 2018*, 115-39 Revista española de Derecho constitucional 141-169 (2019).

¹⁶¹ *Ex multis*, R. Blanco Valdés, *El año que vivimos peligrosamente: del bipartidismo imperfecto a la perfecta ingobernabilidad*, 109 Revista española de Derecho constitucional 63-96 (2017) and D. Giménez Glück, *El bloqueo, evitable, de la formación de gobierno: una propuesta de reforma del procedimiento de investidura*, 99 Revista de Derecho Político 301-324 (2017).

government¹⁶². At the time of the writing, the celebration of an agreement between Pedro Sánchez and the leader of the left-wing party UP (*Unidas Podemos*) Pablo Iglesias seems conducive to a leftist Cabinet seeking abstention, at least, from other parties¹⁶³; uncertainty is high as for the chances that such an agreement will resist the daily practice of government¹⁶⁴.

The Catalan *affair* has followed its doomed trajectory. After the first 2019 electoral campaign, the independence issue went somehow silenced in the Spanish public debate, as the tentative formation of a Cabinet occupied the entire scene¹⁶⁵. Yet, the criminal trial against the Catalan leaders continued across the European elections¹⁶⁶ and has come to its natural end. On 14 October 2019, the Supreme Court has sentenced many of the Catalan leaders up to 13 years of imprisonment and relevant accessory penalties (like prevention from holding public charges) for sedition, embezzlement and misuse of public funds¹⁶⁷.

¹⁶² D. Giménez Glück, *El Gobierno hiperminoritario (y su relación con el Parlamento)* (2019).

¹⁶³ C.E. Cué, *Sánchez e Iglesias alcanzan un acuerdo para formar un Gobierno de coalición*, *El País*, 12 November 2019. Updates in *PSOE-Unidas Podemos: Coalición y nuevos pactos*, *La Vanguardia*, 14 November 2019 and *Pactos de investidura: El PSOE y Unidas Podemos se preparan para consultar su acuerdo a la militancia*, *El País*, 19 November 2019; on the possible terms of the agreement, P. Benito, *Estas son las claves del pacto de coalición que negocian sin vetos Pedro Sánchez y Pablo Iglesias*, *El País* 12 November 2019. Sánchez has eventually received the *Investidura* on 7 January 2020: see comments in V. Mondelo, *ERC bloqueará el Gobierno si Pedro Sánchez no acepta negociar la autodeterminación y la amnistía*, *El Mundo*, 8 January 2020.

¹⁶⁴ See L. Abellán, *El Rey bromea con Pedro Sánchez tras prometer el cargo: "Ha sido rápido. El dolor viene después"*, *El País*, 8 January 2020.

¹⁶⁵ See Ó. Mateos y de Cabo, *La elección parlamentaria del presidente del Gobierno en España: análisis normativo, estabilidad institucional y propuesta de reforma del artículo 99.5 de la Constitución española*, 111 *Revista Española de Derecho Constitucional* 155-184 (2017); D. Delgado Ramos, *El control parlamentario del Gobierno en funciones en España: La experiencia de la XI Legislatura*, 16-2 *Estudios constitucionales* 183-220 (2018) and M.R. Ripollés Serrano, *Gobierno en funciones y control parlamentario*, 109 *Revista española de Derecho constitucional* 155-183(2017).

¹⁶⁶ See M. Cecili, *Puigdemont candidabile per le Europee. I "rivoluzionari catalani" all'assalto delle istituzioni spagnole ed europee*, *Diritti comparati* (24 May 2019).

¹⁶⁷ See R. Rincón, *Sentencia del 'procés': penas de 9 a 13 años para Junqueras y los otros líderes por sedición y malversación*, *El País*, 15 October 2019, and the news in the press of that day; the whole judgment (in Spanish) is in P. Gabilondo, *Oriol Junqueras, condenado a 13 años de cárcel por sedición y malversación*, *El Confidencial*,

One may wonder whether a solution could be to grant an *ad hoc* pardon in exchange for the burial of the independence hatchet, as it happened already long ago. However, this requires both a political and a constitutional condition. First: a government backed by a stable majority that takes the *responsibility to politically* respond to the Catalan claim and to prompt an end to the penal issue while resisting to the criticism that will surely come from part of the Parliament and the society. Second: under the Constitution, pardon powers, although exercised in fact by the executive, fall within the royal prerogative, subjected to the admission of guilt from the pardoned person. Therefore, once an '*acuerdo de indulto*' has been reached with the Government, Catalan leaders must at least formally ask pardon by admitting that they have been guilty of the crimes for which they have been convicted; that is, they must bow to the same King that declared their stance 'illegal and in betrayal of whole Spain'¹⁶⁸. It seems a hard political penitence for the Catalans, one which may have repercussions not only on the political-institutional relations – including the European Union level¹⁶⁹ – but primarily in the

14 October 2019, and E. Naranjo, *Sentencia completa del juicio del procés*, *El Periodico*, 5 November 2019. Comments in E.A. Maya Moreno, *Sobre la sentencia del Proceso Catalán*, *HayDerecho*, 19 October 2019. See updates on the mass contestations: *Manifestación independentista en Barcelona: Última hora de los enfrentamientos*, *La Vanguardia*, 27 October 2019, and comments in A. Ferrero, *El soberanismo mantiene la capacidad de movilización contra la sentencia*, *Público*, 26 October 2019; L. Frosina, *Il conflitto catalano tra giustizia e politica. Prime osservazioni sulla sentenza del Tribunale Supremo sul cd. Procés*, 20 *Federalismi.it* 1-17 (2019).

¹⁶⁸ See Art. 62 (i) Const. The controversial nature of the *indulto*, confirmed by the TC on numerous occasions, has been duly highlighted by the relevant literature: see M.I. Serrano Maíllo, *¿Debe exigirse motivación a los acuerdos de concesión de indultos?*, 34 *Teoría y realidad constitucional* 609-624 (2014) and A. Ruiz Miguel, *Gracia y Justicia: Soberanía y Excepcionalidad*, 113 *Revista española de Derecho constitucional* 13-35 (2018).

¹⁶⁹ See, lately, the Judgment of the Court of Justice of the European Union, C-502/19, *Junqueras Vies*, 19 December 2019, ECLI:EU:C:2019:1115: the Court has maintained that Oriol Junqueras Vies – a Catalan leader, president of *Esquerra Republicana*, elected to the European Parliament in the 23-26 May 2019 polls while pending the criminal proceedings for rebellion (where he was sentenced to 13 years) – enjoyed, as a consequence of the proclamation of the results, personal immunity under Art. 9 of the Protocol n. 7 on *Privileges and Immunities of the European Union*, and was therefore to be released from temporary detention in order to allow him to move to Brussels and to fulfil the necessary

Spanish society. Perhaps, a step by the Government and even by the King himself, somewhat adjusting the terms of the debate by conciliatory public declarations, could be of help. In the long run, it might be useful to re-think of sub-state communities in view of a multifaceted (*pluri*)-national sovereignty¹⁷⁰; and to question whether a constitutional reform embracing a fully-fledged right to secession may help to rationalise future claims of that sort¹⁷¹.

Whether all these conditions will effectively concur in the next times, is a question that has no reliable answer yet.

formalities to take office. As opposite, should the Supreme Court hold that the case is for a withdrawal of his immunity, it should ask the European Parliament to suspend that immunity in accordance with Art. 9(3) of the mentioned Protocol. Cfr. the *Opinion* of the Advocate General Szpunar (12 November 2019) holding that once a member of the European Parliament is proclaimed, it is up to the European Parliament alone to decide on his immunity (par. 72f., 110f.); on that point, D.M. Herszenhorn, *Spain was wrong to impede Catalan candidate from taking MEP seat, says top lawyer*, *Politico.eu*, 12 November 2019. See the news in the press of 19 December 2019: adde E. Wax, *EU court: Spain wrong to stop Catalan separatist taking up MEP seat*, *Politico.eu*; E. Sánchez Nicolás, *Catalan party: release leader after MEP 'immunity' verdict*, *EuObserver*; cfr. M. Cecili, *Catalogna: Junqueras vince la battaglia alla Corte di Giustizia, mentre Torra rischia la Presidenza*, *Diritticomparati.it* (20 December 2019; indeed, the Spanish electoral Court – *Junta Electoral* – has declared void the credentials of Quim Torra, who was to be appointed President of the *Generalitat*, as a consequence of the '*inhabilitación*' stemming from the criminal sentence, and held that Junqueras' request to be released and to take office as a Member of the European Parliament is to be rejected. See L. Mayor Ortega, *La Junta Electoral inhabilita a Quim Torra*, *La Vanguardia*, 3 January 2020; F.J. Pérez, *La Junta Electoral acuerda destituir a Quim Torra tras su condena por desobediencia*, and Id., *La Junta Electoral sacude la investidura*, both in *El País*, 4 January 2020.

¹⁷⁰ See G. Delledonne, G. Martinico, *Legal Conflicts and Subnational Constitutionalism*, XLII(4) *Rutgers Law Journal* 881-912 (2011); a thorough comparative account of 'subnational constitutionalism' in G. Delledonne, G. Martinico and P. Popelier (eds.) *Re-exploring subnational constitutionalism*, 6-2 *Perspectives on Federalism* (Special Issue) 1-360 (2012).

¹⁷¹ These last two issues are also addressed, respectively, in S. Tierney, *Reframing Sovereignty? Sub-state national societies and contemporary challenges to the nation-state*, and W. Norman, *From quid pro quo to modus vivendi: can legalizing secession strengthen the plurinational federation?*, both in F. Requejo Coll, M. Caminal i Badia (eds.) *Political Liberalism and Plurinational Democracies*, cit., respectively at 115-138 and 185-205.

SHORT NOTES

THE CONCEPT OF “PUBLIC INTEREST” IN THE CASE LAW OF THE ITALIAN COURT OF AUDITORS

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Abstract

This essay is about the concept of “public interest” in Italian public law. It examines the recent case law of the Italian Court of Auditors, which is both an external audit institution and an administrative court or tribunal with exclusive jurisdiction over certain issues of public law. It focuses on the latter function, more specifically on some recent developments concerning the concept of public interest. It identifies three related but distinct features or dimensions of public interest.

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1. Introduction

This short essay is about the concept of “public interest” in Italian public law. It focuses, in particular, on the case-law of the Court of Auditors. Three themes will be considered. First, the history and development of the Court of auditors will be briefly illustrated. Second, the Court’s recent case law will be examined. Third, there will be a discussion of the various ways in which the concept of public interest emerges.

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2. The Courts of Auditors: Continuity and Change

The Court of accounts is one of the oldest institutions in the Italian legal order. A Chamber of accounts was created as early as in 1389 at Chambery, at that time capital of the Grand duchy of Savoy. Between 1847 and 1859 King Carlo Alberto of Piedmont and Sardinia took three fundamental decisions concerning judicial review. First, he devolved all the controversies concerning tax and fiscal matters, including those concerning the property of the Crown, to ordinary judges. Second, he founded the Chamber of accounts in Turin, then capital of the Kingdom, responsible for all the administrative matters, besides the litigation about accounts. Third, in 1859¹, the Council of State, traditionally an advisory body, was entrusted with the power of handling all the case law of administrative nature. In the same year the Chamber of accounts was transformed into the Court of accounts or Court of Auditors, summing also the competences formerly belonging to the Comptroller General. In 1862² the same distribution of competences was extended to the whole of the newly (1861) created Kingdom of Italy³.

Since then, the jurisdictional and consultative functions of the Court of accounts have been revised several times⁴, though its structure and competences have remained almost untouched. The Constitution of 1947 has confirmed its importance and functions⁵. It ought to be said at the outset that Italy has not only an equivalent to the French *Conseil d'Etat*, an administrative court with exclusive jurisdiction over many issues of administrative law, but also attributes judicial capacity to the Court of auditors, particularly with regard to the financial liability of both civil

¹ Act of Parliament of 30 October 1859, no. 3707.

² Act of Parliament 14 August 1862, no. 800. For a retrospective, see *I 150 anni della Corte dei conti, Raccolta di Materiali* (Court of Auditors, 2012), 9 ff.

³ Similar Courts existed in Parma, Florence, Naples, and Palermo. The last two, created respectively in 1817 and 1818, were preserved for some years in order to get rid of the existing load and may be due to their good performances: see G. Landi, *Istituzioni di diritto pubblico delle Due Sicilie (1815-1861)*, II, (1977) 971 ff.; C. Ghisalberti, *Corte dei conti (storia)*, Enc. Dir., vol. X (1962) 853 ff.

⁴ See, for example, the decrees of 13 August 1933, no. 1038 and 12 July 1934, no. 121. Within the more recent legislation, see the legislative decree of 15 November 1993, no. 453 and the Act of Parliament 14 January 1994, no. 20.

⁵ Article 100 (2) of the Constitution. For further remarks, see G. Carbone, *Art.100*, in *Commentario della Costituzione* (1994) 64.

servants and elected administrators and the retirement treatment of State employees. The Court is also an important actor in the country's accountability chain, because it carries out the oversight of public expenditure. Finally it has retained a consultative role towards the executive and legislative branches of government⁶.

3. Some recent developments in the Court' case law

Arguably, the case law of the Court, both in its jurisdictional and oversight activity, is important for the interpretation of the concept of public interest. Though public interest is a typical essentially contested concept⁷, its conceptualization along about 150 years of Italian constitutional and administrative history can be traced through the lenses of the Court's decisions. This evolution has become growingly evident in the last twenty-five years or so, after the waves of privatization and liberalization of the public sector, partially autonomous and yielded by the need of reducing the stock of government debt, which has reached unprecedented levels, and partially imposed by EU politics.

The Court has tried to preserve its sphere of competences notwithstanding the reduction of the dimension of the public sector. Sometimes it has succeeded in expanding it, thanks to the necessity of introducing different forms of spending review, both at the national and the local level, which has favored the expansion of oversight on public finance, considered as a whole. As of consequence, the concept of public interest has been evolving in order to keep new phenomena inside the scope of the Court's jurisdiction, as well as of its oversight, even when some concepts had to be stretched to unexpected and questionable boundaries. Such expansion has been tolerated and sometimes ratified by Parliament, lest a reduction of the powers of the Court

⁶ F. Forte, G. Eusepi, *A profile of the Italian state Audit Court: An agent in search of a resolute principal*, in Eur. J. of Law & Economics 1 (1994) 151-160; F.M. Rossi, *Public Sector Accounting and Auditing in Italy*, in I. Brusca, E. Caperchione, S. Cohen, F.M. Rossi (eds), *Public Sector Accounting and Auditing in Europe*, IIAS Series: Governance and Public Management (2015) 125-141.

⁷ W.B. Gallie, *Essentially Contested Concepts*, in Proceedings of the Aristotelic Society (1955), 56.

might be considered a relaxation of oversight over public expenditure.

The swelling of the notion of public interest has been gradual and often imperceptible, but steady and impressive, from different viewpoints. First of all, several decisions taken by the Court of Auditors in its judicial capacity have sought to include in the sphere of liability for damage to the public treasury or misconduct in the management of public funds banks and other subjects entrusted with the disbursement of money. On the basis of legislative provisions issued since 1979⁸, the Ministry of Industry (later renamed of the Economic Development), began to allot grants-in-aid to projects to be selected through calls for bid, in order to sustain the economy of Southern and insular regions. Banks were used as simple suppliers or distributors: they had no concrete prerogative in terms of inspection or on-the-spot investigation in order to verify whether the beneficiary did own all the requisites to obtain the benefit. On the contrary, they were formally instructed by a Ministerial decree to check only the presence of formal requirements as prescribed by the statute. Some years after the grants had been distributed, when police investigation revealed abuses due to lack of substantial requisites, diversion or misappropriation of funds, or similar causes, the Courts of Auditors began to treat banks as public agents or concessionaries. It held that they should have acted with full diligence, carried out their duties with careful attention, exactly in the same way they would have felt obliged to act should the money had been theirs. Therefore they were often held liable for damages according to their assimilation to public agents, in the name of a notion of public interest which is imposed *a posteriori* on private subjects initially used as simple terminals of a process of money distribution. Several decisions taken by both the Court's lower and appeal panels defined and refined this interpretation⁹. A sort of service relationship was presumed to exist between the administration entrusted with the preliminary verification of the requisites and the bank responsible of the payment. The quality of the public interest protected was the same on the side of the

⁸ Act of 3 April 1979, no. 95.

⁹ See e.g. Corte conti, Sez. giur. Lazio, 1 December 2011, no. 17/2012; Sez. giur. Sardegna, 14 March 2011, no. 142/2013; 12 November 2014, no.24/2015;

administration and of the agent or concessionary, who was consequently bound to restore the whole damage caused to the inland revenue. Only repeated signals from bank to administration could justify the acquittal of the bank on a basis of extraordinary diligence.

There are even stronger reasons for the courts of accounts to consider banks, acting as treasurers of local authorities, and therefore not as mere executors of orders, responsible of the correct ascription of sums to the different headings, qualifying the interest pursued by both public entities and treasurers as public on the same footing¹⁰. Furthermore, civil servants working as accounting agents are deemed obliged to a compelling and extended measure of diligence in the protection of public interest in handling public money: administrative controls may not suffice, while high standards of fairness, integrity and care have to be necessarily deployed both in managing public goods and in organizing the administrative structure of public authorities¹¹.

Accordingly, the Courts of Auditors may interfere with the discretionary choices made by public bodies in order to check whether the implementation of public interests has been properly carried out, without exceeding the limits of their jurisdiction¹². Prudence and diligence, convenience and means-ends relationship, correctness in investment managing can thus be controlled under strict scrutiny techniques. Effectiveness is the main value to be protected by the accounting jurisdiction¹³. The consistency of discretionary measures with the public goals which

¹⁰ See e.g. Corte conti, Sez. II appello, 30 June 2010, no. 265; Sez. giur. Lazio, 13 February 2014, no. 161. See e.g. Banca d'Italia, *Eurosistema, Tematiche istituzionali*, (2016) 189 ff. The responsibility of the treasurer is sometimes presupposed under a sort of *juris et de jure* presumption of guilt, against which the agent is only admitted to prove not to have committed the fact, while most authors prefer to qualify his conduct as responsibility for breach of obligation.

¹¹ See e.g. Corte conti, Sez. giur. Veneto, 12 May 2016, no. 71. Professionals entering relationships with public subjects do not ordinarily incur responsibility actioned in the courts of accounts: as far as lawyers are concerned see e.g. Cass. Sez. Un. 18 December 1998, no. 12707; panel doctors under contract with the National Health Service can be responsible for over-prescribing or for serious mistakes, and in the same way public work directors and inspectors, auditors, and so on.

¹² See e.g. Cass. Sez. Un., 21 February 2013, no. 4283; Corte conti, Sez. Giur. centrale, 8 June 2010, no. 405;

¹³ Now see art. 3 of d.lgs. 26 August 2016, no. 174.

public bodies are requested to achieve and the concrete details of their initiatives are included in the jurisdiction of the Courts of Auditors¹⁴. For example, the opportunity for local authorities of buying swaps, derivatives or other risky equities can be scrutinized according to informal criteria of specific opportunity and foreseeability, both on the side of the advisor and the buyer¹⁵. Also the choice of realizing a public work and even the way in which it is conceived can be subjected to strict scrutiny in terms of concreteness and actuality of the public interest¹⁶. Similarly, the awarding of public grants to private subjects must be carried out with the greatest attention to the public interest pursued, checking their compatibility with the real needs of the local economic and job situation¹⁷. As a consequence, all damages yielded by unfair conduct in handling public money must be restored in civil courts for breach of legal or contractual obligations but at the same time the responsible agent can be sanctioned in the interest of the efficient use of public resources and of the future efficient working of the public administration¹⁸.

Another area where the notion of public interest is attributed a very wide meaning is the area of the supervision on local authorities which have reached a condition of financial difficulty immediately preceding bankruptcy: in such cases, the regional panels of the Courts check whether their task are carried out in the interest of the whole community, for the sake of collective resources which need to be managed in terms of effectiveness and efficiency¹⁹.

That said, it must be added that public interests do not necessarily have economic nature: in the administration of real estate, for instance, the Courts suggest that profit is not always the dominating factor, since immovable can be fruitful in other

¹⁴ E.g. Cass. Sez. Un., 2 April 2007, n. 8096.

¹⁵ E.g. Corte conti, Sez. I giur. centr. app. 16 December 2015, no. 609.

¹⁶ E. g. Corte conti, Sez. II giur. app., 21 October 2009, n. 500; Corte conti Lombardia, Sez. contr., 15 November 2016, n. 328.

¹⁷ Corte conti, Sez. giur. Sardegna, 8 July 2016, n. 163.

¹⁸ E.g. Cass. Civ., III Sez., 14 July 2015, no. 14632.

¹⁹ See e.g. Corte conti, Sez. Giur. riunite in speciale composizione, 11 December 2013, no. 5; the same interpretation can be found in several decisions of the Constitutional Court: 29/1995, 470/1997, 267/2006, 179/2007, 198/2012, 60/2013.

perspectives²⁰. Non-patrimonial interests can be worth of protection, provided that their use is sufficiently motivated, and that the disposal of a property is aimed at providing some utility to the public entity which decides to alienate it.

A stricter notion of public interest is applied when the Courts of Auditors is requested to decide about the regularity of the expense incurred by regional or town councilmen²¹. Daily allowances and all expense accounts must be used with extreme care, implying a strict functional link between the expense and its public aim. The formal regularity of the account documents is irrelevant: the only factor to be considered is the finalization of the use of public resources to a public interest strictly considered. Buying books or newspapers treating topics relating to the political or administrative functions might not be allowed; having meals with mayors or aldermen in order to discuss administrative subjects is highly suspect.

4. Three dimensions of the public interest

Although the concept of public interest has its roots in older phases of public law, it continues to evolve. Several interests have been identified in the Court's case law; some emerge from time to time according to cycles in the economic and financial condition of the State and of the other public authorities, while others have become stable and are frequently mentioned by the Court's decisions. The recent case law of the Court of Auditors shows also that there are three related but distinct dimensions of the public interest.

First of all, interests belonging to the sphere of protection and promotion of public ownership and of the eminent domain are legally relevant because of their instrumentality to collective needs. Any damage caused to them obviously deserves indemnification, though it may be difficult to assess its quantitative dimension. A loss of income may be easily quantified; the same applies to expenses unlawfully authorized. However, the

²⁰ See e.g. Corte conti, Sez. contr. Molise, 15 January 2015, del. No. 1; Sez. contr. Campania, 25 September 2015, del no. 205/2014.

²¹ See e.g. Corte conti, Sez. contr. Emilia-Romagna, 8 November 2016, no. 106; Sez. giur. Molise, 26 September 2016, no. 42;

violation of a prohibition may generate economic consequences of uncertain amount.

Secondly, some collective interests may be regarded as being part of the public interest when they have an economic value, that is to say a measure of the benefit provided and such benefit cannot be individually and separately enjoyed. Collective goods, in the economic sense, are the best example, though after the 1970s of the last century many Constitutions have started to refer to some of them. The protection of the environment as a constitutional good or value is the most prominent case of such change. Interestingly, according to the Court of Auditors, the recognition of a public interest to the preservation of the environment as a constitutional good implies the recovery of damages economically calculable.

Thirdly, collective interests can also concern immaterial goods entrusted to the care of public structures or authorities. Given the number and extension of collective interests in the welfare state, the case law of the Court of Auditors frequently considers the damages to such interests. For example, damages can derive from the inefficient use of public resources, the alteration of the order of priorities in the administrative action, the failure in reaching prescribed standards through the investment of financial and human resources in a public service, or, finally, corruption. It is much harder to issue sanctions against low performance of services or inefficiencies in the economic and financial balance of a public agency as represented in a budget or other financial documents. Even immaterial or moral damages can be related to a serious prejudice to the corporate image of a public authority, equivalent to a public interest, or even right²². Such possibility is quite recent, since until at least 1997 it was completely excluded: the turning point has been an important decision of the Court of cassation in grand chamber²³, that has been adopted as a landmark case and confirmed by unanimous decisions of both Court of cassation and courts of accounts later on²⁴.

²² See A. Venturini, *Danno c.d. “morale” patito dal soggetto pubblico: natura e giurisdizione della Corte dei conti*, Dir. proc. amm., 2000, 907.

²³ Cass. Sez. Un., 21 March 1997, no. 5668.

²⁴ See e.g. Cass. Sez. Un. 98/2000, 14990/2005; Corte conti, Sez. riunite 23 April 2003, no. 10.

AUTHORITY VERSUS LIBERTY IN EUROPE: EVOLUTION OF A PARADIGM

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Abstract

The conflict between authority and liberty has long been considered as a way of interpreting public law. Such a paradigm seemed to have lost its relevance after the advent of contemporary constitutional democracies and the consequent acknowledgment of the individual (or the person) as the base of public power. However, the working paper aims to show how the current crisis of the rule of law, with regard to both European and global trends, has restored the importance of the authority-liberty opposition.

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1. Introduction

In many legal systems of continental Europe, courts and legal scholarship have variably contributed to laying down the foundations of administrative law. Although this continues to be the case, there is sometimes discussion about the persisting adequacy of less recent theories. Among these theories, there is the relationship between liberty and authority; that is, the state of being free from restrictions imposed by public authorities.

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For a long period of time, according to an important strand in public law, this relationship was viewed as being dialectic and was said to be at the center stage within national legal systems. The question that now arises is not only whether this is still the case within such systems. It is also whether such dialectic relationship may be used as an interpretative model of reference for EU law¹.

There are some symptoms of the persisting importance of the relationship between authority and liberty. However, this seems to be a product of the crisis of the liberal-democratic polities rather than the expression of the intrinsic features of the two terms of such relationship. This is the issue which will be examined in this short paper. It ought to be said at the outset, for the sake of clarity, that I agree neither with the strand of legal theory according to which public law is dominated by the conflict between individuals and the State and that this conflict is insuperable², nor with the less recent strand in public law theory which contests the excess of emphasis put on authority. According to this latter strand, at the heart of public law there is a contrast between the subjective right of the individual and the subjective right of “the State personified”; there is, rather, a series of tensions and trade-offs that are produced by social co-ordination and “co-operat[ion]”³. These quick remarks explain that, for a better understanding of the current relevance of the relationship between authority and liberty, we cannot ignore the ideological dimension of the various strands in public law, which exerts an influence on the interpretation of law. We must, in particular, consider two perspective which are related but distinct: while the first is about being, the other is about having to be⁴.

¹Amongst other, B. Mattarella, *Il rapporto autorità-libertà e il diritto amministrativo europeo*, in Riv. Trim. Dir. Pubbl. (2006) 910; Id., *Le funzioni*, in M.P. Chiti (ed.), *Diritto amministrativo europeo* 160 (2013). L. De Lucia – B. Marchetti (eds), *L'amministrazione europea e le sue regole* (2015), p. 11, are wondering if it is possible «spiegare il diritto amministrativo dell'Unione europea in termini di relazione autorità/libertà».

² S. Cassese, *L'arena pubblica. Nuovi paradigmi per lo Stato*, in Riv. Trim. Dir. Pubbl. (2001) 602.

³ L. Duguit, *The Law and the State*, in 31 Harvard Law Rev. 182 (1917).

⁴ On the point of view of *be*, it's also quite understandable the utilization of the relationship between authority and liberty to outline the preference given in the past and present to administrative prerogatives and privileges or to legality and

2. Authority v. Liberty: an Outdated Paradigm?

In Italian legal scholarship, the idea that the relationship between authority and liberty was a sort of paradigm found expression, in particular, in the works published by Massimo Severo Giannini in the mid Twentieth century⁵. Those works seem to refer more to the rule of law as it was conceived in the nineteenth century than to contemporary constitutional democracies. The paradigm was therefore presented in terms of a contrast born from the seeds of conflict between the nobility and the bourgeoisie⁶. It dealt with the historical moment in which the middle classes conquered the parliaments of their respective nations, and in which law assumed the status⁷ of a guarantee in the face of the authority which was exercised by the monarchy.

It may be argued that the conflict between authority and liberty was overcome by constitutional democracy⁸. The main steps of this process of change may be briefly mentioned. They include the US Declaration of Independence of 1776 and, more importantly for the old continent, the French Declaration of 1789, according to which individual rights and liberties are the core and the superior goal of the constitutional order. In particular, Article 2 provided that “the aim of every political association is the preservation of the natural and imprescriptible rights of Man. These rights are Liberty, Property, Safety and Resistance to oppression”. As a consequence of this, it was the individual (or the person) who was at the basis of public law⁹. It was precisely on

liberties in the judicial review of administrative acts: in this way see D’Alberty, *Diritto amministrativo comparato* (2019) in particular pp. 47 ff..

⁵ M.S. Giannini, *Lezioni di diritto amministrativo* (1950) 71. See also B. Russell, *Autorità e individuo* (2011; original edition 1949).

⁶ Even if J.S. Mill, *Saggio sulla libertà* (1993; original edition 1859) 11, tells that the litigation between liberty and authority is just known in ancient Greece and in ancient Rome, as a conflict between subjects (servants), or classes of subjects, and government.

⁷ If you prefer, the value and the strength.

⁸ Without prejudice to “la concezione della protezione dei diritti essenzialmente inquadrata entro la cornice di contrappesi e di limiti del principio di maggioranza” P. Ridola, *Diritti costituzionali*, in S. Mangiameli (ed.), *Diritto costituzionale. Dizionario sistematico* (2008) 390.

⁹ See, for example, G. Silvestri, *Relazione di sintesi*, in F. Manganaro - A. Romano Tassone - F. Saitta (eds.), *Sindacato giurisdizionale e sostituzione della pubblica amministrazione* (2013), where it’s affirmed that the starting point of contemporary constitutional orders are individual rights, not power. See also, on

this basis that a liberal democratic strand in public law emerged and its innovative nature was emphasized by the comparison between the liberty of the ancients and that of the moderns, to borrow the words used by Benjamin Constant¹⁰. In brief, the liberties and freedoms of the individuals may only be interfered with under legislative authority and the essence of political authority derives from representative institutions.

Against this (increasingly important) strand, runs another strand in public law, according to which authority (or *puissance publique*) is still the “banner around which public law is ordered”, as a French public lawyer, Yves Gaudemet, has recently strongly and concisely argued¹¹. It would thus seem that more than a century has passed in vain since it was stated that “the logical starting point is not liberty, but the State”¹²; or that liberties and fundamental rights are not the factors that constitute public power and set limits to its exercise, but, more simply, constraints set out by the State in the exercise of its powers, given by itself to itself. Thus intended, such constraints may be viewed as limits of the supremacy of public authorities, but they do not constitute individual rights. In other words, liberties would be also rights without own object¹³.

the Italian point of view, F. Benvenuti, *Il processo costituzionale amministrativo e tributario*, now in *Scritti giuridici* (2006) 2727, who claims that “la nuova Costituzione ha fatto addirittura del cittadino il punto centrale dell’intera comunità in quanto il cittadino esprime con la propria attività, sommata a quella di tutti gli altri cittadini, il senso e il valore della collettività nazionale”; M. Fioravanti, *Art. 2. Costituzione italiana* (2017) 124, who affirms that fundamentals rights “hanno rovesciato il rapporto tra libertà e potere”.

¹⁰ B. Constant, *La libertà degli antichi, paragonata a quella dei moderni* (2005; original lecture 1819).

¹¹ Y. Gaudemet, *Etica e diritto: la deontologia del giurista*, in *Diritto pubblico* (2015) 713-722.

¹² O. Ranalletti, *Concetto e contenuto giuridico della libertà civile*, in *Scritti giuridici scelti*, I (1992; original edition 1899) 207. W. Gasparri, “Il punto logico di partenza”. *Modelli contrattuali, modelli autoritativi e identità disciplinare nella dogmatica dell’espropriazione per pubblica utilità* (2004) XI, exactly says that “la differente definizione del «punto logico di partenza», il diverso equilibrio e la diversa sintesi, volta per volta, tentata tra le ragioni del diritto di libertà nelle sue varie forme e quelle del potere pubblico, determinò [nel periodo dello Stato liberale] - e continua tuttora a determinare - i diversi modelli teorici di ricostruzione della relazione tra soggetto privato e amministrazione pubblica”.

¹³ P. Laband, *Das Staatsrecht des deutschen Reiches* (1911; original edition 1876-1882). See also Vivien, A.F.A Vivien, (1852). *Etudes administratives.*, 1852, pp. 16

This strand (which may be called authoritarian) in public law is contrasted by those who argue that “the modern state stands as a representation of the people and, in light of its democratic foundations, is placed in the service of the people”¹⁴. Nevertheless, others considers people as a net (a canvas or a textile). For someone this metaphor implies that people are worth more than the sum of the individuals (just as the net is not the sum of the threads)¹⁵. Accordingly, the relation between people and singular individual would be as the relationship between the forest and the tree. There is the forest even if a tree dies. Differently, I think that if you pull out a thread of the net, for instance a fishing net, you lose the whole net.

The doubts concerning the traditional way to conceive public authority concern also the debate about the administrative act¹⁶. The contrast between authority and liberty does not appear to be convincing. The reason is, that the relationship between public administration and individuals is governed by the principle of equality and must, therefore, be conceived as an equal relationship *under* the law, while discretionary power is a sort of political power related to the democratic circuit *beyond* the law¹⁷.

3. The Persisting Usefulness of the Paradigm

For the reasons just set out, the authoritarian strand in public law is not acceptable. However, this does not necessarily imply that the paradigm focused on the relationship between public authority and individual liberty is useless. Its contemporary usefulness seems to depend on the democratic deficit inherent within current legal systems.

There are two sides of the coin: one is internal to the nation-State, while the other is external, and is related with the EU. From the first point of view, the phrase “the rule of law is in crisis” has

ff., who claimed that the State and the Public Treasury “doivent passer avant le citoyen”.

¹⁴ M. Loughlin, *Foundations of Public Law* (2010) 435. See also D. Sorace, *Diritto delle amministrazioni pubbliche. Una introduzione* (2018) 19.

¹⁵ P. Grossi, *Nobiltà del diritto* (2008) 82.

¹⁶ R. Villata, – M. Ramajoli, *Il provvedimento amministrativo* (2006) 2.

¹⁷ L. Ferrara, *Individuo e potere. In un giuoco di specchi*, in *Diritto pubblico* 11 (2016, supplemento).

become a recurrent, almost stale, statement¹⁸. From the other point of view, in the European Union especially, the rule of law is showing worrying concessions¹⁹. The truth is that the democratic deficit of EU is not an accident but the original program²⁰. Precisely from the viewpoint of the EU, we might first consider that no process of state building can be imposed and achieved without placing the subject (the individual and/or the person) at the centre. In other words, no political unification is possible if EU law and the effectiveness of its implementation do not find their *raison d'être* in the protection of individual rights²¹. Nor could there be any social or economic cohesion without the unequivocal recognition of the principle of substantive equality. It is this principle which requires a reconsideration of monetary, banking and financial market unification to fiscal unification, as in the case of joined-up budget policies.

The conflict between authority and freedom worsens if the powers traditionally exercised by representative democracies are transferred to supranational, international and transnational organizations on which individuals have little or no control. Thus, in the context of the European Union, the persistent deficit of political-democratic representation (just downsized by the Lisbon

¹⁸ On the law crisis, amongst many others, see M. Dogliani, *Il principio di legalità: dalla conquista del diritto all'ultima parola alla perdita del diritto alla prima*, in *Diritto pubblico* 1 (2008); S. Fois, *La crisi della legalità* (2010). Recently, L. Bessenlink – K. Tuori – G. Halmai – C. Pinelli *The rule of law crisis in Europe*, in *Diritto pubblico* 267 (2019).

¹⁹ L. Saltari, *Le amministrazioni europee. I piani d'azione e il regime dell'attività* in L. De Lucia - B. Marchetti (eds.), *L'amministrazione europea e le sue regole*, cit. at 1, 124.

²⁰ R. Bin, *Critica della teoria dei diritti* (2018) 76.

²¹ The goal of guarantee, therefore, would prevail on the principle of the *effet utile* in the interpretation and enforcement of EU law. On the relationship between liberal setting and functional setting in EU law see M. Savino *I caratteri del diritto amministrativo europeo*, in L. De Lucia - B. Marchetti (eds.), *L'amministrazione europea e le sue regole*, cit. at 1, 231 ff.; M.P. Chiti, *Diritto amministrativo europeo* (2011) 530 ff. Least recently, J. Weiler, *Eurocracy and distrust: some question concerning the role of the European Court of Justice in the protection of fundamental human rights within the legal order of the European Communities*, in 61 *Washington Law Review* 1103 (1986); J. Coppel – A. O'Neill, *The European Court of Justice: Taking Rights Seriously?*, in 29 *Comm. Mkt L. Rev.* 669 (1992).

Treaty) is noteworthy.²² Moreover, the influence that the lobbies exercise over decision-making processes is remarkable. Even if they are regulated, they provide a glimpse into the “dark side” of business. Occupying centre stage is the role played by technocracies, including agencies and not majoritarian institutions²³, from the moment that “technical rules also present intrinsic political value” (underlined, from the European Central Bank's perspective, by the quantitative easing program or by the case of outright monetary transactions, situated on the crossroads between monetary and political/economic decisions²⁴). It's disputed and disputable that those independent or not majoritarian authorities exercise neutral powers or apply the rules of the art²⁵. It's not by chance, therefore, that it may be said: “Good-bye, Montesquieu”²⁶.

The crisis of the rule of law is even more visible in Eastern Europe, in countries like Hungary and Poland where some measures taken by the legislative and executive branches have undermined the independence of judiciary power.²⁷ However,

²² On the democracy deficit, among many others, R. Bellamy - D. Castiglione, *Il deficit democratico e il problema costituzionale*, in P. Costa - D. Zolo (eds.), *Lo Stato di diritto. Storia, teoria, critica* (2002). There is also who claims that “l'Unione Europea non è una democrazia” R. Dahrendorf, *Libertà attiva. Sei lezioni su un mondo instabile* (2005) 109. Researching different legitimations of European Bodies and Institutions, J. Black, *Constructing and contesting legitimacy and accountability in polycentric regulatory regimes*, in LSE Working papers (2/2008).

²³ M. Loughlin, *Foundations of Public Law*, cit. at 14.

²⁴ C.J.E.U. (Grand Chamber), 6/16/2015, C-62/14, as known, has thought that O.M.T. programme formed part of the monetary policy.

²⁵ On the political character of the same money, recently, F. Morosini, *Banche centrali e questione democratica. Il caso della Banca Centrale Europea* (2014).

²⁶ B. Ackerman, *Good bye, Montesquieu*, in S.R. Ackerman - P.L. Lindseth - B. Emerson (eds.), *Comparative Administrative Law* (2019) 38.

²⁷ See, for instance, M. Aranci, *Il Parlamento europeo ha votato: attivato l'art. 7, par. 1, TUE nei confronti dell'Ungheria*, in www.eurojus.it (9/17/2018); Id. *I recenti interventi della Corte di Giustizia a tutela della Rule of Law in relazione alla crisi polacca*, in *European Papers* (4/2019) 271; F. Casolari, *The Respect of the Rule of Law within the Legal Order of the European Union: A Drama in Two Acts*, in *Diritto pubblico comparato europeo online* (4/2016). See also C.J.E.U. (Grand Chamber), 6/24/2019, C-619/18; European Commission for Democracy through Law (Venice Commission), Opinion n. 943/2018, *Hungary - Opinion on the law on administrative courts and the law on the entry into force of the law on administrative courts and certain transitional rules* [www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)004-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)004-e).

there is also much to be said about Western Europe. Suffice it to mention the changing relationships between legislative and executive, the opaque role of social medias and the rise of both populism and nationalism.

Three other recent trends should at least be mentioned. The first concerns technocracy, viewed from a different angle; that is, the role of the courts, as opposed to representative institutions, in the definition of constitutional principles²⁸. The second problem, for which the traditional dialectic relationship between authority and liberty may be reconsidered is I.C.T. How can we fail to take into account the warning of Kissinger who affirms that in the internet age “individuals turn into data, and data become regnant”?²⁹ Even more so it is not possible to overlook on the increasing role of algorithms in the making of administrative and judicial decisions in which people have no or not enough control, so much that there is an “algorithmic authority” facing the individual³⁰. Last but not least, the current relevance of the authority-liberty paradigm emerges if we consider the processes of immigration and for instance the matter of the residence permits and expulsion of foreigners (having no role in the foundation of public power)³¹. If we look at the recent events in the Mediterranean Sea, clearly individual lives are at risk.

²⁸ See, amongst others, C. Fusaro, *Rappresentare e governare. Da grande regola a tallone d'Achille del governo parlamentare* (2015) 51-53, who argues that “se si lascia l’attuazione dei principi costituzionali solo o prevalentemente a giudici e corti costituzionali, se si accetta [...] che ogni scelta si riduca alla formulazione di ragionevoli composizioni tra principi giuridici, che ogni decisione si traduca in pur equi e ragionevoli bilanciamenti di principi e di valori affidati ai tecnici del diritto [...] si rischia così di annichilire il senso stesso della rappresentanza e della sovranità popolare”); Bin, 2018. See also the array of papers published by the review *Diritto pubblico* since 2016.

²⁹ H.A. Kissinger, *How the Enlightenment ends*, in *www.theatlantic.com* (2018).

³⁰ For the expression quoted (used in a partially different meaning), C. Shirky, *A Speculative Post on the Idea of Algorithmic Authority*, in *www.shirky.com/weblog/2009/11/a-speculative-post-on-the-idea-of-algorithmic-authority* (2009); on the general matter, S. Civitarese, *Umano troppo umano. Decisioni amministrative automatizzate e principi di legalità*, in *Diritto pubblico* (1/2019) 5; G. Avanzini, *Decisioni amministrative e algoritmi informatici* (2019).

³¹ In this sense, G. Rossi, *Saggi e scritti scelti di Giampaolo Rossi*, II. (2019) 890.

4. Conclusion

In sum, and in spite of the non-linearity of the remarks made concerning the authority-liberty paradigm ³², three conclusions may be drawn from them:

a) historically, the natural setting of the authority-liberty paradigm is that of the nineteenth century, that is to say the period in which peoples did not have the sovereignty;

b) during the twentieth century, within the constitutional democracy of Western States, there was really a contrast between authority and liberty, at very least in so far as the latter belongs to individuals;

c) the paradigm can nonetheless still be useful for understanding the limits of law and democracy and the new challenges of the global and technological era.

³² Just as the story of liberties and individual rights: see R. Bin, *Critica della teoria dei diritti*, cit. at 20, 146.