THE ITALIAN JOURNAL OF PUBLIC LAW

Vol. 15 Issue 2/2023

ISSN 2239-8279

BOARD OF EDITORS

ITALIAN JOURNAL OF PUBLIC LAW, VOL. 15 ISSUE 2/2023
TABLE OF CONTENTS

KEYNOTE SPEECH

ARTICLES

SHORT ARTICLES

KEYNOTE SPEECH*

*Marta Cartabia***

Congratulations LLM, Masters and JSD class of 2023!

I'm not used to speaking at a graduation of this magnitude. It's overwhelming.

I am thrilled to be back at NYU on this day of elation and celebration.

We are here to celebrate you and your outstanding accomplishments after years of hard work, rendered even harder by the unprecedented circumstances we all went through.

I feel proud for each of you! And for each of your families!

What a gratification and what a relief!

A new page, a new chapter begins today.

We are all full jurists. People in law.

Whatever our professional field is and will be, we will work for justice.

Be it on the bench, at the bar, in business, in social work, in law firms, in public administration or in public service.

Your professional life can take many different forms. Law is everywhere and permeates every aspect of life. You can do many different things with this invaluable degree, earned at such a prestigious Law School.

Whatever your talent and whatever your field of interest may be, you will work for justice.

* NYU School of Law - Convocation Day, 18 May 2023, Madison Square Garden

* Professor of Constitutional Law, Bocconi University, former President of the Italian Constitutional Court

Yet, what is justice?

It is hard to believe, but even after completing an outstanding course of studies in law, this question is almost impossible to answer.

Who is able to say what is justice?

We are not able to provide a persuasive answer, and yet this is an unavoidable question.

So, let us slightly rephrase it: what kind of justice do we want to work for?

This is more accessible.

We might not be able to spell out our idea of justice, but we have some images in mind.

Let me recall some turning points in my career where I was struck by "fragments of justice" that inspired my work as an academic, as a judge, as a minister of justice as well as in my personal life.

First picture.

I was in a seminar in Florence at the European University Institute listening to a young professor Joseph Weiler speaking about the origins of the European Union. He was telling us, PhD students, that European integration was born out of the intuition of three people: the German Konrad Adenauer, the French Robert Schuman and the Italian Alcide de Gasperi. It was the aftermath of World War II.

France, Germany and Italy had all been involved in the war, on different sides.

France and Germany had been long-time enemies. Yet they decided to try a common enterprise, right after the end of the war. They had learned from the previous experience that humiliating the loser was a lose-lose game. Even when the loser is the Nazi regime. The victim of humiliation would react with rage, resentment, aggression. Exacerbating conflict brings about more conflict.

If they wanted, as they did want, to preserve peace on the continent, they had to try a new experiment. So, they decided to take a counter-intuitive move. Three enemies became the main partners of a new legal community for the common regulation of a strategic economic sector. That small community based on solidarity and common interests is still there, it has grown, and it has developed, and it persists.

Even with war at its borders, now.

This ethos echoed the spirit of the founding of the Italian Republic in 1948, as I had learned from my professors in Law School. This is the reason why I studied Constitutional Law.

In the Constitutional Assembly, the political parties were dramatically polarized along the lines of the incipient Cold War. They had fought one against the other. Yet, despite all the reasons for conflict and disagreement, they were able to say all together a resounding "never again" to the fascist regime and were able to find a common ground for the construction of a new polity based on human dignity, democratic institutions, the separation of powers and the rule of law. The Constitution was written in some 18 months and approved by a large majority. Many points were left open, undecided. But that Constitution has always provided the necessary points of orientation throughout the history of the Republic, even during the most dramatic of times.

Building bridges between rivals: what kind of justice is this?

It left me disoriented, uneasy and disconcerted. And yet it also captured me.

Second picture.

NYU Law School, academic year 2009-10 – what a wonderful memory!

Albie Sachs, a former justice of the Constitutional Court of South Africa, was invited to give a lecture. He was a freedom fighter against apartheid in South Africa. He was a target of the apartheid regime and became a victim of an attack where he was severely injured, losing an eye and an arm. I remember him telling us that after the attack he was surrounded in the hospital by friends and people who were fighting alongside him for the same cause. One of them, who had spent twelve years on Robben Island (a maximum-security prison), told him not to worry, the attack on him «would be fully avenged».

Judge Sachs appreciated the devotion of this friend and was even moved; but he felt uncomfortable with the idea of vengeance.

He said – and I am quoting his words: «Perhaps there is something wrong with me, but the idea of an eye for an eye, a tooth for a tooth, an arm for an arm, fills me with anguish. Is that what we are fighting for, a South Africa filled with armless and partly

blind people? Is that what freedom means?» (A. Sachs, Soft Vengeance, p. 77).

Years later, Albie Sachs actually agreed to meet with his attacker.

It was the same spirit that some years later I recognized in my own country. A group of people, composed of both victims and perpetrators of the terrorist attacks by the "Red Brigades" in Italy during the 1970s and 80s, who had targeted the state and even kidnapped and killed Aldo Moro, an outstanding statesman and former Prime Minister. They agreed to meet each other- the victims and the perpetrators -, to look one another in the eyes, to spend time together and talk, with the help of a mediator. They have been meeting for eight years, in order to understand what happened on the other side, what moved the perpetrators to do what they did; to find out what happened to the families of the victims. And to restore their memories and their lives.

It is hard to believe, unless you do not listen to their own voice. Taming the instinct of revenge. Meeting with the author of an attack that caused you a permanent disability or costed the life of your father: what kind of justice is this?

Again, I was disoriented, uneasy, and disconcerted. And yet captured.

Some years later, I was sitting on the Constitutional Court of Italy.

It has been an honor and a privilege to serve my country in the Constitutional Court, with the mission of defending and disseminating the basic values of our Constitution.

During my nine years of service, I realized that, even unintentionally, the language of my reasoning included expressions like balancing rights, reasonableness, reasonable accommodation, judicial dialogue, institutional cooperation, law's relations. And so on.

It is a language that bears the imprints of those fragments of justice that shocked me so much and yet captured me.

As a judge, I learned that even when we are confronted with hard cases and, sometimes, tragic choices, the solution is not an either/or option. There is always room for a third way out. Or even a fourth or fifth one….

A courtroom is not a comfort zone.

In fact, there are almost no easy cases. And make no mistake: there are no small cases at all. Each case is a serious one, for the people involved. And each case may be an opportunity for the judge to develop an important doctrine, for the lawyer to defend a right.

Hard cases push us to think harder, and to think more deeply, and to think more widely.

Taking seriously the discomfort that comes from hard cases: that's where new forms of justice come from. And often they are grounded in a «both/and» approach, rather than an «either/or approach».

The need for justice is always the same, but the responses to injustice change. Ancient Greek civilization shows this: from private vengeance to courts, from an eye for an eye to restorative justice – friends, do not miss the opportunity to read Aeschylus' *Orestea*.

In my capacity of Minister of Justice of Italy, I was confronted with the problems of the administration of justice, I met the victims of a number of serious crimes, I visited a number of prisons and witnessed the miserable conditions of life therein.

The unquenchable thirst for justice for the victims calls for "a word of justice". They need to have the courts promptly pronounce a judgment.

And yet even that is never enough.

I dedicated my best efforts to reforming the Italian criminal justice system, with the purpose of delivering justice to the victims while also giving the perpetrators of crimes a second chance, for the sake of everybody's human dignity and for the sake of a safe and secure life for our community.

That is why I turned my attention to restorative justice based on the experience of the South African Commission for Truth and Reconciliation.

Now, the paradigm of restorative justice is a new chapter of criminal justice in the Italian legal system and the European institutions strongly recommend it.

I am not a politician. I am a constitutional scholar, happy to be back with my first-year students in Bocconi University Milan.

But when I was asked to serve my country I never declined.

I took those public responsibilities without a political agenda, but with the legacy I was given by outstanding people like Joseph Weiler, Albie Sachs, and many others who intentionally or unintentionally helped me understand what I was looking for, what kind of justice I was seeking.

Dear NYU Law class of 2023, you are all destined for great things.

Law is your profession. It is also an extraordinary possibility to serve your country.

My wish for you is that you keep looking for the kind of justice on which you want to spend your personal and professional energies. Never give in.

Allow yourselves to be both disconcerted and also captured by the fragments of justice that come into your life.

Stay uneasy. Follow your stars!

ARTICLES

THE ITALIAN LEGAL ORDER AND THE EUROPEAN UNION: AN EVOLVING RELATIONSHIP *

*Giacinto della Cananea***

Abstract

The task of this article is a twofold one: descriptive and interpretative. The first intent is to describe the essential facts concerning the relationship between the Italian legal order and that of the EEC, now the EU. The latter has passed its seventy years, which have witnessed development, change and evolution that will be briefly charted in the subsequent paragraphs. This part seeks to lay the groundwork for later discussion; that is, interpretation. It can be helpful to say at the outset – for the sake of clarity – that there are contending theories and the literature is still rapidly evolving. The objective within this part is to render accessible to a wider public the debate within Italian scholarship.

* This article is a revised version of the paper presented to the workshop on EU law and national constitutions organized by the Pazmany University (Budapest) in December 2022. I am grateful to Marta Cartabia and Oreste Pollicino for their comments on an earlier draft. The usual disclaimer applies

** Professor of Administrative Law, Bocconi University of Milan

TABLE OF CONTENTS

1. Introduction

My task in this article is a twofold one: descriptive and interpretative. The first intent is to describe the essential facts concerning the relationship between the Italian legal order and that of the EEC, now the EU. The latter has passed its seventy years, which have witnessed development, change and evolution that will be briefly charted in the subsequent paragraphs. This part seeks to lay the groundwork for later discussion; that is, interpretation. It can be helpful to say at the outset – for the sake of clarity – that there are contending theories and the literature is still rapidly evolving. The objective within this part is to render accessible to a wider public the debate within Italian scholarship. It will be seen that the divergence between scholars turns on differences as to the way in which a traditional concept of public law, sovereignty, must be intended, as well as on the role that political and judicial institutions can play, respectively. It is also designed to explain why different scenarios may emerge in the near future.

2. The path towards Europe: *le début*

It can be helpful to begin with two quick caveats. First, from the descriptive purpose of this paper follows the necessity to consider some essential facts that are relevant and significant from a public law perspective. In brief, the empirical implies the historical. In this respect, many accounts of the relationship between the Italian legal order and that of the EEC/EU are based on the analysis of some "significant" judicial decisions.

There is nothing wrong with this, as judicial politics are increasingly relevant. [1] However, on the one hand, the broader institutional, political and social context should not be neglected, especially when there is a "rigid" constitution and political forces take fundamental decisions, as happened in Italy in 1948 and in 1957. On the other hand, judicial decisions regard only a part of our civil, economic, and social life. Other areas are only occasionally affected by judicial decisions. This is the case of Economic and Monetary Union (EMU), which produced salient constitutional implications.

[1] See M. Shapiro, *Courts. A Comparative and Political Analysis* (1981) and A. Stone Sweet, *Governing with Judges. Constitutional Politics in Europe* (2000).

The second caveat concerns the significance of the description that follows. It is well-known that constitutions are distinct cycles, but there are rare moments in which the trajectories of various national constitutions converge. A convergence of this type occurred in the late 1940s, when the constitutions of Italy, Germany and other nations of Europe were transformed. Another one occurred after 1989, when other nations regained full independence. This suggests that neighbour countries often face similar problems. However, their solutions may, and often do, differ, largely, because of significant differences in history, institutions and political preferences.

A) A new constitutional settlement

Retrospectively, two main choices shaped Italy after 1945: on the one hand, the balance between legal continuity and transformative change and, on the other hand, the openness towards other legal systems.

The continuity of the Italian State was assured, notwithstanding the radical discontinuity with the fascist regime (1922-1943). Political parties could certainly have chosen to amend the existing constitution, the *Statuto Albertino*, which had a century of history. But all relevant political actors thought that it was necessary to formalize the foundations of the new liberal and democratic order in a new constitution. They thus chose to break with the earlier regime by replacing the old constitution with fresh constitutional settlement. [2]

The Republican Constitution was thus adopted and entered into force in 1948. It re-introduced the parliamentary regime. At the same time, it laid down a rich bill of rights. Moreover, it broke with our institutional tradition because twenty regions were created, five of which with a special legal status. This implied a repudiation of the traditional centralization, though a real change was not easy to achieve.

[2] For further analysis, see M. Cartabia and N. Lupo, *The Constitution of Italy: A Contextual Analysis* (2022).

B) Constitutional openness

There was discontinuity, too, as far as the external dimension of the State was concerned. This point can be aptly demonstrated by the analysis of three constitutional provisions. First, the primacy of international law was established. In this respect, Article 10 provided that the Italian legal system "shall conform to the generally recognized principles of international law", that is international custom, while treaties would have to be ratified by Parliament. Second, a new clause concerning limitations of sovereignty was established. According to Article 11,

"Italy shall agree, on conditions of equality with other States, to such limitations of sovereignty as may be necessary to ensure peace and justice among Nations. Italy shall promote and encourage international organizations pursuing such goals."

This constitutional provision is of fundamental importance for two reasons that are related but distinct. On the one hand, it implies a rejection of the traditional notion of the indivisible nature of sovereignty, as it was conceived after Bodin and Hobbes;[3] that is, sovereignty is no longer regarded as a whole or totality, but rather as a bundle of sovereign powers or functions. It is precisely as a result of this that, under Article 11, the exercise of individual sovereign functions or powers can be transferred to international organizations. On the other hand, though this clause was defined with a view to international bodies, it provided a legal basis that could be, and was, used for European integration.

The third constitutional provision confirms and specifies the previous one in the field of labour. Coherently with the emphasis that Article 1 puts on labour (upon which "the Republic is founded "), Article 35 affirms that labour must be protected "in all its forms and practices". Such protection is not limited to the State, but transcends it. Indeed, Article 35 (3) provides that Italy must "promote and encourage international agreements and organizations which have the aim of establishing and regulating labour rights". The following paragraph, whilst recognizing the "freedom to emigrate", requires public authorities to protect Italian workers abroad.

When these constitutional provisions are considered as a whole, it becomes clear that two central pillars of the fascist regime

[3] See Hobbes, *Leviathan, Or the Matter, Form and Power of a Commonwealth, Ecclesiastical and Civil* (1651).

were broken; that is, authoritarian government and autarchy. The similarity with postwar Germany is evident. Both the Italian Constitution and the German Basic Law (*Grundgesetz*) adopted international law as part of the national legal system. [4] The ramifications of these innovative choices will become more evident when discussing the path of European integration.

C) **The choice for Europe**

Recent and accurate historical studies have shown that the famous speech delivered by the French Minister of foreign affairs, Robert Schuman, on 9 May 1950 was not at all "out of the blue". Quite the contrary, it had been preceded by an accurate elaboration by the group of high civil servants led by Jean Monnet and its essential contents had been shared with other European leaders, such as Konrad Adenauer.[5] Whether or not Alcide De Gasperi, then Italy's President of the council of ministers, had been previously informed about the speech, there is no doubt that he and his government were consistent supporters of the project. A broad pro-European consensus emerged between catholic and liberal forces. The Italian Minister of foreign affairs Gaetano Martino played a fundamental role in relaunching the project after the fiasco of the European Defence Community (1954). [6] A solid parliamentary majority supported the ratification of the treaties of Paris (1952) and Rome (1957) establishing the European Community of Coal and Steel and the European Economic Community, respectively, though parliamentary debates were quite harsh and socialists and communist parties eventually voted against both treaties.

While the emphasis is generally put on the fact that, as a consequence of those political decisions, Italy has been a founding member of both European organizations, other two aspects must be

---

[4] A. La Pergola & P. Del Duca, *International Law and the Italian Constitution*, 79 Am. J. Int. L. 598 (1985).

[5] See already J. Monnet, *Mémoirs* (1976). For a different interpretation, A. Milward, *The European Rescue of the Nation State* (1991), for whom the European construction was instrumentally used to rescue the nation-State.

[6] See E. Serra (ed.), *La relance européenne et les Traités de Rome (*1989). On the role played by De Gasperi, see A. La Pergola, *Italy and European Integration: A Lawyer's Perspective*, 4 International and comparative Law Quarterly 259 at 26o (1994) (arguing, however, that De Gasperi had an instrumental approach, because he viewed Italy's participation in European institutions as a kind of insurance against the danger of domestic instability).

highlighted. First, those political decisions were, together with that to join the military alliance based on the North Atlantic Treaty (1949), the fundamental choices made by Italy after 1945. Second, in contrast with the widespread – but wrong – opinion according to which the European construction had an economic dimension, its political character was manifest during parliamentary debates. During his speech at the Senate in 1952, De Gasperi unequivocally affirmed that "in Europe we build a coalition of democracies founded on the principle of liberty". These were not just the words of an official speech. Indeed, when Spain applied for the first time for membership of the EEC, its application was rejected precisely because it did not meet the standards of liberal democracies.

In the following two decades, the choice for Europe, initially promoted by the *élite*, received growing popular support. Left-wing parties' initial hostility to the Communities faded. [7] The public consistently endorsed Italy's active role in the construction of an integrated Europe. Opinion surveys showed that the project of integration – the "ever closer union between European peoples" – found more support in Italy than in the other Member States. It also obtained also the support of the Constitutional Court, after an initial reluctance.

3. Judicial doctrines

At this stage, it is easier to understand the role played by the jurisprudence of the Constitutional Court. Two different phases or stages can be envisaged. They are characterized by two doctrines, respectively; that is, separation and integration. There has not been, however, a radical discontinuity between such phases. Rather, there has been an evolution, as Paolo Barile argued five decades ago in his pioneer work on the "path" of the Constitutional Court with regard to Europe. [8] More recently, the Court has accepted to engage in a closer cooperation with the European Court of Justice.

A) Separation

Since *Van Gend*, the case in which the European Court of Justice affirmed the principle of the direct effect of the Treaty of

[7] La Pergola, *Italy and European Integration: A Lawyer's Perspective* (fn 6), 264.
[8] P. Barile, *Il cammino comunitario della C0rte*, (25) Giurisprudenza costituzionale, 2406 (1973).

Rome, [9] the judicial policy of the Court was characterized by a sophisticated conception of monism.[10] In other words, the legal systems of the Member States and the EC were not regarded as being separate, in contrast with traditional "dualist" theories of international law. [11]

In 1964 the Italian Constitutional Court (ICC) recognized that the article 11 of the Italian Constitution authorized the State to limit its sovereignty. However, its opinion diverged from that of the ECJ in *Costa v. ENEL*. [12] It refused to consider EC law as "higher" than national law. This was manifest in its argument based on the traditional *lex posterior* criterion, according to which subsequent national legislation prevails on previous EEC norms (the Treaty of Roma). The assumption on which this argument was based was, clearly, that there was no primacy of EEC law.

Still ten years later, in 1973, in *Frontini*, the ICC refused the logic of monism embraced by the European Court. It affirmed the traditional criterion according to which *lex posterior derogat priori*. As a consequence of this, ordinary courts (civil, administrative, criminal) could enforce EC law against subsequent and conflicting national legislation only after the ICC itself had authorized them to do so, on a case-by-case approach.[13]

B) Integration (within certain limits)

A discontinuity occurred more than ten years later, in *Granital,* when the ICC accepted that EC law could be directly applicable, without its prior judgment. However, the ICC did not ground this shift in the monism implicit in the approach of the ECJ.

---

[9] ECJ, Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963). For a 'classic' interpretation of this ruling, see E. Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 Am. J. Int.l L 1 (1981) (arguing that the ECJ created a new constitutional framework). See also, for a retrospective, J.H.H. Weiler, '*Van Gend en Loos': the individual as subject and object and the dilemma of European legitimac*y, 12 I-CON 94 (2014).

[10] See E. Cannizzaro, *The Neo-monism of the European Legal Order*, in E. Cannizzaro, P. Palchetti and R.A. Wessel (eds.), *International Law as Law of the European Union* (Brill, 2012), 38.

[11] For further analysis, G. Gaja, *Positivism and Dualism in Dionisio Anzilotti* (1992) 3 Eur J Int'l L 123.

[12] ICC, judgment n. 14/1964, [1964] CMLR, p. 425. On the European side, see ECJ, judgment of 15 July 1964, case 6/64, *Costa v. ENEL*.

[13] ICC, judgment n. 183/1973, *Frontini* [1974] CMLR, p. 372.

It kept a dualist perspective, affirming that the EC and the national legal orders, though still distinct, were coordinated. [14] Writing extrajudicially, the former President of the ICC observed that:

"the Constitutional Court progressed beyond its intermediate stance by accepting a view of supremacy that an American constitutional lawyer might find similar to that embodied in the supremacy clause of Article VI of the United States Constitution…. The 1984 decision takes the autonomy language of the 1975 decision and carries it to its logical conclusion. Italy's adherence to the European Communities through Article 11 of the Italian Constitution makes Community law applicable in Italy as the law of an autonomous legal order. This Article 11 acceptance of Community law therefore requires that ordinary courts determine whether Community law covers the subject matter dealt with by subsequent internal law. If it does, the Community law takes precedence over the internal law without regard to whether the internal law was adopted before or after the Community law". [15]

In brief, with *Granital*, the ICC accepted the primacy of EEC law over national law and looked at it from the perspective of the decentralized system of constitutionality established in Italy. There is, however, an important exception. The Court has reserved to itself the power to assess the conformity of Community norms with the fundamental principles of the constitutional order and the inalienable rights of the human person. [16]

In conclusion, in 1984 the ICC accepted supremacy. However, as it was argued earlier, the ICC did not repudiate its dualist approach. Nor, as a consequence, did the Court left the Italian Constitution without any protection against any excessive ambition of EC institutions. Indeed, such a protection was re-affirmed, though only for a sort of "*noyeau dur*", including fundamental human rights and the "supreme" principles of our constitutional order; that is, the so called "counter-limits". Although no list of the latter exists, it is clear that, if there was a

[14] ICC, judgment n. 170/1984, *Granital* [1984] CMLR, p. 331. For further analysis, see M. Cartabia, *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Union*, 12 Michigan Journal of International Law 173 (1990).

[15] See A. La Pergola & P. Del Duca, *International Law and the Italian Constitution* (fn 3), 613-614.

[16] For further remarks, see A. Pace, *La sentenza Granital, ventitré anni dopo* (2007), in www.associazionedeicostituzionalisti.it (for whom there is a "tortuous" path between *Frontini* and *Granital*).

shift in the case-law of the ICC, it was not from denial of supremacy to its full and unlimited acceptance. The ICC choose, rather, supremacy under conditions and limits.[17]

This judicial policy was confirmed, few years later, by another judgment (n. 389/1989) rendered by the ICC. Initially, the Court reiterated what it had affirmed in 1984. Then it made a further step, holding that the Community legal order and the national one were "reciprocally autonomous, but co-ordinated and communicating". As a consequence of this, EC norms which were self-executing had direct effects within the national legal order and both judges and public administrations were required to disapply national rules contrasting with them. [18] More recently, in his ruling n. 20/2019, the ICC has affirmed that the rights recognized and protected by the EU Charter of Fundamental Rights have "constitutional character" and has, accordingly, has delineated a more flexible view concerning its relationship with administrative and ordinary courts when fundamental rights are at stake. [19]

To sum up, the "European" jurisprudence of the ICC has had a gradual and incremental character. It began with the rejection of the supremacy of EC law, on grounds that the two legal orders were separated. Subsequently, it shifted to the recognition that those legal orders were co-ordinated. Eventually, its doctrine is that the relationship between them must be stressed. There is clearly a development, which is inevitable, because the legal order of the EC/EU itself has constantly evolved.

C) Judicial cooperation

A new development has occurred in the last fifteen years; that is, after some decades during which administrative and ordinary courts have increasingly engaged in a judicial cooperation with the ECJ, the ICC, too, has accepted to do so. To begin with, it should be said that the Italian judicial system is not monist. Quite

[17] See M. Cartabia and J.H.H. Weiler, *L'Italia in Europa. Profili istituzionali e costituzionali* (Il Mulino, 2000), 128.

[18] ICC, judgment n. 389/1989, § 4. For further remarks, see M. Cartabia, *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Union* (fn 13), 191 (noting, however, the tension between the Court's doctrine and the results it achieved).

[19] ICC, judgment n. 20/2019, § 4. For further remarks, see O. Pollicino, *Not to be Pushed Aside: the Italian Constitutional Court and the European Court of Justice* (2019), in www.verfassungsblog.de .

the contrary, it is pluralistic, for three reasons. First, there is no established rule of the precedent. As a result, lower courts are not formally bound by the rulings adopted by higher courts, even though they generally respect them. Second, Italy has a dualist system of judicial review, with both ordinary judges (at the top of which there is the Court of Cassation) and specialist administrative courts, including the Council of State and the Court of Auditors. Third, the Constitutional Court has become a key institutional actor. Within this pluralistic judicial systems, divergent interpretations are not at all infrequent, and even conflicts are not rare, especially between the Council of State and the Court of Cassation. All these judges, moreover, cooperate with the ECJ through the mechanism that has been called "jewel of the Crown"; that is, the preliminary reference mechanism.[20]

This procedural device is strategic in many respects. Under Article 267 TFEU, lower courts can send preliminary references to the ECJ, while the highest jurisdictions are required to do so. This furnishes the ECJ with nearly two thirds of all the legal questions it has to solve. It allows the ECJ to involve national courts in the enforcement of EU law, in order to ensure that such law is applied uniformly. Consequently, and ingeniously, it uses the legitimacy and competence of national courts. Whatever the constitutional status of international or supra-national rulings, national governments and parliaments feel incomparably more bound by the ruling of their own courts.[21] Moreover, a preliminary ruling may give to a lower court a better chance to promote an adjustment of legal interpretation, which is impeded by a higher court.

As regards Italian courts, since the 1980's the judicial dialogue between the ECJ and administrative and ordinary courts has gradually intensified. Both quantitative and qualitative aspects deserve mention. Quantitively, in the years 1953-2015, while French judges sent 931 preliminary references to the ECJ, of which 118 came from the *Cour de Cassation* and 99 from the *Conseil d'Etat*, Italian judges sent 1326 preliminary references, of which 132 came from the Court of Cassation and 126 from the Council of State. [22] In sum, there was a greater propensity of Italian judges to use this

[20] P. Craig, *EU Administrative Law* (2007) 285.
[21] See A. Stone Sweet, *The Judicial Construction of Europe*, cit. at 1, 15.
[22] ECJ, *Judicial statistics 1953-2015* (2015), 97-102. For further remarks, see G. della Cananea, *The Global, European and National Dimensions of Administrative Law*, in J.B. Auby (ed.), *The Future of Administrative Law* (2016) 101.

mechanism and, comparatively, Italian administrative judges were more incline to do so than ordinary judges, in view of the latter's wider area of competence. Qualitatively, there is virtually no salient legal question, from public procurements to criminal law, in which national judges refrain from using the preliminary reference procedure, thus making of the ECJ a source of authority alternative to the ICC.

The last remark may explain, among other things, another shift of the ICC's judicial policy. It concerns the use of the preliminary reference mechanism. The ICC has never considered itself as a "court" in the meaning of Article 267 TFEU, for more than one reason: structurally, only one third of its members are professional judges, while two thirds are appointed by political institutions, the President of the Republic and Parliament; functionally, its main power is not to adjudicate disputes either between individuals or between individuals and public authorities, but to check the constitutionality of legislation. Moreover, similarly to other national constitutional courts, the ICC was reluctant to send preliminary references to the ECJ. Affirming that a constitutional court does not seek preliminary ruling raises the question whether this is a matter of law or policy. From a legal point of view, there is no insuperable obstacle to admitting that a constitutional court may be regarded as a court of last resort. This was confirmed when the ICC for the first time sought a preliminary ruling from the ECJ.[23] This suggests that the evasion of references was, rather, a matter of policy.

When the ICC decided to seek a preliminary ruling, it specified that this could be done because there was a dispute between two public authorities, that is to say the State and a Region enjoying a special status, Sardinia. According to the ICC, therefore, a necessity to seek preliminary rulings arises only with regard to inter-institutional disputes (*giudizi in via di azione*), that is to say those that arise either between the State and the regions or between

[23] ICC, order n. 104/2008. For further details, see G. della Cananea, *The Italian Constitutional Court and the European Court of Justice: from separation to interaction*, 15 European Public Law, 523 (2008). See also F. Fontanelli and G. Martinico, *Between Procedural Impermability and Constitutional Openness: the Italian Constitutional Court and Preliminary References to the European Court of Justice* (2010) 346 (arguing that "this decision represents a veritable shift from the procedural impermeability between constitutional procedural law and EC law").

the latter. [24] The second case concerned the complex interaction between the norms aiming at protecting the finances of the EU and the domestic rules concerning the duration of criminal proceedings. Notwithstanding the strong perplexity raised by the Court of Cassation, backed by some prominent constitutional lawyers, about the risk that a national tradition would be infringed, the ICC choose to continue its "dialogue" with the ECJ and its choice furnished an adequate solution.[25] In other words, it choose dialogue instead of standing up as the last defensor of national identity.

The third step regards the right to be silent within the an administrative procedures managed by the financial markets regulatory authority; that is, CONSOB. This requires a slight digression. In US public law, the leading case is *Miranda*, a case which was decided by the Supreme Court almost sixty years ago. The case addressed several questions involving custodial interrogations without the presence of an attorney. In the Italian Constitution, the provision concerning due process in criminal trials (Article 111) can be, and has been, interpreted in two opposite ways. For some, it is a norm concerning criminal trials. For others, this norm is the manifestation of a broader principle of procedural fairness. The ICC has raised doubts as to whether the former interpretation is compatible with Article 6 ECHR, as interpreted by the European Court of Human Rights in *Chambaz*. [26] In a well written preliminary reference (order n. 117 of 2019), it has urged the ECJ to resolve this doubt in a case concerning an offence of insider dealing. AG Pikamae has consistently argued that the solution must be found in the light of the distinction between natural and legal persons, in the sense that the former may be able to invoke the right

[24] See M. Cartabia, *Europe and Rights: Taking Dialogue Seriously*, 5 Eur. Const. L. Rev. 5 (2009).

[25] On the issues involved with the *Taricco II* saga, there is a burgeoning literature, which is not always perspicuous. The final word has been said by the ECJ in its ruling on Case C-42/17, *MAS*, where it disagreed with the opinion issued by AG Bot, and by the ICC in its ruling n. 115/2018. On the previous approach of the ICC, see O. Pollicino, *From Partial to Full Dialogue with Luxembourg: the Last Cooperative Step of the Italian Constitutional Court*, 10 Eur. Const. L. Rev. 143 (2014). For an analysis of the behaviour of some constitutional courts that affirm their role of ultimate defenders of national identities, see B. Guastaferro, *Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause* 32 Ybk. Eur. L. 263 (2012).

[26] ECtHR, judgment of 5 April 2012, *Chambaz v. Switzerland* (application n. 116603/04).

to remain silent.[27] The Court has followed the opinion of the AG. It has looked at the provisions of EU legislation in the light of Articles 47 and 48 of the Charter of Fundamental Rights of the EU. It has also referred to Article 6 ECHR, on the assumption that, even though the Convention has not been formally incorporated into the EU legal order, the fundamental rights it recognizes and protects constitute general principles of EU law.[28] Once the Court has held that Articles 47 and 48 include, among other things, the right to silence of natural persons who are charged, it follows from this that punitive penalties could not be lawfully imposed. As the Court has made clear, natural persons cannot be penalized if they exercise the right to remain silent. [29]

4. The constitutionalization of the choice for Europe

A) Variety of national patterns

Thus far, we have seen that political leaders took the fundamental, and at that time controversial, decision to join the European Communities on the basis of Article 11 of the Constitution, though it did not refer directly to Europe, and that the ICC backed this choice of the constitutional basis and gradually accepted both the doctrines of direct effect and supremacy of EC law, though not without conditions and limits. The adequacy of that constitutional basis, however, were increasingly controversial because the scope of application of EC law steadily increased and it had a greater impact on national law in areas such as agriculture, industrial policy, and public procurements. It was contested, *a fortiori*, when the competences of the EC were further enlarged by the Treaty of Maastricht. This brought further the extent to which "Europe" was regarded as a domestic policy issues, but raised the issue whether State sovereignty could favour European integration.

In other countries, such as France, Portugal and Spain, for the first time after many years both political and social forces engaged in a national discussion on the benefits of European integration. Ratification processes, necessary for the new Treaty to enter into force, allowed institutions to consider and resolve several

[27] Opinion of AG Pikamae, delivered on 27 October 2020, Case C-481/19, *DB v Consob*.
[28] ECJ, judgment of 2 February 2021, Case C-481/19, *DB v Consob*, § 36.
[29] ECJ, judgment of 2 February 2021, Case C-481/19, *DB v Consob*, § 58.

issues concerning, among other things, two central concepts of public law such as sovereignty and citizenship, in light of the norms establishing the European Monetary Union (EMU) and the citizenship of the EU. The French case is particularly significant in this respect, because the President of the Republic referred the Maastricht Treaty to the Constitutional Council which, for the first time, affirmed that the Constitution was an obstacle to the ratification of an international agreement. The obstacle was, in particular, the provision of the preamble to the 1946 Constitution (incorporated by the 1958 preamble), according to which "France may consent to limitations of sovereignty necessary for the organization and defense of the peace". The French provision was, therefore, very similar to Article 11 of the Italian Constitution. Political institutions deemed that the decision taken by the Constitutional Council could be implemented by way of a minimal revision of the Constitution and thus added a new provision authorizing the "transfers of competence necessary for the establishment of the EMU" and another concerning citizens. But, after the Danish referendum, the decision was taken to have a referendum in France, too. [30]

B) Constitutional reforms (2001-2012)

Things went differently in Italy, notwithstanding the requests of a referendum allowing the people to express its view about European integration, the usual ratification procedure was used, based on parliamentary approval. But the Maastricht Treaty, with all the complex structure of the EU and the technical contents concerning monetary policy, government budgets, did not receive much attention by most leading politicians, let alone the electorate. While the latter was generally, if not generically, for "Europe", a new party, the Northern League, was against it, an aspect to which we will return in the final part of this article.

Meanwhile, it must be observed that a constitutional theory seeking to accommodate the principles of national sovereignty with the realities of European integration and its new structures and processes remained to be constructed. This task was fulfilled, in part, during the following century, in two stages. The first was the

[30] A. Stone, *Ratifying "Maastricht": France Debates European Union*, 11 French Politics & Society, 70 (1993).

constitutional reform of 2001. The second stage was the constitutional reform that took place in 2012, after the economic and financial crisis that hit Europe.

The constitutional reform of 2001 concerned the relationship between central government and regional and local authorities. When such relationship was transformed, with an unprecedented reinforcement of the regions' legislative powers, it was thought that it was necessary to clarify that not only national legislation, but also regional legislation had to respect EU law. Article 117 of the Constitution was thus amended by a provision according to which any piece of legislation adopted by both the State and the regions must respect the Constitution, the legal order of the Community and international agreements. There was much discussion, in academic circles, as to whether such provision simply confirmed the limits stemming from those three types of legal sources or intended to establish a hierarchy between them.

The debate has not ended, but at least two things are enough clear. The first is that Article 117 supplements Article in ensuring an adequate constitutional foundation for European integration. The other thing is which is clear is that, according to the ICC, only EU law has direct effects and supremacy on national law, with the consequence that administrative and ordinary judges do not apply national provisions in contrast with it, while their contrast with the ECHR must be judged by the ICC itself. Some years after the reform, not only has the ICC confirmed that it is still Article 11 which ensures a "secure foundation" to the law of the EU, but it has also affirmed that the new text of Article 117 deals with only one of the several aspects raised by the relationship between the EU and the national legal order, [31] thus emphasizing continuity.

C) Adjusting to the EMU

For a better understanding of the other constitutional reform, some words should be said about EMU and the crisis that burst out in 2009. When the Treaty of Maastricht had been negotiated its supporters had emphasized the benefits of a single currency (among other things, it would serve to dilute the influence of the German central bank) and enhanced monetary stability. As

[31] ICC, judgment n. 220/2010, § 7 (all the Court's judgments are now available on the website: www.cortecostitutionale.it; in some cases, an English translation is also provided).

these issues had a highly technical nature, they received scant attention from the public. Article 11 of the Constitution, seen in conjunction with another clause protecting "saving in all its forms" (Article 47), was regarded as an adequate basis for the transfer of monetary policy to the EU.

Things were very different twenty years later, when the European debt crisis burst out. Even though Italy was not one of the countries that were unable to refinance their government debt and needed external support, the reiteration of financial orthodoxy by EU institutions and the conditions imposed on Greece, which were perceived as socially harsh and unjust, brought to a split between the traditional parties, on the one hand, and the parties and movements that openly criticized the EU, this time backed by some economists, lawyers and political scientists. [32] The parliamentary majority supported all the measures taken by at European level, including the creation of the European Stability Mechanism and the stipulation of the Fiscal Compact. It also supported a constitutional reform. But political opposition to the EMU grew to an unprecedented level, which explains the partial shift of the country's strategy which will be discussed in the next part of this paper.

Meanwhile, it is appropriate to illustrate the new constitutional reform. It concerned various aspect of public budgeting. Article 81 of the Constitution, concerning the State budget, was amended in two ways: a controversial balanced budget provision was introduced and recourse to borrowing was limited, coherently with the prohibition of excessive government deficits.[33] Article 97, too, was amended by a new provision establishing that public administrations must ensure that their budgets are balanced and that public debt be sustainable "in accordance with European Union law". Finally, under Article 119 (1), the obligation to have balanced budgets was imposed on regional and local authorities, with a view to "ensuring compliance with the economic and financial constraints imposed under European Union legislation". Moreover, under Article 119 (7) such public authorities may have recourse to borrowing only as a means of funding investments,

[32] An interesting example is Giandomenico Majone, a political scientist who had previously analyzed the regulatory strategy of the EU: see his book *Rethinking the Union of Europe Post-Crisis. Has Integration Gone Too Far?* (2014).

[33] For further analysis, see P. Giarda, *Balanced Budget in the 2012 Constitutional Reform*, 126 Rivista internazionale di studi sociali, 335 (2018).

with the exclusion of current expenditure. The first two provisions are not without difficulties, because the notion of budget cycle used by Article 81 is unclear and the notion of debt sustainability laid down by Article 97 is somewhat enigmatic. It is not easy, therefore, to understand whether and how those provisions could be enforced by the ICC. However, considered as a whole, the new constitutional provisions had two goals; that is, repeating, for emphasis or clarity, Italy's adhesion to the principles upon which EMU is based and, obtaining acceptance of the public debt by the financial markets.

Retrospectively, it can be said that both goals have been achieved, but not without costs. The tighter limits imposed on government budgets and public debt are, to say the least, "not welcome in the political arena", because they limit the political options for those who govern. [34] Moreover, the discontents view them as a sort of Trojan horse for further limitations of sovereignty, which would imply huge economic and social costs.

D) National identity and European integration

Thus far, our analysis has shown three things. First, the choice for Europe has been, together with NATO membership, the fundamental political decision of Italy after 1945. Second, after the initial reluctance of the ICC to recognize the principles of direct effect and supremacy, there has been a significant development in its jurisprudence, with the acceptance of the theory of integration between national legal systems and that of the EC/EU. Third, after many years the Constitution has been amended. The relationship between political decisions and constitutional jurisprudence may thus be considered.

Comparatively, there is more than one way in which politicians can delegate authority to courts. To illustrate, consider the following three institutional settings. In a system based on the principle of parliamentary sovereignty, the courts can be conceptualized as agents of parliamentary institutions. Thus, for example, in the United Kingdom their function has been often described as supervising the executive in order to ensure the respect of parliamentary will, as expressed in codes and legislation. If something goes wrong, in the sense that the courts discharge their powers and duties in ways that are unforeseen and unwanted by

[34] Giarda, *Balanced Budget in the 2012 Constitutional Reform* (fn 18), 346.

elected politicians, Parliament can overrule undesirable judicial decisions by amending legislation, using normal procedures. In a system based on a written and rigid constitution, which may only be amended though special procedures (thus, for example, in Italy, either a two-thirds majority or a popular referendum are required), courts have greater authority, because they can invalidate legislation. They can be viewed as trustee courts, in the sense that they exercise responsibility with respect to the Constitution. However, they are not unbound, because elected politicians may change constitutional provisions, even though this may be costly, in terms of political and social acceptance. Finally, in a treaty-based regime, a court – such as the European Court of Justice and the European Court of Human Rights – enjoys an even greater discretion, because the rules of which it has to ensure the respect can only be amended by a unanimous decision of the contracting states. [35]

As observed earlier, the Italian legal system falls within the second institutional settings. For elected politicians – the principal, to borrow the terminology of economics and political science – it would have been very hard, if not virtually impossible, to rediscuss the principles defined by the ECJ, due to the requirement of unanimity established by EU treaties. It would, however, been easier for elected politicians to contest the solutions envisaged by the ICC, for example by making a reference to national constitutional identity or some other generic concept. However, they did not do so. Quite the contrary, both the constitutional reforms of 2001 and 2012 have further strengthened the ties with the EU, in the former case in the context of a redefinition of the role played by central and regional authorities, respectively, in the latter case with a view to reinforcing the protection of the public interest to sound financial management.

Two concluding remarks look appropriate. First, there is not only a clearly discernible "path" in the jurisprudence of the ICC concerning EC/EU law, but, more generally, a gradual transformation of the relationship between the two legal systems. Even though there is not a clause like the *Europa-artikel* of the German Basic Law, there is an increasing integration between the national legal order and that of the EU. Second, it can be said that

[35] For further discussion of these institutional settings, see A. Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, 16 Indiana J. Glob. Leg. St. 1 (2009).

the Italian constitutional identity has been gradually shaped in close connection with the European construction,[36] with a strong support of the political and cultural *élite*.[37] This point of general interest can be confirmed – *a contrario* - by a quick look at the different state of things which concerns international law, after the controversial judgment issued by the ICC in the German liability case.

E) Counter-limits in another field: international law

Before examining this case, it may be helpful to briefly consider the foundations of the present law and the options at our disposal when thinking about the judicial remedies against the states. All legal systems have to make some fundamental choices about justiciability in actions involving the state and its officers. Within national systems of public law, an option that is diminishingly used is to have a general cloak of immunity. The opposite option is the acceptance of a general principle of justiciability, though the courts act as gatekeepers and thus allow remedies for state action affecting certain interests, but not for others. From the viewpoint of international law, however, states enjoy immunity from suits before domestic courts.[38]

Such privilege was at the heart of the complex dispute that arose at the beginning of the new century. In short, some individuals brought claims against Germany before Italian ordinary courts, seeking reparation for injuries caused by violations of international humanitarian law committed by German occupying forces during the II World War, including those against Italian nationals. Germany instituted proceedings against Italy, requesting the ICJ to declare that Italy had failed to respect the jurisdictional immunity which Germany enjoys. Greece, too, requested permission to intervene in the case. The ICJ endorsed this

[36] For a similar viewpoint, see M. Cartabia and N. Lupo, *The Constitution of Italy*, cit., 27 (analyzing the relationship between the Italian Constitution and the 'composite' European Constitution); F. Fabbrini and O. Pollicino, *Constitutional identity in Italy : European integration as the fulfilment of the Constitution*, EUI working paper n. 2017/06 (with a focus on values).

[37] In addition to the scholarship that will be considered in the next part of this article, see S. Micossi and G.L. Tosato, *L'Unione europea nel XXI secolo. «Nel dubbio, per l'Europa»* (2008) and A. Padoa Schioppa *et al.*, *L'Europa nonostante tutto* (2019).

[38] A. Peters, E. Lagrange, S. Oeter and C. Tomuschat (eds.), *Immunities in the Age of Global Constitutionalism* (2015).

claim. But eventually the Court found that Italy had violated Germany's immunity by declaring enforceable the civil judgments rendered by the courts, [39] although three judges dissented from the majority; that is, judges Cançado Trindade, Yusuf and Gaja (ad hoc judge sitting in this case).

Two years later the ICC was requested by domestic courts to reconsider such immunity in the light of the constitutional guarantee of access to a court.[40] Its starting point was that such guarantee was an absolute one and could not, therefore, be derogated. While the ICJ focused on jurisdictional liability, the ICC focused on another issue; that is, the conflict between the norm of international custom, as interpreted by the ICJ, and the norms and principles of the Italian Constitution, more precisely the "essential principles of the state order", including the principles of protection of fundamental human rights. The threshold has thus been set out is a very high one, because the ICC has reiterated its general doctrine of '*controlimiti*' (counter-limits) to the limitations of national sovereignty stemming not only from generally recognized norms of international law, but also from EU law and the treaties agreed with the Holy Seat.

The conclusion that follows from this doctrine is that, if a fundamental right is infringed, then its role is ensure its protection, whatever the consequences. [41] In practical terms, for the ICC, the national constitution trumps international law.[42] While the judges of the ICJ could, and did, express their dissent, this could not be done by the members of the ICC, because the domestic constitutional framework does not provide for dissenting opinions. However, we now know that the ICC was divided. A former member of the Court has subsequently said that he was even ready to resign from the Court, in order not to be associated with such a "terrible decision", a form of "legal protectionism".[43] Others have pointed out the frequent temptation of constitutional courts'

[39] ICJ, judgment of 3 February 2012, *Jurisdictional immunities of the State* (Germany v. Italy; Greece intervening), § 100.
[40] Article 24 of the Italian Constitution.
[41] ICC, judgment n. 238 of 2013. available in English on the Court's website: https://www.cortecostituzionale.it/
documenti/download/doc/recent_judgments/S238_2013_en.pdf.
[42] C. Tomuschat, *The National Constitution Trumps International Law*, 6 It. J. Public L. 189 (2014).
[43] A. Stone Sweet & G. della Cananea, *Interview with justice Sabino Cassese*, German Law Journal, 2022.

presidents to leave a sort of legacy.[44] What is questionable is that the ICC has failed to give weight not only to international customary norms, but also to the role of the ICJ in ensuring that disputes among nations are peacefully resolved. It is even more questionable because it takes for granted that, when Article 24 of the Italian Constitution refers to access to the courts for the protection of individual rights, it only refers to domestic courts, as distinct from international courts.

5. The legal and political ramifications of closer integration

While the path illustrated thus far is acknowledged by Italian legal scholarship, some of its legal and political ramifications are controversial. The structure of the argument is as follows. It begins with the distinction between facts and interpretations. Then there is discussion of three interpretations that are not only distinct, but also mutually exclusive, in the sense that each excludes or precludes the other. There is, first, the most authoritative interpretation, according to which, after seven decades of European integration, the Italian State is no longer what it was initially. There is, second, the opposite interpretation, which emphasizes the traditional conception of sovereignty. There is still another interpretation, which is based on the distinction between the *acquis communautaire* and new policies.

A) Variety of interpretations

This section is based on two premises, which should be fully delineated for the sake of clarity. The first is the general distinction between facts and interpretations. The second premise is a development of the former, from a public law perspective.

In its general terms, the first distinction is relatively easy to understand. Put simply, facts concern what actually happened and can be proven to be effective or real. Whether or not a certain constitutional provision exists, is a matter of fact, not of opinion. Thus, for example, when the Victorian constitutionalist Albert

[44] O. Pollicino, *From Academia to the (Constitutional) Bench: An Heterodox Reading of the Last Move (Decision No. 238/2014) of the Italian Constitutional Court on the Relationship between Constitution and International (Customary) Law*, in *Diritto pubblico comparato ed europeo*, 2015, IV.

Venn Dicey criticized French *droit administratif*, among other things, on grounds that a certain constitutional provision excluded the liability of the servants of the State, he referred to a provision that no longer existed. More generally, an interpretation or opinion that is not based on facts or even prescinds from them is less likely to be taken into account by participants in a discussion. That said, a statement about a fact is not examined only to ascertain whether it refers to something true or real.[45] Their importance or relevance must also be considered. In other words, facts do not just exist, because we must ascribe meaning to them. The importance of context, therefore, must not be neglected.[46]

From a public law perspective, a further caveat is apposite. The relevance and significance of all elements of fact is partly determined by essentially contested concepts;[47] that is concepts which involve widespread agreement, such as democracy and fairness. EU treaties provide an instructing example. According to Article 4 TEU, the Union is founded upon the values of democracy, liberty and respect for the rule of law and fundamental rights. It can be argued that a positive norm is insufficient to determine the content of concepts such as democracy and the rule of law and that their meaning is functionally related to the practice in which these values are sustained. Not surprisingly, therefore, there is variety of opinion about what these values mean, and that of the new members of the EU may differ from the opinion of the founders.[48] However, this argument must be qualified, for more than one reason. First, even before the Maastricht treaty there was a shared

[45] For an excellent analysis of this issue of method, see M. Loughlin, *Public Law and Political Theory* (Oxford, Clarendon Press, 1994) 50 (suggesting that, since knowledge is relational, truth or falsity may not be determined outside the social context).

[46] Loughlin, *Public Law and Political Theory* (fn 37), 50 (suggesting that, since knowledge is relational, truth or falsity may not be determined outside the social context).

[47] W.B. Gallis, *Essentially Contested Concepts*, 56 Proceedings of the Aristotelian Society 167 (1955).

[48] For further discussion, see A. von Bogdandy, *Towards a Tyranny of Values? Principles on Defending Checks and Balances in EU Member States*, in A. von Bogdandy *et al.* (eds.), *Defending Checks and Balances in EU Member States*, Berlin, Springer, 2021, 73. For a different approach, which views the enforcement of values as a political task, rather than legal, and thus calls for dialogue, see O. Mader, *Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law*, 11 Hague Journal on the Rule of Law 133 (2019).

understanding between the founders of the Community, in the sense that only liberal democracies could become part of it. Second, as Article 4 existed before the more recent enlargement, the agreement that then existed about certain ramifications of those values – for example, judicial independence - cannot be neglected. Third, Article 4 does not simply acknowledge that those values are shared by the Member States, but also requires the latter to respect them. [49] This is confirmed, among other things, by Article 7 TEU. It is in this sense that the soundness of an interpretative proposition concerning the values upon which the Union is founded must necessarily take into account facts and uses.

B) A new type of State

As observed initially, the first interpretation argues that, if we consider not only the potentiality created by the Constitution of 1948, in particular the acceptance of "limitations to sovereignty" established by Article 11, but also the facts that followed, a new type of State has emerged, which can be called the 'communitarized' State because it is involved in a process of integration. For a better understanding of this school of thought, which is widely shared among public lawyers, a slight digression is necessary with regard to the concepts of sovereignty and integration.

The concept of sovereignty that is embodied in the Italian Constitution, so the argument goes, is no longer that elaborated by Bodin, and Hobbes at the birth of the modern State, let alone that which is taken for granted by the realist school of international relations. For true, in Bodin we find two distinct conceptions of sovereignty, one of which is analytical, because it distinguishes the various sovereign powers (including making laws, declaring war, appointing the highest magistrates), while the other is synthetical, because it views sovereignty as a totality.[50] In Hobbes, instead, it is the latter conception that predominates. Coherently with this conception, many realists have argued that, from the perspective of

[49] See S. Mangiameli, *The Constitutional Sovereignty of Member States and European Constraints: the Difficult Path to European Integration*, in S. Mangiameli (ed.), *The Consequences of the Crisis on European Integration and on the Member States. The European Governance between Lisbon and the Fiscal Compact*, Berlin, Springer, 2017, 198 (discussing the "homogeneity clause").

[50] J. Bodin, *Les six livres de la République* (1576).

international law, what matters is whether internationally agreed norms are enforceable through sanctions or military threats. In contrast with this established school of thought, Abraham Chayes and others have argued that, in the modern world, sanctions and military threats are extraordinary measures. Most of the times, States comply with the norms they have agreed simply because, in a complex and interdependent world, the normal way exercise power is to be members of regional or global legal regimes and be able to influence their decisions. Within such regimes, compliance is assured by other means, including incentives, pressures, and judicial or quasi-judicial mechanisms.[51] This is a managerial and pragmatic approach which explains much of the world we live in. Article 11 of the Italian Constitution perfectly fits within this conceptual framework. As observed earlier, at its roots there is the idea that "a shared sovereignty is not only conceivable and admissible, but also necessary in light of the goals – peace and justice among the peoples of the world – that the State, no State alone, could achieve. Membership of international organizations is thus the only legitimate way to pursue constitutional purposes.

This general argument can be further specified, with regard to Europe, by the concept of integration, in both judicial decisions and academic writing. The core of the argument of the ECJ in *Van Gend en Loos* has two limbs. The first is that "the Community constitutes a new legal order of international law, for the benefit of which the states have limited their sovereign rights, albeit within limited fields", which confirms that sovereignty can, and has been, limited. The second limb of the argument is that the institutions of the Community are "endowed with sovereign rights", which affect both the Member States and individuals. The underlying idea is, thus, that sovereign powers are no longer exercised by each State individually, but are "transferred" to the Union and thus exercised jointly.

There is a rich literature that explores the rationale of EU integration and there are contending theories, including neo-functionalism, intergovernmentalism, and multi-level governance. In the Italian context, both the first and the last theory have gained consent. The central tenet of neo-functionalism, the concept of spill-over, that is to say the idea that integration in one area creates

[51] A. Chayes and A.H. Chayes, *The New Sovereignty. Compliance with International Regulatory Agreements* (1995).

pressures for integration in other areas, has been appealing to political leaders, seeking to explain why the Communities would secure peace and prosperity, both of paramount importance for a country that adopted a Constitution which refused war as an instrument to solve disputes (Article 11) and that literally had to be reconstructed after 1945. It has been appealing, moreover, to both policymakers and scholars seeking to explain why the single market has been supplemented by common policies, including the single currency. Multi-level governance, with its emphasis on the existence of multiple levels – subnational, national and supranational – of government where authority and policymaking are shared, and thus on interconnection rather than hierarchy, is also appealing to policymakers seeking either to achieve goals that would be precluded without joint action (for example, the protection of the environment or trade agreements with the most powerful States) or to alleviate the costs of unpopular decisions,[52] in the logic "Europe requires us to do so". It has an undeniable appeal, too, for constitutional lawyers who wish to shed light on the role that subnational institutions can play, as well as on judicial dialogues.[53]

Considered together, shared sovereignty and European integration support a theory of the State that emphasizes the dimension of change. The Republican Constitution is regarded, at the same time, as the key element of discontinuity with regard to the previous political regime and as the source of a new order, where might and power are limited by both democracy and law. The emphasis put on limitations of sovereignty explains the diffusion of the idea of "external bounds". Three examples can be instructive. State aids to enterprises, a traditional instrument of administrative action, are not prohibited by the treaties, but are legitimate only if they do not jeopardise competition and it is much preferable that monitoring and surveillance are discharged by a supranational institution, the Commission. Similarly, the

[52] P. Craig, *Integration, Democracy and Legitimacy*, Oxford Legal Research Paper n. 47/2011, 16.
See also J.H.H. Weiler, *The political and legal culture of European integration: an exploratory essay*, *I-CON*, vol. 9, 2011, issues No 3-4, pp. 678-694 (for a discussion of the legal culture of European integration).

[53] See, for example, D. Tega, *The Italian Constitutional Court in its Context. A Narrative* (2021). For a critique of 'multilevel constitutionalism', see G. della Cananea, *Is European Constitutionalism Really "Multilevel"?*, 70 Heidelberg Journal of International Law 284 (2010).

prohibition of excessive government deficits is viewed as an instrument aiming at preventing a government failure, as distinct from the market failures which are cured by public regulation. The fact that it is now the national Constitution that requires public authorities not to run excessive deficits and to ensure debt sustainability confirms that these limits must not be viewed as external impositions but, rather, as requisites of sound governance. Discretion is not excluded, but it is limited by technical considerations and subject to impartial controls, in particular by judges.

Clearly, in contrast with the popular understanding of democracy and input legitimacy, this school of thought emphasizes output legitimacy and the rule of law. It advocates political deference to bureaucratic expertise, judicial wisdom and external bounds deriving from membership of regional organizations as features of the modern State. It argues that a new type of State has emerged, one that is involved in an evolving integration; that is, a State that has renounced to the full and indivisible sovereignty. [54]

C) The defence of national identity and democracy

What has just been said about the first school of thought can be helpful for understanding the other one, though this cannot be simplistically viewed as the opposite. Its main concerns are the preservation of national identity and the defence of democracy in the only area where it has flourished historically; that is, the State. It must be said at the outset, however, that these concerns are not simply distinct, but are also emphasized in the context of different visions of public law and the State. They thus deserve autonomous treatment.

After the Treaty of Maastricht, several national politicians and scholars have highlighted the Union's duty to respect Member States' "national identities, inherent in their fundamental structures, political and constitutional" (Article 4 (1) TEU).[55] In the

[54] S. Cassese, *The Global Polity*, Sevilla, Global Law Press, 2012, 81; A. Manzella, *Lo Stato "comunitario"* (2003), now in *Quaderno europeo. Dall'euro all'eurocrisi* (2005) 35.

[55] See A. von Bogdandy & S. Schill, *Overcoming Absolute Primacy: Respect for National Identities in the Lisbon Treaty*, 48 Common Mkt. L. Rev. 1 (2011) (suggesting that the identity clause reshapes the relationship between the Union and its States).

Italian context, however, few have referred to national identity in connection with an organicist vision of the social body. Rather, some constitutional lawyers have expressed concern for the threats to which individual rights and equality are exposed. The core of the argument rests on the uniqueness of the framework for civil and social rights, including those relating to health and social security, that has been laid down by the Italian Constitution. There is no particular role in this list for individual freedom, adherence to the rule of law, government transparency, and so forth. These considerations, which are central to the liberal view of the State, are viewed as formalistic features. Hence the radical critique of the limits that stem from membership of EMU, such as the prohibition of excessive government deficits and the primary concern for monetary stability. The negative consequences that follow from these "neo-liberal" policy choices are said to affect, in particular, the protection of health. Some commentators criticize the asymmetry between the economic and the social with these words:

"Past experience has taught us that muddling through under the existing treaties works only at the expense of the democratic and social constitution. Past and present experience also shows the necessity of using macroeconomic instruments that are part of the social democratic tradition, and which EU rules constrain or foreclose. If those are now required, there are only two ways to harness them: either by aligning EMU to democratic and social ends or by unravelling it in a coordinated fashion to restore democratic and social constitutionalism at the national level". [56]

The concern for democracy, which is other pillar of these theories, is expressed in more than one way. While the founders of the European Community saw it as a club of liberal democracies that was the best way to secure peace and prosperity, and legitimacy was thus conceived in terms of outcomes, these commentators assert that the notion of democracy is attenuated or limited. The notion of democracy is directed at the deficit that is said to exist within the EU. While other scholars identify the democratic deficit in the "disjunction between power and electoral accountability" and express concern as to "executive dominance", [57]

[56] M. Dani, E. Chiti et al., *"It's the political economy…!" A moment of truth for the eurozone and the EU*, 19 International Journal of Constitutional Law 309 (2021).
[57] See, however, Moravscik's defence of the EU from the charge of democratic deficit: *In defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union*, 40 Journal of Common Market Studies 603 (2022).

these commentators explicitly address the tension between the technocratic nature of the CEU and its legitimacy. Their main thrust is the mixture of bureaucratic overreach and lack of transparency and accountability, which brings the Union away from the perspective of democratic constitutionalism. [58]

The differences between the first and the second school of thought are profound and can give rise to diverse consequences. Detailed analysis would require an extended chapter in itself. What follows is, perforce an outline of some issues, some of which are more abstract, while others are very concrete.

Consider, first, what is perhaps the crucial point from the perspective of both constitutional law and legal theory; that is, the conception of sovereignty. The phrase "limitations of sovereignty" that is employed by Article 11 of the Constitution can be interpreted in the sense that it allows the transfer of functions and powers to the EU. However, it can be interpreted in a radically different manner; that is, in the sense that EU institutions can be allowed only to exercise functions and powers which still belong to the State. The latter interpretation's underlying assumption is that sovereignty is inalienable similarly to what was argued in France at the epoch of the referendum on the Treaty of Maastricht. The consequence that follows from this is that sovereignty – traditionally intended - has not withered away, but is still at the heart of the constitutional settlement. Thus, for example, the supporters of this theory concede that the powers related to monetary policy are exercised by the ECB *de jure*, not *de facto*, and therefore the acts of the ECB constitute binding determinations of the matters that come within their remit. But, they argue, those powers can, legally, return to the State, to which they belong. This interpretation can be appealing theoretically, but it is not immune from practical difficulties. There is nothing to indicate that these powers can be brought back to the State, if it wishes to remain within EMU. The only possible option is, therefore, a withdrawal from the EU. This is not a threat but, legally, an inevitable consequence. [59]

[58] For further analysis, see E. Chiti & P.G. Teixeira, *The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis,* 50 Common Market Law review 683 (2013).

[59] See Chiti & Teixeira, *The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis* (fn 49), 707 (criticizing the "politics of fear").

Consider, now, the ratification of EC/EU treaties. For almost three quarters of a century, the legitimacy to the EC/EU has been based on the mechanisms of representative democracy. As a result, governmental negotiation must be followed by parliamentary ratification of the treaties. Factually, Parliament always ratified the treaties and, thus, sanctioned the transfer of functions and powers to Europe. However, the discontents argue that this method is acceptable only from the viewpoint of "formal" legality. What lacks, for them, is a "substantive" legitimacy, because the people should be allowed to express its voice through referendum, as happened in France and the UK. This theory is even more problematic than the previous one, because Article 75 of the Italian Constitution explicitly prohibits referendum concerning international treaties, such as those upon which the EU is founded. [60] The discontents thus reply that nothing prohibits a consultative referendum. In this case, there is a precedent, the consultative referendum held in 1989 on the project to give a constituent mandate to the European Parliament. But there is nothing to suggest that a mechanism that is not provided by the Constitution could be converted into something that the Constitution explicitly prohibits. Nor is it easy to see how Article 75 could be amended, because the very first clause of the Constitution provides that "sovereignty belongs to the people, which exercises with the forms and limits established by the Constitution". In other words, the choice for representative democracy cannot be overturned.

This perhaps explains why some constitutional lawyers recently posed a provocative challenge to the established jurisprudence of the ICC. As observed earlier, this jurisprudence has recognized the increasing integration between the national legal order and that of the EU. The critics contend that the Court should not hesitate to acknowledge the existence of a conflict between EU policies and the rights protected by the Constitution, which are said to be part of the national identity in the sense of Article 4 (1) TFEU. In light of the settled case law of the ICC, it is perfectly legitimate for these constitutional lawyers to pose searching questions concerning the legitimacy of the obligations that stem from EU membership. Moreover, it should not be forgotten that a similar line of reasoning has been used by the ICC

[60] For further discussion, see C. Martinelli, *Referendum in Italy and Ireland: Two Different Ideas of Direct Democracy and Popular Sovereignty*, Diritto pubblico comparato ed europeo on line, 1555 (2022).

in the German liability case, with the consequence that the national Constitution – as interpreted by the ICC – trumped international law. It is by the same token perfectly fitting to subject this analysis to close critical scrutiny, for example by raising the issue concerning liability, because within the EU there is a centralized system of enforcement, which is based on the Commission and the ECJ, as opposed to the international system. This is more especially so given that most of the cases in which the discontents complain about limitations imposed on social rights derive, in fact, from national constitutional provisions, such as those concerning financial balance and debt sustainability. This applies also to a variant to the previous argument; that is, some decisions taken by the institutions of the EU, such as the Stability and Growth Pact (SGP), have gone beyond the treaties and, consequently, unduly limit the exercise of power by national institutions. [61] There are excellent arguments to criticize the choice made with the SGP on grounds of policy. But, in light of Article 126 TFEU, which entrust EU institutions with the power to modify the standards for national budgetary policies, it is hard to see how the SGP can be regarded as extra-legal. A distinct issue is whether Italy should agree to further limitations of its budgetary or financial sovereignty. This issue will be discussed in the next paragraph.

D) *Acquis* v. further integration? The new ESM Treaty

Thus far, we have discussed two groups of theories that concern the European construction, as it developed in the last seven decades or so, in other words, the *acquis*. It is time to consider the perspective of further integration. In this respect, for analytical purposes, two opposite visions of Europe can be delineated. For our purposes here, it suffices to characterize each of them in the briefest terms. There is, first, the vision that is centred on the idea, or perhaps the ideal, of an "ever closer union among the peoples of Europe", to borrow the famous words used by the Treaty of Rome's preamble. The other vision of Europe postulates a greatly enlarged union with less intense ties, a sort of 'club' where the members agree only on few fundamental objectives and principles and do not necessarily wish to change the current state of things. My intent

[61] G. Guarino, *Un saggio di "verità" sull'Europa e sull'euro*, Rivista italiana per le scienze giuridiche 211 (2013) (for the assertion that a sort of "golpe" took place).

here is not to discuss these visions in their entirety, because my views have already been expressed elsewhere. [62] My intent is, rather, to show that the differences between these visions of Europe are so profound that the practical consequences will differ depending upon the framework within which they are considered.

This applies, in particular, to the financial mechanisms existing within and outside the EMU. In this respect, the first school of thought tends to assume that the criteria governing the conduct of monetary policy are based on the "nature of the things". For others, bureaucratic expertise and unrepresentative bodies such as central banks make decisions but are unaccountable. They criticize, a fortiori, the European Stability Mechanism (ESM), which is a body created by a separate international treaty and which lies outside the institutional framework of the EU, which exacerbates problems of complexity and opacity. Diverse opinions characterize the debate concerning the ratification of the new treaty which modifies the ESM. As Italy is the only Member State which has not yet ratified the treaty, this is of importance for the whole EMU. The discussion proceeds in the following manner. As a first step, economic arguments in favour and against the new treaty will be illustrated. Next, a specific legal issue will be considered. Finally, the political ramifications of this debate will be discussed.

There are two main arguments supporting the ratification of the new treaty on the ESM. There is, first, a general argument concerning the banking union. The heart of the argument is that the "banking union remains incomplete, without its cross-border deposit insurance pillar supported by a credible fiscal backstop". [63] As a result of this, the EMU remains exposed to financial shocks, which may threaten its systemic stability, with the further consequence of making bailouts necessary, but in contrast with existing rules. It is readily apparent that the theory of integration which underlies this argument is neo-functionalism, with its strong emphasis on spill over; that is, the idea that integration in one area creates pressures for further integration in the same area or in other

[62] See G. della Cananea, *Differentiated Integration in Europe After Brexit: A Legal Analysis*, in I. Pernice & A.M. Guerra Martins (eds.), *Brexit and the Future of EU Politics. A Constitutional Law Perspective* (2019), 45.

[63] S. Micossi & F. Pierce, *Overcoming the gridlock in EMU decision-making*, CEPS policy insights No 2020/3, March 2020, 1, available at http://aei.pitt.edu/102604/1/PI2020-03_Overcoming-the-gridlock-in-EMU-decision-making.pdf.

areas, and that this would secure prosperity, in the guise of stability. This is even more evident when considering that the next step should be supporting the ESM by way of a public guarantee against sovereign default; that is, a Eurobond. The general argument is supplemented by another that concerns Italy. The size of its public debt is huge [64] and the exposure of some national banks is non negligeable. Hence the necessity to prevent banking crises that may have a negative impact on sovereign debt. In sum, if the reform of the ESM fits well with the EMU members' needs, it does more so with the needs of Italy.

The opposite theory contests both arguments. It contests the advantages that would derive from the reform of the treaty establishing the ESM, because this would transform the ESM from a "manager of sovereign debt into an institution for the prevention, control and management of such crises". [65] More concretely, the ESM would be entrusted with the power to decide whether a country which takes part in EMU and that must seek for external financial support, should restructure its government debt. This risk, it is added, is particularly serious for Italy, precisely in light of its high public debt, which would be exposed to heavy instability. In brief, "the EMU Member State that has the most to lose is Italy". [66]

The contribution of economic science to a better understanding of the advantages and disadvantages, when a government is faced with a difficult strategic decision, may not be underestimated. In a legal analysis it is extremely hard – if not impossible – to weigh up the pros and the cons of such a decision. However, in some respect legal analysis may clear the ground from possible misunderstandings. This is the case of the proposition according to which, if the new treaty is ratified and the ESM is entrusted with new powers and thus makes an agreement with an EMU country, where certain conditions are included, those conditions may be unilaterally and retroactively modified by the ESM board, against the will of the State concerned. This proposition is not legally or politically tenable. It is not legally tenable because

[64] It is "colossal", for Micossi and Pierce, *Overcoming the gridlock in EMU decision-making* (fn 56), 1.

[65] M. Messori, *The flexibility game is not worth the new ESM*, LUISS working paper n. 15/2019, October 2019, available at https://sep.luiss.it/publication-research/publications/m-messori-the-flexibility-game-is-not-worth-the-new-esm/.

[66] Messori, *The flexibility game is not worth the new ESM* (fn 58), 12.

unilateral and retroactive modifications of a bilateral agreement are excluded. It is politically untenable, because there is no reason why a board should have a privileged status against a country that is signatory to a treaty.

That said, the political spectrum is more divided that it ever was. The majority that supported the government led by Mario Draghi was so divided that they decided not to decide about the the new ESM Treaty. The new government, which is based on a Euro-sceptic majority, initially affirmed that it was necessary to wait until Germany's Constitutional Court adopted its ruling on the action brought against the ratification of the new treaty. That ruling was adopted at the end of 2022. The decision with which the NEW government is confronted is a twofold one. On the one hand, they have to come to grips with the question concerning the whole EMU, which now has twenty members; that is, whether the new treaty must be ratified, after which every country may decide whether to use the instruments that it provides. On the other hand, they must clarify whether they intend to avail of the loans at the conditions provided by the new treaty. Logically and legally, the two issues are clearly distinct, and the stakes concerning the former are higher than those regarding the latter, because for the first time Italy might be viewed as obstructing further integration. However, politically the distinction tends to blur in the opinion of the political leaders according to whom approving the ESM changes would "end our national sovereignty". Moreover, the government might be tempted to threat not to initiate the ratification process in order to negotiate on other dossiers, such as the reform of the SGP. This would be, in itself, a change, because it would show the government's intent to operate so as to maximize its (perceived) individual interest regardless of the perspective of an ever closer union between the peoples of Europe, [67] and might run counter the maintenance of the Italy's political position in the core of the EU. Like in Borges' "garden of forking paths", cyclical repetition is not disjointed from differently spreading trajectories. [68]

[67] For a discussion that catches well the assumptions upon which this vision of the EU is based, see
C. Harlow, *A Community of Interests? Making the Most of European Law*, 55 Modern L. Rev. 331 (1992).
[68] JL Borges, *The Garden of Forking Paths*, English translation (1948).

6. Conclusion

There will be no attempt to summarise the preceding arguments. It can be helpful, rather, to highlight some analogies and differences between Italy, Germany and France, three founders of the EU. Like France and Germany, Italy is a founding member of the European Communities and now of the Union. Like Germany and unlike France, its membership has been based on the mechanisms of representative democracy and its constitutional identity has been gradually shaped in close connection with the European construction. Unlike Germany, however, there is for the first time a parliamentary majority that is reluctant, if not openly hostile, to further integration at least in some areas. The role of legal scholarship is to raise adequate awareness of the past choices, especially those that are enshrined in the Constitution and which can be changed only through the prescribed forms and within certain limits, and to be equally aware that there are always sunsets and new dawns.

FRAMING MIGRATION, POPULATION AND LEGAL ORDERS: THE INTEGRATION PUZZLE IN ITALY

*Hilde Caroli Casavola**

Abstract

The present contribution summarizes the relationships between, on one hand, migration and population in Italy and, on the other, between the Italian legal framework and the effective integration of migrant people taking into account the gaps on the former in the different dimensions of the phenomena at European, national and local level and the general political issues related to the latter

TABLE OF CONTENTS

* Professor of Administrative Law, University of Molise

1. Introduction

The present contribution summarizes the relationships between, on one hand, migration and population in Italy and, on the other, between the Italian legal framework and the effective integration of migrant people taking into account the gaps on the former in the different dimensions of the phenomena at European, national and local level and the general political issues related to the latter.

Among the peculiar consequences of the transformations that have been sweeping the EU Member States since the early 2000s (economic crisis, increased migratory flows and others), there is that of a heightened awareness in all its national societies of the importance – social, economic, political – of the problems linked to the exclusion or inclusion, integration and participation of foreigners.

Whether third-country nationals or stateless persons, legally or irregularly residing immigrants, refugees, asylum seekers[1] and so on, integration has been a central theme of public debate in Europe in recent years. The topic is closely linked to that of economic and social equality (more precisely, it recalls inequalities, which have grown exponentially in the last two decades), a founding value of continental liberal-democracies, and which, also because of the instrumentalization punctually recorded in the political debate, mainly during election campaigns, amply justifies careful reflection and rethinking on how to facilitate integration through rules.

The growing awareness of the structural character of migration, combined with the serious negative consequences of demographic decline and the presence of inner (isolated) areas,[2] mostly overlapping with rural ones, make Italy a unique case-study of migrant's integration in connection with local core-periphery dynamics and peculiar institutional and regulatory frameworks

[1] Legal positions used in EU Member States national legislation concur to define five main social groups that can be identified as the following: aliens (or non-EU citizens), EU citizens, refugees, migrant workers and illegal residents. In 2021 forced migrants were 89,3 million so divided: internal displaced people, 53,2 million; 21,3 refugees; Palestinian refugees under UNRWA mandate, 5,8 million; abroad displaced Venezuelan people, 4,4 million and asylum seekers, 4,6 million (UNHCR database). Main push factors are wars (32), food crisis or shortages (870 million interested people) and environmental crisis due to climate change (24 million of internal displaced people), besides Covid-19 pandemic.

[2] On the National Strategy for Inner Areas-NSIA see *infra*, note n. 95.

and tools. The close link between process of regression and recalibration (mostly impoverishment) of Welfare, historical regulatory gaps, the depopulation of vast areas and emerging social discontent phenomena, led to the search for answers that were neither based on emergency and short-term logics, nor exclusively on regulations. The answers had to be practically feasible and, to this end, adapted to the peculiarities of the socio-economic, geographical and cultural situation of the various territories.

From the observation of this complex and contradictory reality, which is even more relevant today in the face of the threatening geopolitical situation, a series of questions emerge concerning how to intervene, with which instruments and institutions to equip the country and the local authorities involved, in order to emerge from an *impasse* fraught with further and greater unknowns. To answer these questions, it appears necessary first to closely define the framework and the 'European paradigm', which constitute the essential regulatory premise for understanding the national discipline. Historical national gaps were in fact formed and consolidated during a period and in a context of prolonged EU disengagement and a vacuum not only of strategies, but of any useful collective political and regulatory initiative, despite the fact that increased migration was widely announced. Then, to examine the main possible and practicable integration strategies, defined starting from the geo-territorial characteristics of the regions involved and the national labour market.

Managing the phenomenon involves channelling the flows and avoiding both illegal trafficking and abuse of the right to asylum (such as false declarations of origin). Integrating, on the other hand, means first planning a progressive sizing of services (housing, health, social, welfare and others), appropriate to a larger and more industrious community. Secondly, subordinating to the interest in working and contributing to the country's prosperity, the recognition of citizenship rights. This, to be sure that those who come, do not just aim to take advantage of social protections. Increasing social cohesion implies first establishing the right institutions for this purpose and strengthening them, to overcome obstacles to individual and collective development and growing inequalities, since – to use Kant's words – even a Republic of wicked people can turn into a decent state in the presence of good institutions.

For a long time, we have been witnessing, on the contrary, a

process of impoverishment and side-lining of health, education and welfare services, implemented in the name of an alleged principle of rational organization (based on minimum thresholds) and by means of linear cuts, as easy as they are indistinct, a non-choice with inauspicious effects. Added to this is the problematic 'transversality' to numerous areas of state and local authority activity, which a serious commitment to integration necessarily requires: if already in ordinary times the fragmentation of functions, their duplication and the confusion of competences between offices invalidate any capacity for inter-administrative coordination and between the different levels of government in matters of high political impact, in conditions of emergency (economic, migratory, pandemic, etc.) the bureaucratic tangle becomes overwhelming and administrative officials do not know which level or office is responsible for a given policy.

Further, the national leading classes (*elite*) are generally reluctant to invest in increasing the supply of services necessary for integration, due to the fear of triggering an incremental mechanism, a pull factor – so to say – exponential and 'no return' for immigration (H. Nordström). Meanwhile, political forces of all orientations (not only Italian) find themselves, at best, annihilated by the dilemma: reactionary and conservative ones, whether or not to instrumentalise the issue to increase consensus in the polls; moderate and progressive ones, whether or not to confront it, fearful of indirectly fomenting populist sentiments and nationalist (or sovereignist) drifts. Political instability inevitably determines the government's agenda and the prospects for legislative interventions inspired by a calm, constructive parliamentary debate are becoming increasingly remote. Countries remain paralysed by political battles and the problem unsolved.

In the Italian case, a strategic function for future well-being (the management of migration, understood as the phenomena of immigration and emigration) has become, for at least a five-year period, a catalyst for consensus in the political *tourbillon* and the incessant electoral campaigning that characterises the domestic context; then, in the last year, a stone guest. In the weeks leading up to the last general election (September 25th, 2022), in fact, the topic remained out of the public debate, probably because it was a divisive issue for the electorate.

2. Migration and the EU

The issue of migration was prevalent in the public debate of the EU Mediterranean countries in the past years and it still remains among the major focuses of their decision-makers, policy experts and national legislators. Available data, mainly based on OECD regional monitoring systems – which usually do not include the number of asylum seekers –, indicate an increase in overall migration flows in 2019[3]. Across Southern European countries the dynamic was quite different, as migration to Spain increased consistently (+18% in 2019) while migration to Italy decreased slightly (-9%, Ibidem). Regarding mixed migration flows, the numbers of registered arrivals show that the Eastern Mediterranean route – leading to Greece and Bulgaria – was the main route taken by migrants and refugees travelling to Europe by sea and by land in 2019, compared to those travelling in 2018[4].

The underlying socio-economic challenges of the presence and the handling of temporary and permanent immigrants in the EU Mediterranean countries have a significant impact on the political scenario in terms of workable solutions to the main administrative problems and capacity of the national leaderships to present them to voters and to deal with cross-cutting tasks (as managing identification and relocation procedures, redefining national welfare systems or access to job market etc.).

The impact of Covid-19 pandemic on the evolution of migration flows ultimately showed the biggest fall in the number of registered arrivals through the Eastern Mediterranean route. As documented by Frontex (figure 3), there was a significant decrease of over three quarters, to around 20.000, while the number of detections of irregular border crossing in the Western Mediterranean region decreased by 29% to around 17.000 and the arrivals through the Central Mediterranean route almost tripled[5]. Even in 2022 the latter, together with the Balkan route, remains the

[3] OECD, ILO, IOM, UNHCR, "2020 Annual International Migration and Forced Displacement Trends and Policies Report to the G20", p. 4-5.

[4] DTM, *Mixed Migration Flows in the Mediterranean. Compilation of Available Data and Information*, February 2020, p. 3-4, whose data include all registered arrivals.

[5] To over 35.600 (Frontex New Release, *Irregular migration into EU last year lowest since 2013* due to Covid-19) on the 8 of January 2021; to 67.724 on the end of December 2021 (while to 61.618 through the Balkan route; IDOS, *Dossier Statistico Immigrazione 2022*, p. 2).

most used route where the highest number of illegal entries was recorded[6].

During the meeting of the EU Member States' Ambassadors of 16 June 2020, Italy, together with the Mediterranean countries Spain, Greece, Cyprus, Malta (Med 5), confirmed their willingness to negotiate an agreement on the European Asylum Agency. More than two years later however it is clear that the way of strengthening EU sectoral decision-making bodies is still long and difficult and that most of the small improvements so far realized at supranational level, were deeply connected with political circumstances and compromises.

Among the most interesting civic and government initiatives deserve consideration the "From the Sea to the City" Consortium, born in 2020 and launched by Mayors and city representatives from all over Europe that have shown their willingness to uphold fundamental refugees' and migrants' rights. With the aim of pursuing a welcoming and human-rights based migration and refugee policy, they offer a very significant example of bottom-up approach to socio-economic problems. The small dimension of towns, villages and cities of the Mediterranean landscape is in fact the right one to ensure an adequate, tailored and diffuse integration of asylum seekers and refugees coherent with European common legal traditions and values and respectful of its socio-economic fabric.

2.1. The "Dublin system" and its reform

The EU has no specific competence in the field of immigration. The policy of the European institutions has long been characterized, on the one hand, by the effort to pursue the common interest, on the other hand, by the protection of the Member States national prerogatives, in accordance to Articles 79 and 80 TEU. The following analysis will be focused, as first, on the so-called "Dublin system" and its failures and inefficiencies[7]. Second, the new

[6] The increase in arrivals in the EU is 77% compared to 2021 (for the Central Mediterranean route +59%, for the Balkan route +168%). Between January and the 24th November 2022, through the Balkan route arrived 281.000 migrants, while 94.341 travelled on the Central Mediterranean one (EU Commission, Frontex data).

[7] The negative outcome emerges most recently in the *Report on the implementation of the Dublin III Regulation*, 2nd December 2020, of the European Parliament, Committee on Civil Liberties, Justice and Home Affair, A9-0245/2020.

European Pact's proposal for a regulation on Asylum and Migration Management[8] will be considered, marking its new features and lack of significant improvements. In the final part, the future of migration policies is reviewed, through an analysis of the planned funding of the 2021-2027 financial framework.

The Treaty of the European Economic Community, signed in Rome on 25 March 1957, contains no provision devolving to the European institutions power in the field of immigration. The regulation of this matter is therefore left to the discretion of the Member States, without any regulatory framework. In the years following the signing of the Treaty of Rome, the increasing migratory flows towards Europe have placed immigration at the top of the EU Member States' agenda. Combating illegal immigration, strengthening border controls and the important role that controlled immigration plays in the economic and demographic development of the Union represent major challenges for the EU. Traditionally visas, asylum and immigration issues are left to intergovernmental cooperation only.

The Dublin Convention, signed by 12 Member States on the 15th of June 1990[9], was set up to determine the Member States responsible for examining an application for international protection (the minimum coordination among MS, their national policies through the adoption of a common criterion of responsibility) and to fulfil international obligations, in accordance with the Geneva Convention (1951) and the New York Protocol (1967)[10]. The so-called "Dublin system" was born as an international agreement, closely linked to the Schengen Agreement: they became two pillars of European asylum and immigration policies[11]. As stressed in several EU documents, it is the

[8] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (COM(2020) 610 final, of 23.9.2020).

[9] By Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, Netherlands, Portugal, United Kingdom. On this topic, see, among others, N. Blake, *The Dublin Convention and rights of asylum seekers in the European Union*, in C. Harlow, E. Guild (eds.), *Implementing Amsterdam: immigration and asylum rights in EC law* (2001); A. Hurwitz, *The 1990 Dublin Convention – A Comprehensive Assessment*, Int'l J. of Ref. Law 646 (1999).

[10] On the so-called Geneve Convention, see B.S. Chimni, *The Birth of a "Discipline": From Refugee to Forced Migration Studies*, 22 J. of Ref. Stud. 16 (2009).

[11] On the harmonization policy pursued by the Dublin regulation, see R. Marx, *Adjusting the Dublin Convention: New Approaches to Member State Responsibility for*

'cornerstone' of the Common European Asylum System-CEAS[12]. The Dublin regulation should prevent an application by the same applicant from being examined in more than one Member State and requires it to be examined by the State where the applicant entered the EU. Furthermore, it (Dublin reg.) established other criteria for determining responsibility apart from first Member State of the entry. On its basis if the asylum seekers have illegally crossed the border of a Member State, it is that Member State that has to take charge of them. However, asylum seekers have the right to remain in the country of arrival, despite not having regular entry documents, and to be assisted according to the Reception conditions directive, the Asylum procedures directive and the Qualification directive.

After the entry into force of the Treaty of Amsterdam in 1999, the right to asylum felt within the Community competences because of the approval of the Dublin II Regulation (Regulation (EC) No. 343/2003), which replaced the Convention in 2003[13] and consisted also in the so-called "Eurodac-Regulation" (Regulation (EC) No. 2725/2000) as well as the related Implementing Regulations (Regulation (EC) No. 1560/2003 and Regulation (EC) No. 407/2002). Five different criteria underlie the decision of which country should be responsible for an asylum claim[14]. First, the principle of family unity: the State where a family member is located is competent. Second, the issuance of residence permits or visas: if the applicant holds a valid residence permit, the issuing State is responsible. Third, the application submitted in the

Asylum Applications 3, Eur. J. of Migration and L. 7, 14 (2001). On the relationship between the Dublin system and the Schengen system see, among others, K. Hailbronner, C. Thiery, *Schengen II and Dublin: Responsibility for Asylum Applications in Europe*, 34 Common Mkt. L. Rev. 987 (1997); B. Tonoletti, *Catastrofe e redenzione del diritto pubblico europeo*, in F. Cortese, G. Pelacani (eds.), *Il diritto in migrazione. Studi sull'integrazione giuridica degli stranieri* (2017) 55-106; M. De Somer, *Dublin and Schengen: A tale of two cities*, EPC Discussion Paper (15 June 2018).

[12] I.e. European Council, 'The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens' [2009] OJ C115/1, para 6.2.1.

[13] J. Aus, *Logics of Decision-making on Community Asylum Policy – A Case Study of the Evolvement of the Dublin II Regulation*, ARENA Working Paper No. 3 (February 2006).

[14] U. Brandl, *Distribution of asylum seekers in Europe? Dublin II Regulation determining the responsibility for examining an asylum application*, in C. Dias Urbano De Sousa, P. De Bruycker (eds.), *L'émergence d'une politique européenne d'asile* (2004) 33.

international transit zone of an airport: it is foreseen that when "the desire to seek international protection is manifested in the international transit zone of an airport of a Member State, that State is the competent one". Forth, in case of legal entry into a Member State, the latter will be competent for it. Last, in the opposite case of illegal entry or presence in a Member State, if the applicant has illegally crossed the border of a Member State by land, sea or air from a Third country, the Member State is responsible for the illegal entry or residence.

The EU Commission evaluated the Dublin system in 2007 and suggested a reform which led to the adoption of recast Regulations for Dublin (Regulation (EU) No. 604/2013, "Dublin-III-Regulation") and Eurodac (Regulation (EU) No. 603/2013) in 2013 and to changes to the Dublin Implementing Regulation (Regulation (EU) 118/2014). The main objects of the recast were to strengthen the efficiency of the system and to improve the standard of protection for asylum seekers[15]. In 2014, the Dublin III Regulation came into force, replacing the previous one with measures not detailed enough to give a substantial change. The competence to examine an application for international protection still lies with the Member State that plays the greatest role in relation to the applicant's entry into the EU territory, with certain exceptions[16]. The criteria for determining the State responsible is still the same, with the residual criterion, but one that is predominantly applied, being the State of first entry into the EU. This very criterion leads to an imbalance in the responsibilities of the EU Member States: frontier and costal States – like Italy, Spain, Malta and Greece – are

[15] For several years, legal claims have been brought before the European Court of Human Rights to denounce the violation of the European Convention for the Protection of Human Rights by Member States, in application of the Dublin Regulation, almost always rejected or declared inadmissible. On this point see J. Lenart, *«Fortress Europe»: Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Utrecht J. of Int.'l and Eur. Law 4 (2012).

[16] On the claims of State competences at this stage, J. Monar, *The External Dimensions of the EU's Area of Freedom, Security and Justice. Progress, Potential and Limitations after the Treaty of Lisbon*, Swedish Institute for European Policy Studies, Report n. 1 (May 2012) 23. On marginal, limited spheres of exclusive competence of the EU at the time, E. Neframi, *Division of Competences between the European Union and its Member States Concerning Immigration. Study required by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs* 7 (2011).

overloaded by the double burden of border control in the interests of all the Member States and the task of receiving asylum seekers.

Since 2014 the increasing numbers of flows made more and more clear the failures and inefficiencies of the Dublin system[17]. Frontier and costal EU Member States administrations were unable to handle the great number of asylum and international protection applications they received. These countries found themselves not equipped to monitor and control the great migrant inflows and flows out of the country and, in several cases, managed to circumvent the system by shifting the weight of the flows to the countries of last destination, such as Belgium, France, Germany, the Netherlands and Sweden. Further, the inter-administrative coordination among different national authorities was (and is still) lacking. Migrants often found (and still find) themselves stuck in a 'limbo' for long periods, awaiting a decision on their legal *status*. In addition, the Dublin system does not take sufficient account of several type of family members for reunification, which is currently the main reason for entry, and obviously places greater pressure on the countries on the Union's southern borders. The need for broadening the definition of "family links" to include also siblings and family formed in third states, for instance, has been often outlined by experts and scholars[18]. What does not work, finally, are the repatriations to the countries of first entry of the so-called 'Dubliners'[19]. Migrants tend to redistribute themselves after their arrival in Europe, mainly to countries, such as Germany and Sweden, which are not always able to trace migrant's movements and send them back, both for operational difficulty in avoiding illegality and economic reasons since repatriation has a cost. As documented by IOM, "[*a*] *total of 28,256 migrants were assisted to return from the European Economic Area-EEA in 2019, which accounted for 43.5 per cent of the total caseload. Despite a 17 per cent decrease as*

[17] On the non-functionality of the Dublin system as a burden-sharing instrument in the proper sense, see Matrix Insights Ltd., *What system of burden-sharing between Member States for the reception of asylum seekers?*, PE 419.620 (22 January 2010). On the redistributive implications that it however has, see G. Noll, *Negotiating Asylum* (2000), 318 ff.

[18] D. Thym, *Secondary Movements: Overcoming the Lack of Trust among the Member States?* in emigrationlawblog.eu (October 2020); F. Maiani, *L'unité familiale e le système de Dublin. Entre gestion de flux migratoires et protection des droits fondamentaux* (2006).

[19] C. Feitgen-Colly, *The European Union and Asylum: an Illusion of Protection*, Common Mkt. L. R. 1503 (2006).

compared to 2018, the EEA remains the top host region (IOM, 2020). Most of the beneficiaries were assisted to return from Germany (13,053, or 46 per cent of the total number of beneficiaries assisted from the EEA). Greece (3,804) remains the second main host country, despite a 22 per cent decrease in the number of migrants assisted compared to 2018. Austria (2,840) and Belgium (2,183) have lost their respective third and fourth positions, being overtaken by the Netherlands (3,035), which experienced a 41 per cent increase in the total caseload of migrants assisted (ibid.)"[20].

The most controversial aspect is the willingness of Member States to counteract the phenomenon so-called asylum shopping, i.e. the practice of asylum seekers applying for asylum in different countries or in a particular country after having transited through other countries. The EU legislation, through the so-called Dublin Regulation, establishes that asylum applications must be presented and registered in the country of first arrival and that the decision of the first Member State where the application has been formalized is the final decision in and for all other EU countries. This practice is very common amongst the so-called economic migrants and the whole mechanism therefore ends up entrusting the "filtering" role of the border countries, in order to control flows and limit entries[21].

As a consequence of the "migratory crisis" in 2015, the EU Commission launched on 4 May 2016 – as a first step of a full revision of the CEAS – a recast Dublin Regulation ("Dublin IV"), a recast Eurodac-Regulation as well as a proposal for the establishing of a European Union Agency for Asylum. The Commission Proposal "for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person"[22] aimed at streamlining the Dublin rules "*to enable an effective operation of the system, both in relation to the swifter access of applicants to the procedure for granting international protection and to the capacity of Member States' administrations to apply the system*". Besides it was intended to contain and limiting "*secondary*

[20] Available at migrationdataportal.org.

[21] On this topic, see C. Odorige, *The Shoppers; Venue Shopping, Asylum Shopping: A Resolution in EURODAC?*, *CEE e|Dem and e|Gov Days* 229-237 (2018).

[22] Proposal com(2016) 270 final. For an in-depth analysis of the proposal, see the study carried out on behalf of the European Parliament by F. Majani, *The reform of Dublin III Regulation* (28 June 2016).

movements within the EU, including by discouraging abuses and asylum shopping" and to identify tools *enabling sufficient responses to situations of disproportionate pressure on Member States' asylum systems"* through a "*corrective allocation mechanism*" that ensures a "*high degree of solidarity and fair sharing of responsibility*" among Member States. In the critical studies of EU Law scholars was unanimous evaluation that the 2016 Proposal would not enhance the efficiency of the system and from a practical implementation perspective streamlining the Dublin rules was bound to fail[23]. Shortly before the presentation of the Dublin IV proposal, a temporary and unprecedented derogatory scheme was approved[24]. The latter, at recital 34, expressly establishes that:

> "The integration of applicants in clear need of international protection into the host society is the cornerstone of a properly functioning CEAS. Therefore, in order to decide which specific Member State should be the Member State of relocation, specific account should be given to the specific qualifications and characteristics of the applicants concerned, such as their language skills and other individual indications based on demonstrated family, cultural or social ties which could facilitate their integration into the Member State of relocation".

A different way to allocate asylum seekers to Member States was thus defined and it recalls the same logic of Art. 38 of the Asylum Procedures Directive: due regard must be given to the existing connection 'between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country'. Giving more weight to objective links between an asylum seeker and a given country, this scheme fuelled a broader

[23] See, among others, M. Di Filippo, *The Dublin Saga and the Need to Rethink the Criteria for the Allocation of Competence in Asylum Procedures*, in V. Mitsilegas, V. Moreno-Lax, N. Vavoula (eds.) *Securitising Asylum Flows* (2020) 196-235.

[24] The so-called relocation scheme, provided by the EU decision 2015/1523 of the Council of 14 September 2015, establishing provisional measures in the area of international protection for the benefit of Italy and of Greece OJ L239/146, and the (EU) Decision 2015/1601 of the Council of 22 September 2015, establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L248/80. On this topic, see C. Scissa, *Relocation: Expression of Solidarity or State-Centric Cherry-Picking Process?*, 1 Freedom, Sec., Just.: Eur. Legal Studies 132-51 (2023).

debate on the overall reform of the Dublin system. Despite the circumstance that the 2016 Dublin IV Proposal has been withdrawn in 2020, the new European Pact's proposal for a regulation on asylum and migration management recalls for many aspects the Dublin IV Proposal.

2.2. The New European Pact's proposal for a regulation on asylum and migration management

Presented at the end of September 2020, the new European Pact's proposal on asylum and migration management[25] follows years of complete deadlock and failed negotiations. It comes in a peculiar moment, after the failure of the last legislature to reach an agreement on the reform of the rules governing asylum at European level. At the same time the world panorama has changed drastically: from the spreading feeling of aversion towards reception and hostility towards NGOs or private entities among the Member States population and above all because of the SARS pandemic Covid-19. Irregular migrant arrivals on the EU territory have been falling sharply for some time and asylum applications, while remaining constant (around 700,000 requests per year from 2017 to 2019), are just over half of those recorded by Member States in 2015 and 2016. This is a far cry from the situation in the middle of the last decade. Nevertheless, irregular migration is still a cause for concern due to the volatile circumstances playing as push-factors driving migration in countries of origin.

Promised as "a fresh start", the new Pact however does not provide a proper binding regulation and it is a rather timid proposal, a useful starting point for further discussion among EU Member States, with strong limitations, as further analysed. The strategy of the Commission is twofold: on one side, a proposal for an asylum and migration management's Regulation, on the other, a "new solidarity mechanism" connected to "robust and fair management of the external borders" and capped by a new "governance framework". It recognizes that no Member State should bear a disproportionate responsibility and that all MSs should contribute to solidarity on a regular basis. To come to the contents, it provides four relevant novelties. First, the emphasis on the principle of solidarity between States of first arrival and

[25] Communication of the EU Commission, COM(2020)610 final, of 23 September 2020 on the proposal for a Regulation on asylum and migration management.

destination, as well as on the harmonization of procedures[26]. Second, a pre-screening procedure at the border aimed at identifying those arriving from a country on the list of so-called "safe countries" of origin and for whom the accelerated procedure is envisaged. Third, the outsourcing of controls. Fourth, the inclusion - for the first time - of siblings among the "family links", i.e. as persons to whom they can apply for reunification. The most controversial profile is related to the choice of focusing on border procedures oriented to quick and summary decisions - basically, of "no entry" - instead of an organic reform of the Dublin Regulation[27].

The new Pact has been described as "a three-story building" where the first floor is the external dimension, agreements with countries of origin and transit. The aim is to help people in their countries of origin: to deepen cooperation on migration through comprehensive, balanced and tailored partnerships with them. The second floor consists of measures to strengthen the control and management of the EU's external borders through several elements: a robust screening system that includes identification, health checks, fingerprinting and registration in the Eurodac database[28]; a new European border and coast guard, with more personnel, boats and equipment[29]. Border and migration management information

[26] See, among others M. Moraru, *The new design of the EU's return system under the Pact on Asylum and Migration,* EU Migration Law Blog (14 January 2021); V. Moreno-Lax, *A New Common European Approach to Search and Rescue? Entrenching Proactive Containment*, EU Migration Law Blog (3 February 2021); F.R. Partipilo, *The European Union's Policy on Search and Rescue in the New Pact on Migration and Asylum: Inter-State Cooperation, Solidarity and Criminalization*, 2 Freedom, Sec., Just.: Eur. Legal Studies (2021).

[27] For which the political conditions are clearly not yet ripe; see F. Maiani, *A "Fresh Start" or One More Clunker? Dublin and Solidarity in the New Pact*, EU Migration Law Blog (October 2020).

[28] Provided by Regulation n. 603/2013 of the European Parliament and of the Council is the database for comparing the fingerprints of asylum seekers and third-country nationals apprehended while crossing EU borders. In 2014, following Europe's warning to Italy, accused of contravening the Dublin Regulation and allowing unidentified migrants to transit through EU countries, the Italian Ministry of the Interior issued Internal Circular No. 28197 of 25 September 2014, which states that "the foreigner must always be subjected to photodactyloscopic and fingerprinting checks [...] regardless of the precise identification on the basis of the travel document, if possessed' or even 'the non-existence of grounds for doubt as to the declared identity. This is all the more so if there is a suspicion that he has applied for asylum in some other EU country".

[29] On the original institution, see F. Ferraro, E. De Capitani, *The new European Border and Coast Guard: yet another "half way" EU reform ?*, ERA Forum 385 (2016).

systems has to work in unison by 2023, giving costal and frontier guards the information they need to know who is crossing EU borders. Last but not least, the third floor is tailored to address the most complicated subject of European migration and asylum policies, namely solidarity and the distribution of responsibility for the management of asylum seekers among Member States. The new solidarity mechanism focuses primarily on relocation or sponsored returns. In the frame of the "return sponsorship", the Commission first determines whether a State is faced with "recurring arrivals" following Search and Rescue-SAR operations and determines the needs in terms of relocations and other contributions (capacity building, operational support proper, cooperation with third States). Afterwards it invites Member States to notify the "contributions they intend to make". They can choose to offer relocations for the eligible persons or return sponsorship of migrants not entitled to stay in the EU, and if the return is not carried out within eight months, the relevant State must accept the migrant on its territory. Eligible persons are those who applied for protection in the benefitting State, with the exclusion of those subject to border procedures in force of Article 45(1)(a) and of those assigned on the base of "meaningful links" – family, abode, diplomas – to the benefitting State, in coherence to Article 57(3). The assumption related to these measures is that the benefitting State must carry out identification, screening for border procedures and the first shortened Dublin procedure before it can declare a person eligible for relocation.

If offers are sufficient, the Commission combines them and officially establishes a "solidarity pool"[30]. In other words, Member

[30] The principle of solidarity was affirmed by the CJEU in its judgement in *Slovakia and Hungary v. Council* on 6 September 2017, dismissing the action brought by Hungary and Slovakia against the provisional mechanism for the mandatory relocation of asylum seekers (that contributed to enabling Greece and Italy to deal with the impact of 2015 crisis), adopted by the Council in its binding decision of 22 September 2015, n. 2015/1601 (*supra*, f. 13) on the relocation of 120.000 people within the Union. The Court found the Council "fully entitled to take the view, in the exercise of the broad discretion which it must be allowed in this regard, that the distribution of the persons to be relocated had to be mandatory, given the particular urgency of the situation in which the contested decision was to be adopted" (para 246). On the principle in EU law, see among others, M. Kotzur, *Solidarity as a Legal Concept*, in A. Grimmel, S. My Giang (eds.) *Solidarity in the European Union. A fundamental value in crisis* (2017); R. Wolfrum, C. Kojima (eds.), *Solidarity: A structural principle of international law* (2010); V. Mitsilegas, *Humanizing solidarity in European refugee law: The promise of mutual*

States can decide whether and to what extent to share commitments, choosing between relocating applicants or sponsoring returns. At the same time, they are bound to cover at least 50% of the relocation needs set by the Commission through relocations or sponsorships, and the rest with other contributions. In fact, if offers are not sufficient, the Commission provides - by means of an implementation act - specific relocation targets for each Member State and summarizes other contributions as offered by them. If such targets are not reached and the relocations offered fall 30% short of them, a "critical mass correction mechanism" will be adopted (with the obligation for the interested Member States to meet at least 50% of the relocation needs set by the Commission). A quite similar scenario is open by the declaration that a Member State is "under migratory pressure", by the EU Commission on its own motion or at the request of the concerned State (Art. 50). In this case, the beneficiaries of protection become eligible for relocation too (art. 51(3)). The measures thus set contribute to realize an "half-compulsory" solidarity which is far from effectively solving the failures of the system. There is a lack of strategic and long-term measures and a loss of focus on the fundamental values of the Union, while irregular immigration is encouraged.

As the EU Commission stated, the new Pact put "no effective solidarity mechanism in place". It does not allow for the introduction of the compulsory relocation and leaves open the issue of the asymmetry between the forced responsibility towards migrants of the countries of arrival (and first disembarkation) and the instead entirely voluntary solidarity of the other EU Member States in the migrants' relocation. In short, the Pact does not provide a lasting solution to the problem of their distribution and is the result of consultations in which, among many disagreements, the only points of agreement were the following three: improving the effectiveness of repatriations or returns, establishing a European return system, improving cooperation with Third countries in the area of 'migration management'.

2.3. The financial plan for the next five years

The Covid-19 pandemic that struck the world and its unexpected consequences generated the largest health emergency

recognition, 24 Maastricht J. of Eur. and Comp. L. 721-739 (2017); E. Kuçuk, *The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?*, 22 Eur. L. J. 448-469 (2016).

Western countries have faced since the post-war period. In this epochal moment, the European people and the Union's Member States have united to achieve a common goal, a post-pandemic economic and social reconstruction, through the approval of the Recovery Fund, the largest package of measures ever financed by the EU, amounting to 1,800 billion euros. The plan, which represents an important opportunity for the European integration process and for EU's competitiveness worldwide, is based on the principles of sustainability and equity. These two values also inspired during the pandemic the initiatives and actions carried out by the Third Sector actors, volunteers and NGOs to address the needs related to assistance, care and education. Without the intervention of this important component of our society, most of the vulnerable people, like migrants, would not have received help.

On December 17, 2020, the European Council adopted the regulation laying down the EU's Multiannual Financial Framework (MFF) for the period 2021-2027 (2020/2093). The regulation provides for a long-term EU budget of EUR 1074.3 billion for the EU-2, including the integration of the European Development Fund.

Together with the €750 billion Next Generation EU Recovery Facility, it enabled the EU to provide unprecedented funding in the coming years to support recovery from the COVID-19 pandemic and the EU's long-term priorities across policy areas. The 2021-2027 European budget is distributed in seven (7) policy areas and allocates around €23 billion for immigration, primarily for border management. This is a very low percentage, less than 2%, but at the same time the funds represent an increase compared to previous years. The general objective of the EU is to strengthen security in the management of entry and exit flows both by negotiating agreements with third countries and by strengthening the Schengen Information System. A large part of the funds will be allocated mainly to the strengthening of the security approach and about 75% of the EU budget on migration and asylum would be allocated to returns, border management and the outsourcing of controls. In this perspective it is planned to hire up to 10,000 border guards at the disposal of the European Border and Coast Guard Agency by 2027. The first element that catches the eye is the imbalance between the resources foreseen for border management (over 10 billion in total) and those for the integration of migrants, a sign of the political will to reduce arrivals as much as possible. This choice is based on the

awareness that the pandemic as well as the war in Ukraine fuel socio-economic crisis and consequently the migratory flows towards Europe[31].

2.4. How to improve the EU role and programs? The new EU Asylum Agency

The previous paragraphs examined the major complexities of the European Union's immigration policies. The regulation of the subject is left to the discretion of Member States until the Dublin Convention and the Treaty of Amsterdam. A common approach to the subject has not yet been developed. Yet strengthening cooperation in this area is one of the expressed goals of the European Union, which, however, in the search for agreements that bring together the will of all Member States, focuses more on border control and security than on the subsequent phase of reception and integration[32]. As outlined above, the pillar of EU policies on asylum is represented by the Dublin Convention, which provides that the first country of entry is in charge for the reception of migrants and asylum seekers. This approach has so far led to greater difficulties for the Mediterranean countries, which are obliged to manage huge numbers of people and asylum requests without the support of other EU Member States, most of which are against the relocation of foreigners[33].

Even though the European Commission hopes with the European Pact on Migration and Asylum to find a final agreement on these issues, overcoming the Dublin system, the political prejudice and the consequent opposition between border/frontier States and internal States remains strong, mainly for avoiding

[31] In the Sahel countries, the networks of criminal organisations and Islamic terrorism have in fact been joined by Russian mercenaries (Wagner battalion) who have been exerting further pressure, since September 2021, to increase migration flows from Libyan regions (interview to Emanuela del Re, EU Special Representative for the Sahel, *No ong, no quote*, Il Foglio 4 (26 November 2022).

[32] A. De Petris (ed.), *Refugee Policies in Europe. Solutions for an announced emergency* (2017).

[33] Considering the relevant numbers, two aspects deserve attention: first, the high number of requests for relocation from the State of first entry to other EU Member States, based on the Dublin Regulation (126.000, that's to say 1 every 5); and secondly, the large share of multiple applicants for protection (those who had already applied for protection) amounting to 61.7% of the 510,696, as revealed in relation to the biometric sets stored in the Eurodac database on asylum seekers over the last ten years (Idos, *Dossier Statistico Immigrazione 2022*, Scheda di sintesi, 3).

secondary movements of migrants[34]. The approach of responsibility and voluntary solidarity among EU Member States adopted in the new Pact does not provide a satisfactory solution.

Even in the assessment of the 2021 - 2027 MFF funds allocated to immigration, no better perspectives are in sight. The largest share of the funds is reserved for border security. The EU is aware that, what is coming will be a difficult season: the post-pandemic health and economic crisis and the war in Ukraine are leading to an increase in regular and irregular immigration that will test Europe's strategy on migrants[35]. Even if such challenges are unifying the Union, cooperation on migration control, including expulsion of irregular migrants, has become a priority in the Member States relations.

A new Voluntary Solidarity Mechanism was approved by the Declaration on relocation of migrants endorsed by a group of EU Member States (including Italy, Spain and Greece), on June 2022[36]. Admitting that several European countries might be

[34] J.-P. Brekke, G. Brochmann, *Stuck in Transit: Secondary Migration of Asylum Seekers in Europe, National Differences, and the Dublin Regulation*, 28 J. of Refugee Studies 145-62 (2015).

[35] UNHCR has declared Ukraine a Level 3 emergency (the highest level possible): more than 7,4 million individual refugees from Ukraine were recorded across Europe since 24 February 2022 (updated on 30th September 2022). For Ukrainian refugees on 4 March 2022, the EU activated for the first time the Directive 2001/55/EC, which 'in the event of a mass influx of displaced persons' grants them temporary protection (C. Kerber, *The Temporary Protection Directive*, 4 Eur. J. of Migration and L. 193 (2002); E. Küçük, *Temporary Protection Directive: Testing New Frontiers?*, 1 Eur. J. of Migration and L. 1-30 (2023); in the new EU Pact's proposal, an "immediate protection mechanism", aimed at substituting it, is provided). Single EU Member States were granted the option of applying the Directive not only to Ukrainian citizens, but also to stateless persons and third-country nationals, together with their family members, resident or beneficiary of national or international protection in Ukraine before the 24th February 2022. Instead, about 5 million foreigners present in the Ukrainian territory were excluded: workers, students, asylum seekers and other categories of short-term migrants. The Directive allows beneficiaries of temporary protection to move within the EU and to enjoy the assistance of the Member States where they choose to live. Thus, on one side, this offered to the neighbouring Member States (Poland, Hungary, Slovakia and Romania) the possibility to avoid the burdens that the Dublin Regulation would impose on them, as countries of first entry; on the other side, individuals free consent was taken into consideration in the procedure of choosing the destination country.

[36] The Declaration was endorsed and signed in Luxemburg on the 10th June 2022 by the Ministers for interior affairs (as representative of the respective Executives) of the 27 EU Member States also with the three Schengen-associated

temporary not available to contribute to the mechanism, as engaged in the frontline of the Ukrainian crisis, already hosting a high number of refugees from that country (like Hungary and Poland that gave asylum to millions Ukrainians), the agreement provides for the relocation of approximately 10,000 asylum seekers per year. The signatory Parties committed themselves on a voluntary basis to receiving a number of migrants in proportion to their population and gross domestic product. As an alternative to opening their borders to migrants, they could choose to make financial contributions or send material aid to third countries that could affect the flows. The Agreement specifies that "[r]elocations should mainly benefit Member States facing disembarkations as a result of search and rescue operations in the Mediterranean and Western Atlantic route" and under it, each contributing Member State had submitted a relocation commitment on the basis of an indicative number of movements. In practice while the last months experience showed the large reception capacities of EU countries and the feasible scope for simplifying procedures, the substantial disapplication of the recalled agreement at the first major test (the Ocean Viking and Geo Barents ships case on beginning of November 2022[37]) makes it clear that the increased administrative capacity put in place in response to the 'Ukrainian crisis' did not lead to a reversal towards better standards of protection in the context of the EU asylum and reception system (meaning that a "double standard" is at stake).

Regarding the use of European public funds for the national protection systems and facilities, the issue of controls and checks deserves attention. Many recent judicial enquiries and scandals have shown that frauds and misconducts put in place by managers of reception and protection facilities, are possible due to the lack of checks on the side of the recipients of the goods and services contracted or in other word, the lack of regular, protected hearings of the third-countries nationals hosted in these facilities. The new European Union Agency for Asylum-EUAA (which replaced – since 19 January 2022 – the European Asylum Support Office-

States, Norway, Switzerland and Lichtenstein. See S. Carrera, R. Cortinovis, *The Declaration on a Voluntary Solidarity Mechanism and EU Asylum Policy. One Step Forward, Three Steps Back on Equal Solidarity*, in CEPS In-Depth Analysis (October 2022).

[37] At the 24th of November 2022 only 117 migrants were re-located (ISPI and Ministry for Interior Affairs data).

EASO)[38] strengthened in its operational and control powers over the national systems potentially at risk might be a useful, significant improvement. In fact, EUAA's activities include not only technical support, but also specific focus on the deployment of operational and capacity building assistance in many formats, and mapping practices in different Member States. Further it has developed its own Anti-fraud Strategy Action Plan – in line with the EASO Anti-Fraud Strategy 2020-22[39] – and has documented and identified control activities[40] which are linked directly to the fraud prevention objectives and priority measures as a result of carrying out the fraud risk assessment process. Such a prospect has been emphasized just recently by the circumstance that OLAF has been asked to investigate alleged nepotism and mishandling of harassment claims at the EUAA. The anonymous complaint, by which several employees of the Agency called for a probe into top management, accused of covering up irregularities, is a matter of serious concern. If the analysis done by OLAF of all information of

[38] Regulation (EU) n. 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 (available at the official website euaa.europa.eu). The new Agency is responsible for improving the functioning of the common European asylum system by providing enhanced operational and technical assistance to member states and bringing more consistency to the assessment of claims for international protection.

[39] EASO document adopted by the Management Board decision n. 61, EASO/MB/2020/067 (6 July 2020), www.euaa.europa.eu/sites/default/files/EASO_Anti_Fraud_Strategy_final.pdf.

[40] These activities include: to establish fraud investigations and response Protocols; to have in place the means to undertake investigations of potential frauds (giving due consideration to the scope, severity, credibility and implications of communicated matters); to communicate investigations results (European Anti-Fraud Office-OLAF or other investigators informs of the results of its investigations the EUAA's Executive Director and the Management Board) and to take timely corrective actions (Commission Decision of 12.6.2019 laying down general implementing provisions on the conduct of administrative inquiries and disciplinary proceedings became applicable to the EUAA by analogy on 17/03/2020). Guidelines on Whistleblowing were made available to the Agency staff by creating a link on the EUAA's Intranet site (C4) as well as hotlines creating a link to OLAF's online forms for fraud allegation, also including more information on what to do in case of red-flag of fraud (Management Board decision n. 57 of 20 September 2019 establishing the EUAA's Guidelines on Whistleblowing, EASO/MB/2019/172). See the *document The EUAA Anti-Fraud Strategy: Updated control activities status for Q1 2022*, available online AFS_updated_Q1_2022.pdf.

potential investigative interest, according to standard procedures, will prove mismanagement by the EUAA executive director, it won't be easy restoring the body's credibility. Ultimately European attitude towards EU external border control (with its integrated border management approach) strongly influenced interaction and cooperation amongst relevant states on migration management and caused confusion on institutional mandates of the agencies involved (as shown by the case of Frontex, the European Border and Coast Guard Agency too[41]). The former is a strategic issue-area together with cooperation between intelligence agencies on the fight against international terrorism and energy security, compared to which migration management continues to remain peripheral.

3. Migration and the Nation-State

As already pointed out, despite the fact that increased migration was widely announced, a prolonged vacuum of EU strategies and engagement about its management favoured uncoordinated choices of reaction to the related challenges in the different EU Member States and a lack of any useful institutional and regulatory collective initiative.

When considering the scope of strengthening public institutions to meet the needs of a heterogeneous population, at national level, the assumption is (the existence of) a truly democratic regime and the rule of law while the focus must go on the currently identifiable gaps not addressed by ongoing policies or current regulatory initiatives. On the opposite, in despotic or kleptocratic regimes, the welfare of the people administered is not deemed worthy of attention.

In this view a first relevant point is the discrepancy between administrated and voters: the democratic representation mechanism and the exercise of the freedoms substantial to it (such as the freedom of association and assembly, guaranteed to foreigners as well as citizens by post-war constitutions) normally

41 B. Schöndorf-Haubold, *EU-Border Control by Frontex: European Police Cooperation between Migration Law, Crime Prevention and Human Rights*, written paper presented at the Conference on 'Cross Cutting Tasks Migration. Governance, Public Policies and Rights', 31st March 2022, University of Molise; F.R. Partipilo, *Frontex at a turning point? Fabrice Leggeri's resignation and some prospects for the EU Border and Coast Guard Agency*, ADiM Blog, Editorial (June 2022).

ensure the constant renewal of shared content and the satisfaction of the ever-changing demands and choral objectives of social groups (needs, demands, rights and duties with respect to 'host societies'). However, this aspect – defined by Rudolph Smend, formal integration[42] – requires that the statement of principles (like equality and dignity) and the exercise of the recalled freedoms be combined with the legislative recognition of full political rights. The latter has been restrictive for decades in the European countries and is not likely to happen in several EU Member States in the short term due to a lack of political will, and in some contexts, such as Italy, due to the Supreme courts caselaw. It excludes that Regions and local authorities may extend the right to vote to extra-UE citizens, asylum seekers, no long-term residents[43]. In federal systems, like Germany[44], individual state may recognize (and several *Länder* recognized) it to non-EU citizens, long-term residents only in the elections for the municipal (local) administration[45]. In such cases, the regulation of citizenship (for which long-term residence is usually a pre-requisite) and the fact that it is flanked by particularly empowering and stringent legislation on the integration of asylum seekers[46] is of major importance[47].

---

[42] R. Smend, *Verfassung und Verfassungsrecht* (1928), in *Staatsrechtliche Abhandlungen*, Berlino, 1968, 119-276, spec. 148-60, ital. transl. *Costituzione e diritto costituzionale*, ed. by G. Zagrebelsky, Milano, 1988. For a framework in the philosophical, legal and sociological context, see U. Pomarici, *La teoria dell'integrazione di Rudolf Smend*, II *Democrazia e diritto* 109 (1982).

[43] See the decisions adopted by the ital. C. cost. n. 372 e 379 of 2004 (the first devaluated the provisions of the statutes of Tuscany and Emilia that recognised participatory rights), and the opinions by the Council of State of 16 March 2005 (concerning the town of Genua) and 6 July 2005 (concerning the town of Forlì).

[44] On the different groups and the structure of legal regulation of migrant's status in Germany (pre-Integration Reform 2016), see J. Bast, *The Legal Position of Migrants – German Report*, in E. Riedel, R. Wolfrum (eds.), *Recent Trends in German and European Constitutional Law. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* 63-105 (2006).

[45] On the general topic, see F. Miera, *Political Participation of Migrants in Germany* (2009).

[46] A. Farahat, *Progressive Inklusion: Zugehörigkeit und Teilhabe im Migrationsrecht* (2014).

[47] In the case of the Federal Republic of Germany the Integraziongesetz, adopted on 1 July 2016, is inspired by a binary approach: 'fördern und fordern' (support and demand). It regulates the rights and responsibilities of migrants undergoing the identification and recognition procedure (in most cases, as asylum and international protection seekers). The logic of support and protection of this

Fragmented and dispersed among heterogeneous legal frameworks and rule-makers, EU migration (and immigration) law[48] is far from reaching an appropriate stage of common development and internal coherence. Much depends on the assessment of the supranational courts (the European Court of Justice and the European Court of Human Rights), which can come into play according to the usual mechanisms regulated by the treaties (by the TFEU and the ECHR respectively) and to which a large part of the concrete definition of the extent of the 'rights' of migrants who come into contact with national procedures for the recognition of their status or the guarantee of specific prerogatives connected to it, is owed[49]. The emphasis on universalistic mechanisms as equal treatment (playing as "inclusive institutions"[50]), is of particular importance for material integration[51].

At Member States' national level, economic and cultural integration goes hand to hand with the peculiar characters of the

group of foreigners subordinates the provision of social benefits to numerous certain conditions.

[48] J. Bast, *Deepening Supranational Integration: Interstate Solidarity in EU Migration Law*, 22 Eur. Publ. L. 289-304 (2016).

[49] A meaningful example is the right to a fair trial (art. 6 ECHR) and its related standards: 'fair and public hearing', within a 'reasonable time', before an independent tribunal (6 years according to the Eur. Ct. H.R.). See, e.g., the *Lombardi Vallauri v. Italy* case. No less important is the right to an effective remedy for asylum seekers under 'accelerated' procedures and the decision of the CJEU in the *Diouf* case (C–69/10; see X. Groussot, E. Gill-Pedro, *Old and new human rights in Europe: The scope of EU rights versus that of ECHR rights*, in E. Brems & J. Gerards (eds.), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, 232-258 (2014)). On the lacking cooperative approach between CJEU and the ECtHR in applying a similar standard of protection in the field of asylum and migration, see J. De Coninck, *The Impact of ECtHR and CJEU Judgments on the Rights of Asylum Seekers in the European Union: Adversaries or Allies in Asylum?*, in W. Benedek et al. (eds.), Eur. Y.B. on Hum. Rts. 343-372 (2018).

[50] In the sense of D. Acemoglou, J.A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (2012).

[51] See i.e. the conclusions of AG Bot in the CJEU case C-502/10, *Staatssecretaris van Justitie v. Mangat Singh*: "The granting of long-term resident status must also allow those nationals to be offered rights and obligations which are comparable to those of European Union citizens in a wide range of economic and social matters such as employment, accommodation, social protection and social assistance and strives for as close a harmonization as possible of their legal status. To that effect, that status also seeks to guarantee them legal certainty by affording them reinforced protection against expulsion" (§30).

civil society, being and acting as community of equals in terms of rights and intentions that is embodied in the care of the common, civic, local goods (based on inalienable rights and duties of solidarity)[52]. The degree of internal cohesion, the trust in political institutions and the range of opportunities (discursive, institutional, political etc. that affect his mobilization) concretely available to the individual[53], are largely depending on historical and cultural backgrounds.

3.1. Fragments of a missing (integration) model

If the widely shared objective is to integrate foreigners permanently and regularly living on national territory, to achieve this target it is important, first of all, to overcome the logic of the emergency and start from the structural character of migration[54]. This entails on the one hand, setting (in same case, re-opening) regular channels of access[55] and, on the other, shifting the focus to society, fight against inequalities[56] and discrimination, development and social cohesion[57].

---

[52] On the so-called horizontal relationships among pro-beneficiary actors from a political sciences perspective, see M. Cinalli, *Horizontal networks vs. vertical networks in multi-organisational alliances: a comparative study of the unemployment and asylum issue-fields in Britain?*, 8 Eur. Pol. Com. Working Papers 1–25 (2004).

[53] M. Cinalli, M. Giugni, *Institutional Opportunities, Discoursive Opportunities and the Political Participation of Migrants in European Cities*, in L. Morales, M. Giugni (eds.), *Social Capital, Political Participation and Migration in Europe: Making Multicultural Democracy Work?*, 43-62 (2011).

[54] T.J. Farer, *Migration and Integration: the Case for Liberalism with Borders* (2020).

[55] At European level, the employment placement scheme for third-country nationals and the common asylum system are separated. These are sets of rules that have developed independently and inconsistently and serve very different purposes: in the first case, attracting highly qualified workers (such as information technology experts) or workers from sectors with employment deficits (such as care and health care), through a 'race for talent' in line with the goal of full employment, as set out in the EU programmes; in the second, complying with the obligations of the Geneva Convention on the Right of Asylum, which binds all EU Member States, without encroaching on state prerogatives to regulate access to the national labour market. See F. Weber, *Labour Market Access for Asylum Seekers and Refugees under the Common European Asylum System*, 18 Eur. J. of Migration and L. 34-64 (2016).

[56] F. Heckmann, *Integration and integration policies*, IMISCOE Network Feasibility Study (2006).

[57] R. Berger-Schmitt, *Considering social cohesion in quality of life assessments: concept and measurement*, 58 Soc. Indicators Res. 403 (2002).

Secondly, the operational, geographical, anthropological, cultural-historical, economic and legal context matters. The past of colonial powers such as France and Great Britain has, for instance, influenced the choice of the assimilationist (or universalist) approach to (reception and integration) policy beyond the Alps[58] and the multicultural (or segregationist) approach across the Channel[59]. However, these models[60] functioned until citizenship ceased to work also as "Social Lift" (or Ultimate Rate of Change), and the privilege of belonging to the Nation or being Her Majesty's subjects, the main vehicle of demands for changes in socio-economic policies. This is, in fact, the reason for immigrants' compliance to these models and the social pact they underpin.

In France, the increase in inequalities, since the second half of the last century, has coincided with the debate on the rewriting of the rules of coexistence (modified thirty-one times). In Great Britain, traditional pragmatism, which limited regulatory interference to trade between communities from former colonies, first turned towards the establishment of a cultural policy promoting the diversity of immigrants (with significant support, including economic support from the religious and cultural representatives of the various communities). Then, at the end of the 1990s, social fragmentation and growing separation between groups, as well as the religious question and the resurgence of Islamic fundamentalism, prompted the introduction of correctives to the multicultural model and the explicit contrast of all forms of unlawful discrimination.

In Germany the main function to the needs of the labour market has, since the 1960s, characterized the policy of controlled entry and gradual recognition of residence rights for foreign workers who have been living in the Country for some time. Since

[58] E. Grosso, *L'integrazione alla francese: tra assimilazione e differenza*, in G. Cerrina Ferroni, V. Federico (eds.), *Società multiculturali e percorsi di integrazione: Francia, Germania, Regno Unito ed Italia a confronto* 65 ff. (2017). On the sharing of this model in the Italian context, in the pursuit of the principle of equality, see, E. Lanza, *Il trattamento giuridico dello straniero nell'epoca della globalizzazione*, in G. Moschella, L. Buscema (eds.), *Immigrazione e condizione giuridica* 87 (2016).

[59] T.J. Farer, *Migration and Integration*, cit. at 54, 96 ff.

[60] On integration models based on universalist (equal treatment-based, hegemonic/hierarchical or authoritarian) or selective (multicultural, meritocratic or club-type) devices of participation in the decisions of the organised community, such as citizenship, see M. Ambrosini, M. Cinalli, D. Jacobson (eds.), *Migration, Borders and Citizenship: Between Policy and Public Spheres* (2019).

1999, first the citizenship reform and then the *Integrationsgesetz* (2016) have served to equalize the treatment of children born in Germany with the children of German parents and to recognize wide-ranging integration opportunities – in implementation of the constitutional guarantees of dignity (Art. 1, para. 1, GG) – for long-term resident migrant workers[61], refugees and asylum seekers who demonstrate commitment and meet certain requirements (*inter alia*, language learning)[62]. In addition, during the years of the economic crisis, strong investments were made in strengthening childcare and employment services for working parents (and working women), in order to support the fertility rate[63]. As a result, the latter has risen again in recent years, mainly thanks to the contribution of foreign women and couples.

3.2. The peculiar case of Italy: multiple gaps scenario

Regarding Italy – where non-EU nationals legally living in 2021 rose up to 3.561.540 (+187,664, +5.6%) after the drop in the previous two years due to the pandemic[64] –, first, the historical experience of weak constitutionalising process[65], from the outset split into two very different realities, North and South, matters.

[61] This is the requirement to which European legal protection of non-EU workers is generally subject under the directive of the Council 2003/109/CE (of 25th November 2003). Until 2003, among those admitted to the various forms of protection, this condition was only met in the case of refugees (titled of the right to asylum as defined by international law and derived from the EU common constitutional heritage). Since 2011 (Dir. 2011/51/UE introducing the definition of a "person eligible for subsidiary protection"), the same condition is also considered to be met for the so-called "European asylum" applicants.

[62] On the relevance of the constitutional legal order in the administrative management of the implications of the 2015-2016 migration crisis, see U. Di Fabio, *Migrationkrise als föderales Verfassungsproblem*, *Gutachten im Auftrag des Freiestaats Bayern* 49 ff. (2016) and M. Möstl, *Verfassungsfragen zur Flüchtlingskrise*, 142 Archiv des öffentlichen Rechts 175 (2017).

[63] EUROSTAT, *Family Social Expenditure. Germany* - Country Report (2019).

[64] Idos, *Dossier Statistico Immigrazione 2022*, *Scheda di sintesi*, 4 (at the end of 2020 there were 5.2 million legally resident foreigners and 80.000 guests in migration facilities, SAI; OECD Report 2021).

[65] S. Cassese, *Governare gli italiani. Storia dello Stato* (2014). It was also a consequence of the weakness of liberal ideas in the history of Italian unification path and afterwards. Above all, Italian political parties did not fulfill the nationalizing task attributed to them by the Ital. Constitution (art. 49, «[a]ll citizens have the right to freely associate in parties to contribute democratically to determining national politics»), which was necessary to help the Country overcome the moral failures caused by the fascist experience.

Here public organizations and civic institutions are perceived as structurally ineffective, weak or absent, and the relationship with them, conflicting, at times frustrating. A second aspect characterizing the Country relates to the logic of belonging/extraneity[66] (often prevailing in the public and political debate) and it is the subject of an interesting strand of recent sociological studies. It points to groups even other than migrants (especially ethnic[67], religious[68], unorganized, such as the illiterate, the unemployed) as the target of the 'charge of exclusion'[69] that agitates non-cohesive or fragmented communities[70]. Both aspects concur to determine an internal tension and because of this tension, despite being a country of stable immigration for almost half a century, after having been among the most important emigration countries in the world for more than a century[71], it has not been able to equip itself with an efficient regulatory framework for the ordinary management of migration phenomena; nor with a national discipline on integration, useful for local policy to grant a minimum common standard of services and actions aimed at facilitating migrants' involvement and participation processes.

Migrants' subjective status definition in the internal legal system has occurred over time by virtue of administrative qualifications centred on the condition of regularity or irregularity. In internal documents and so-called 'gray literature' of the Italian

[66] M. Nettesheim, *Migration: Zwischen Menschenrecht und "Community"*, in *Sfide e innovazioni nel diritto pubblico/Herausforderungen und Innovationen im Öffentlichen Recht*, in L. De Lucia, F. Wollenschläger (eds.) 7 ff., espec. 19-20 (2019).

[67] E. Anderson, *The White Space*, in 1 *Sociology of Race and Ethnicity*, 1 ff. (2015); Id., *The Imperative of Integration* (2010); M. Möschel, *Law, Lawyers and Race: Critical Race Theory from the US to Europe* (2014).

[68] G. Kepel, *Les banlieues de l'Islam*, Paris, Le Seuil, 1987. About Italy, R. Mazzola, *La convivenza delle regole. Diritto, sicurezza e organizzazioni religiose* (2005) and P. Piccolo, *Libertà religiosa e accoglienza dei migranti: l'integrazione e la normativa italiana*, in G. Dammacco, C. Ventrella (eds.), *Religioni, diritto e regole dell'economia*, 464 ff. (2018).

[69] N. Luhmann, *Das Recht der Gesellschaft*, 583-584 (1993); ID., *Inklusion und Exklusion*, 6 Soziologische Aufklärung 241 (1995). A recent interesting analysis is given by S. Sassen, *Expulsions: Brutality and Complexity in the Global Economy* (2014).

[70] On the individualisation and erosion of territorial sovereignty (together with the failure of government forces) as causes of the current loss of certainties resulting from globalisation and the re-emergence of nationalisms, Z. Bauman, *Strangers at our door* (2016). On the 'precarisation of government' and the retreat of the state, see I. Lorey, *State of Insecurity*, 13 (2015).

[71] Between 28 and 30 million expatriates between 1861 and the early 1970s.

Ministery for Interior, the usual distinction is made between *planned inflows*, which mainly concern so-called economic migrant (foreign jobseekers), and *unplanned inflows*, formed by migrants fleeing for humanitarian reasons (wars, persecution, natural disasters, floods, desertification, drought and other catastrophes). The former are subject to an ordinary discipline (Unified Text on Immigration) and have been periodically updated, modified and side-regulated (8 times in 36 years)[72]. The relevant discipline is limited to the entry phase of immigrant workers and jobseekers[73] and according to it the recognition of a residence permit is subject to the (previous) sign of a job contract[74].

The latter have been the focus of a discipline with special characteristics that has only recently become the object of provisions mostly of supranational and international derivation and aimed above all at speeding up and facilitating administrative procedures. These are intended at distinguishing those who, although they cannot materially have access to the ordinary discipline of legal permanence, can nonetheless apply for a temporary permit on the base of special reason, also with a view to

[72] The so-called 'flows decree' (the last one was adopted on 21 December 2021, a Presidential decree) is the instrument by which the State determines in advance the maximum number of foreign workers (determined on the basis of the needs of national-based firms) it is able to accept. It is designed to implement a three-year planning (but it does not because the relevant "documento di programmazione triennale" has only been adopted twice, in 2004 and 2006) and has been actually adopted not every year (with the exception of seasonal work), but quite often in coincidence with a new legislation (1986, 1990, 1995, 1998, 2002, 2009, 2012, 2020). Consequently, the regular channel of foreign workers inflow is not always "open" and it is subject to the availability of the quotas defined in the flows decree eventually adopted by the Executive in power. Otherwise, as has often been the case, it is completely closed. Even if the demand for foreign workers in some sectors (so-called 3D jobs: dirty, dangerous and demeaning) is structural in Italy and the most common estimates indicate an annual need for 250,000 foreign workers, it happened only once, in 2007, that such a number was the indicated quota in the flows decree (see Table n. 1).

[73] In Ital. labour law two interests are balanced: on one side, a restrictive interest in preventing and controlling migration by regulating the procedures for allowing access to work, on the other, a protective interest, both to ensure equal treatment of native and foreign workers and to protect the foreigner as a person (M. D'Onghia, *Il lavoro (regolare) come strumento di integrazione e inclusion sociale dei migranti*, in H. Caroli Casavola, L. Corazza, M. Savino (eds.), *Migranti, territorio e lavoro. Le strategie di integrazione*, 51 ff. (2022)).

[74] Art. 5 *bis* of the Unified Text on Immigration-UTI. The link between the two legal acts is logic and chronologic.

obtaining a status useful for aspiring to a long-residence permit. The same procedures have the effect of isolating the others in order to subject them to the irregularity regime and remove them from the territory of the State.

A constant over the years has been that the closure of the regular channel of foreigner workers inflow is matched by an increase in the unplanned (or irregular) inflow and in the number of long-residence permits accorded for humanitarian reasons.

Table n. 1
Decrease in permits issued for labour reasons, increase in those issued for humanitarian ones
2007-2021

Year	Non-seasonal work permits	Seasonal work permits	Total work permits	International protection applications
2007	170.000	80.000	250.000	13.310
2008	150.000	80.000	230.000	31.723
2009	No decree	80.000	80.000	19.090
2010	104.080	80.000	184.080	12.121
2011	No decree	60.000	60.000	37.350
2012	17.850	35.000	52.850	17.352
2013	17.850	30.000	47.850	26.620
2014	17.850	15.000	32.850	64.886
2015	17.850	13.000	30.850	83.970
2016	17.850	13.000	30.850	123.600
2017	13.850	17.000	30.850	130.119
2018	12.850	18.000	30.850	53.596
2019	12.850	18.000	30.850	43.783
2020	12.850	18.000	30.850	26.963
2021	27.700	42.000	69.700	53.609
2022	40.000	30.000	70.000	77.195*

Quotas of foreigners admitted in Italy for work purposes (source so-called Flows decrees 2007-2021) and number of applications for international protection submitted (source National Commission for Asylum Right[75])
**Source Eurostat, Asylum applications – monthly statistics (at 31st December 2022).*

[75] See www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/riepilogo_anno_2021__0.pdf

The system was and is still designed according to a fundamentally rejecting paradigm: just consider the citizenship law, which is anachronistic and inspired more by a country of emigration's need to maintain a link with its ex-pats abroad and their descendants than by a country of immigration's need to integrate newcomers[76]. There has been also a lack of any serious consideration of the economic measures necessary to inflows management and effective integration of asylum seekers (the most numerous group), and to meet the needs arising from the entry of these "other" (climatic, economic) migrants or long-term and job-seekers foreigners. Only because of the measures taken during the pandemic, aimed at bringing irregular migrants 'out' to legality[77], and the new provisions on so-called 'special protection'[78], after the abolition of humanitarian protection in 2018[79], did the rate of recognition of asylum applications increase in 2021 (see Table n. 1 above).

For the first time in 15 years the number of placements for non-seasonal work increased (27.700). Applications for the total number of entries, mostly for foreign workers already in Italy, were more than three times as high (215.000) and those for non-seasonal

[76] Law n. 91 of 1992, requiring the longest residence duration (ten years continuously) among the EU Member States' legal orders. On the blurring of the distinction between citizenship regimes based on the two traditional criteria, *jus sanguinis* and *jus soli*, K. Hailbronner, *Nationality*, in T.A. Aleinikoff, V. Chetail (eds.), *Migration and International Legal Norms*, 75 (2003).

[77] The provisions aimed at regularising the (illegal) situation of workers employed in three specific sectors (agriculture, tourism and domestic and personal care work), adopted in 2020 by the Law Decree n. 34 of 2020 (so-called 'Decreto rilancio'), immediately deemed to be inadequate to the real needs vour of workers in the domestic and agricultural sectors. More than three quarters of the new work permits issued in 2021 (38,715, 76.0%) refer not to new entries, but to the emersion of workers already on the national territory.

[78] Introduced by the Law Decree n. 130 of 2020 (so-called 'Decreto Lamorgese'), converted in Law n. 113 of December 2020, that meant the overcoming of the binary system by which it had been provided (by the previous d.l. 113/2018) that the local authorities part to the second reception national System would be in charge of activating integration services and projects only for protection beneficiaries and unaccompanied foreign minors, while it had reserved to the Central authorities (Prefetture) the provision of first reception services for asylum seekers according to the discipline of Extraordinary Reception Centres.

[79] Following the entry into force of the Legislative Decree n. 113 of 2018, the number of irregular migrants in Italy would grow by as much as 120-140,000 over the next two years, bringing the estimated number in early 2020 to around 610,000 (www.ispionline.it).

workers more than five times as high (111.000), resulting in a considerable delay. To remedy the latter, provisions for simplification were adopted in order to speed up the permit procedure (maximum 30 days) and, only for 2021, to grant the possibility of immediately hiring workers covered by the quota and already present in Italy, albeit irregularly[80]. The latest decree confirms however that utilitarian logic that is far from creating medium- to long-term integration projects for migrants (as demonstrated by the larger quota reserved yearly for seasonal workers compared to the negligible one for other workers from Third countries)[81]. Thus, the paradox is perpetuated: while having to tackle the landings of irregular migrants along the 8300 km of coastline, Italian Executives need to meet the internal demand for labour coming from companies.

3.3. Labor Law gaps

Economic integration, which primarily concerns the achievement of emancipation (or economic autonomy) through decent employment, is a strategic, fundamental objective, explicitly stated in the European Union's integration strategies[82].

Italian labour regulation present numerous critical issues that often constitute, themselves, an obstacle to the integration process. Here it is sufficient to re-call two peculiar circumstances set for the "regular" access to the internal labour market, that tend to favour, rather than avert, 'irregularity'. First, the assumption that the initial labour supply and demand matching necessarily takes place when the potential worker is still in his or her home country[83]. Second, the double requirement of the unfulfillment of the flows quota and the verification (on initiative of the employer, by the Job Center) of the unavailability of a worker already present in the

[80] Articles 42-45 of the Law Decree n. 73 of 2022, converted in Law n. 122 of 2022.
[81] Available at www.interno.gov.it/it/notizie/decreto-flussi-2021-69700-ingressi-consentiti-italia-lavoratori-non-comunitari; see M. Savino, *Tornare a Tampere? L'urgenza di un dibattito sui canali regolari di ingresso*, ADiM Blog-Editoriale, 4 (January 2022).
[82] Istat, Ministery for Interiors, *Integrazione: Conoscere, misurare, valutare*, 29 ff. (2013).
[83] Art. 22 of the legislative Decree n. 286/1998 (so-called Unified Text on Immigration-UTI). The provision introduces a procedure contrary to the common experience that it is impossible to establish a remote working relationship without a direct on-site meeting between employer and employee.

national or EU territory, to take that job[84]. The picture is made even more complex by the deeply rooted phenomenon of exploitation of land workers who are preferably migrants because - according to the current industrial food production system - the workers mobility has become an intrinsic need of the supply chain. As consequence of their vulnerable situation, migrants and foreign workers are more exposed than indigenous people to forms of undeclared work and criminal behaviour such as "caporalato" (gangmaster, illegal hiring)[85].

Again, it is at European level that the first signs of a positive change are to be seen: the social conditionality clause has been in 2021 for the first time included in the formulation of the most important programme of the EU budget, the 2023-2027 Common Agricultural Policy (CAP), which amounts to just under 35% of its annual budget, some 390 billion euro for the next four years. The long bottom-up transnational social initiative of several European citizens' associations[86] resulted in the Amendment No. 732 to the Proposal of the 2021 Regulation on the PAC[87], on the social cross-

[84] In practice it is a cumbersome, rigid and slow procedure that frustrates the effectiveness of substantive measures and fuels irregularity (*Il lavoro (regolare) come strumento di integrazione e inclusione sociale dei migranti*, cit. at 73, 54).

[85] L. Paoloni, *La sostenibilità "etica" della filiera agroalimentare*, in M. Goldoni, S. Masini, V. Rubino (eds.), *La sostenibilità in agricoltura e la riforma della PAC*, 155 ff., esp. 168-9 (2021). The Italian legislator has showed a peculiar distortion in approaching the issue: aimed mainly at regularising pockets of illegality and not so much at actually combating illegal work and informal or criminal middlemen.

[86] Namely the Associazione Rurale Italia, with Coordinamento europeo via Campesina (ECVC) have been working for years for the adoption of the social conditionality clause in the CAP National Strategic Plans.

[87] The amendment, approved on the 22nd October 2020, was adopted as art. 14 ("Principle and scope"), Section 3 ("Social conditionality") of the Regulation (EU) 2021/2115 of the European Parliament and of the Council establishing rules on support for strategic plans to be drawn up by Member States under the Common Agricultural Policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulation (EU) No 1305/2013 of the European Parliament and of the Council and Regulation (EU) No 1307/2013 of the European Parliament and of the Council. It states that «[M]ember States shall indicate in their CAP Strategic Plans that, at the latest as from 1 January 2025, farmers and other beneficiaries receiving direct payments under Chapter II or annual payments under Articles 70, 71 and 72 are to be subject to an administrative penalty if they do not comply with the requirements related to applicable working and employment conditions or employer obligations arising from the legal acts referred to in Annex IV».

compliance in agriculture. Latest from January 2025, by mean of an administrative sanction affecting the beneficiaries of EU direct or annual payments who disrespect working and employment conditions or employer obligations deriving from national, EU and international law, it grants the protection of the rights of farm workers, including migrants[88].

In addition, foreign employees suffer a form of labour segregation (in construction industry and agriculture), they lack contractual protection and guarantees[89], earn on average a quarter less than Italians (wage discrimination), risk unemployment more often[90] and do not have the opportunity to see their efforts recognised and rewarded through a functioning social lift. And it is precisely this condition of "legal" minority and restriction in a "parallel" workfare market that so often prevents effective labour and social integration.

On the active labour policies[91] front, the legislative interventions (establishment of the National Agency for Active Labor Policies-ANPAL, reform of the Job Centers, introduction of work-school alternation and enhancement of apprenticeships) did not have a significant impact and remained at the level of mere organisational "make-up".

Such a deficient regulatory framework is counterbalanced by increasingly widespread best practices, voluntarily developed in different areas, and implemented with the participation of various actors: the private sector (firms, multinational enterprises and the business community), trade unions, civil society partners and local institutions. Analyses of these best practices clearly indicate that multiple actions - such as the provision of scholarships, training

[88] L. Paoloni, *La sostenibilità "etica" della filiera agroalimentare*, cit. at 85, 169.

[89] Foreigner seasonal workers (with a short-residence permit), for example, are not entitled to certain forms of social security and assistance, such as family allowance on the basis of art. 25, par. 1, UTI.

[90] Foreigner seasonal workers are excluded from involuntary unemployment insurance and reimbursement of the contributions (paid by the employer) in the event of repatriation too.

[91] These are qualified as measures of a public nature in support of weak social groups on the labour market and aimed at facilitating their integration or reintegration into the labour market through professional retraining paths or direct incentives to companies to ensure their inclusion in the workforce. These measures are distinct from those of a passive nature addressed to those who have lost their jobs and aimed at reducing the social and economic hardship connected to the state of unemployment (through the allocation of subsidies).

placements and administrative assistance activities by bilateral bodies and observatories, the promotion of better working conditions, labour inclusion measures in national collective job agreements - combined in an integrated approach, also aimed at fostering greater company productivity, represent the most effective mean of real integration of foreign workers as well as a prerequisite for effective dignity of all workers[92].

3.4. Demographic and anti-depopulation policy gaps. Reception and Integration System

Despite the prevailing "securitization" approach fuelled by the political debate in recent years, an increasing number of studies and research on concrete experiences see in the settlement of migrants or in efficient asylum seekers and refugees' reception policies the pivot for a revitalisation of the Italian lands, Alps and Apennines or for small municipalities[93]. Similarly, integration projects carried out by asylum seekers and refugees, supported and followed by the Italian reception system[94] is seen as an opportunity for development and revitalisation of inner areas[95] and their small communities[96]. The arrival of migrants in the Peninsula in fact

[92] M. D'Onghia, *Il lavoro (regolare) come strumento di integrazione e inclusione sociale dei migranti*, cit. at 73, 63-66; D. Marino, *Dall'azienda all'insediamento informale: esperienze positive di integrazione e lavoro sicuro*, in L. Calafà, S. Iavicoli, B. Persechino (eds.), *Lavoro insicuro. Salute, sicurezza e tutele sociali dei lavoratori immigrati in agricoltura*, 203 (2020); M. Monaci, L. Zanfrini (eds.), *Una macchina in moto col freno tirato. La valorizzazione dei migranti nelle organizzazioni di lavoro*, for ISMU Foundation (2020).

[93] M. Dematteis, A. Di Gioia, A. Membretti, *Montanari per forza. I rifugiati nelle Alpi e negli Appennini* (2017); M. Giovannetti, *Il sistema di accoglienza e protezione per richiedenti asilo e rifugiati nei piccoli comuni italiani*, 1-2 Contesti – Città Territori Progetti (2017); M. Giovannetti, N. Marchesini, L. Pacini, *L'accoglienza di richiedenti asilo e rifugiati nelle aree interne: una strategia per il rilancio del territorio*, 2 Working papers. Rivista online di Urban@it (2018); A. Membretti, G. Cutello, *Migrazioni internazionali ed economie incorporate nelle aree montane*, 1 Mondi migranti (2019).

[94] Sistema di accoglienza e integrazione-SAI (official website www.retesai.it). See A. De Petris, *Reception and integration policies of asylum seekers in Italy*, in Id. (ed.), *Refugee Policies in Europe. Solutions for an announced emergency*, cit. at 32, 103 ff.

[95] On the National Strategy for «Inner Areas»-NSIA see F. Barca, P. Casavola, S. Lucatelli S. (eds.), *Strategia nazionale per le aree interne: definizione, obiettivi, strumenti e governance*, 31 Materiali UVAL (2014).

[96] The adaptation necessary for refugees and asylum seekers to reach integration must involve civil society on a small and large scale and it is always a two-way process, dynamic and multifaceted, requiring efforts and involvement of all

coexists with a significant depopulation phenomenon[97], connected to a serious demographic decline (and an increasing old-age index)[98] and enhanced by internal and international emigration of the native population[99].

It is worth recalling here the relation between the number of asylum seekers hosted and the resident population. ISPI estimates show that it is low compared with other European countries: 3 per 1.000 inhabitants[100]. Both institutional determinations[101] and

parties, that of the refugees and asylum seekers to adapt to the host society without having to give up their cultural identity and that corresponding to the willingness of host communities and public institutions to meet the needs of a heterogeneous population (M. Gnone, *L'integrazione dei rifugiati: il* refugee gap *e l'attivazione dei territori*, UNHCR (2018)).

[97] Between 1981 and 2019, three thousand eight hundred Italian municipalities (out of 7847) lost an average of 22% of their inhabitants each year, while the national population increased by a total of 3 million people, but not uniformly. The municipalities with a tendency towards depopulation are small: the average number of inhabitants is 5,815. In 75% of the cases they are even below 3,000 inhabitants and only 549 municipalities have more than 5,000 inhabitants (Istat data and Ministery for the South and Cohesion data, elaborated by the Centro Studi Enti locali, www.entilocali-online.it). See C. Tomassini, D. Vignoli (eds.), *Rapporto sulla popolazione* (2023), published by Associazione Italiana per gli Studi di Popolazione.

[98] The average number of children per woman for Italy has "risen" from 1.2 in the mid-1990s to 1.24 in 2020, when circa 405 thousand children were born); it was 1.44 in the years 2008-2010 (Istat database, *Report Natalità 2020*). In France it stands at 1.83, in Germany at 1.53, while the average for EU Member States is 1,5. The working-age population (so-called productive potential) currently amounts to 36 million Italians, but ISTAT estimations indicate that it will fall to 25 million in 2070. This follows the silence or a blatantly anti-birth policy that has prevailed over the last 30 years.

[99] E. Pugliese, *The Mediterranean model of immigration*, 3 Academicus Int.'l Sci. J. 96-107 (2011); Id., *La nuova emigrazione nel crocevia migratorio italiano*, 12 Sociol. e ricerca soc. 138-149 (2020).

[100] While in Sweden it is 24 per 1.000 inhabitants and it decreases for Malta (17), Austria (13) and Germany (12); see www.ispionline.it/it/pubblicazione/migrazioni-italia-tutti-i-numeri-24893 (2022 data).

[101] On the ground of the economic sustainability of the commitment and the feasible involvement of prefects, municipalities and other local institutions, the quota of circa 2,5 migrants per 1000 inhabitants was fixed by the 2016 Agreement between the National Association of Ital. Municipalities and the Minister for Interior Affairs coherently to the assessment criteria per region defined by the Permanent Conference for Relations among the State, the Regions and the Autonomous Provinces of Trento and Bolzano (s.c. Unified Conference; www.statoregioni.it/it/conferenze-unificata) of 10 July 2014.

practical evidence[102] suggest that a certain proportion helps to avoid dynamics like concentrations in ghetto-suburbs (as exist in large metropolises), where urban and social degradation nourish each other, and is useful in the view of exploiting the advantages of both a widespread territorial distribution of migrants and the broader social interaction typical of the local dimension.

In this dimension effectiveness of integration pathways is also favoured by the contextual character of a pre-existing cohesion as community. Historical, cultural and artistic traditions play a great role as they substantiate a disparate set of networks, leveraging the most engaging and effective youth gathering activities (sports, music, games, recreation) often promoted within religious groups.

During the so-called migration crisis (2015), for instance, positive experiences of co-habitation between migrants and the local population happened in some remote areas of Italian mountain regions, as in Molise, Piemonte and Valle d'Aosta. In such contexts, the fear of isolation, harsh weather conditions and external dangers are strategic drivers of amalgamation, reciprocal trust among different groups and solutions for potential social conflicts (or the integration of minorities)[103]. In depopulated areas, like the small village of Ripabottoni, where migration is a challenge and an opportunity, the local community took action, promoted

[102] In this sense, the conclusion of the research conducted by the Universities of Hildesheim and Erlangen-Nuremberg and funded by the Robert Bosch Foundation, *Two Worlds? Integration Policy in Urban and Rural Areas*, which examines 92 municipalities in 12 German *Länder* (www.bosch-stiftung.de/en/story/urban-versus-rural-areas-how-can-integration-work), matches with the one of CNEL IX Report, *Integration Indexes of immigrants in Italy*, 2013 («the conditions for the social and occupational integration of immigrants are better in more restricted contexts of low 'social complexity', i.e. in territories that are not part of particularly large urban areas or metropolitan realities, characterised by a high demographic concentration, by a more frenetic and competitive life, by selective mechanisms (sometimes excluding), by mediating structures (and superstructures) that regulate social relations, making them increasingly indirect and anonymous, thus increasing the sense of alienation, marginalisation, and non-belonging», p. 13). A meaningful example is drawn by M. Cerutti, *Il ruolo delle Regioni*, 64 Dislivelli. Ricerca e comunicazione sulla montagna 38-39 (2016), describing the Plan to repopulate mountain municipalities adopted by the Piemonte Region. In cooperation with Uncem, Coldiretti, cooperatives and voluntary associations, actions were taken to foster the integration of refugees in small mountain villages and experimental social farming projects were promoted.

[103] H. Caroli Casavola, *L'integrazione nella società pluralista e i migranti*, 2 Rivista Trimestrale di Diritto Pubblico 383-404 (2020).

petitions and organized street protests against the closure – decided by central authorities – of the local migration center, gaining the attention of the international press[104].

Further, the relevant local authorities always maintain a margin of discretion in favour of "tailored" individual solutions, they pursue integration as a duty especially with respect to the indigenous population to which they are held accountable much more than in metropolitan contexts.

On this basis, the role of local authorities would be indispensable. However, in praxis their involvement is limited to the second reception system (SAI) that in recent years has undergone a greater compression in terms of number of places financed and target of foreign guests identified by the legislation.

Acceptance of migrants is in fact structured in a twofold organization. First, hotspots and first aid and assistance centres (Centri di primo soccorso e assistenza[105]) are devoted to the immediate reception (so-called first reception). Second, a public System for Reception and Integration («Sistema di accoglienza e integrazione» -SAI, formerly called SPRAR and Siproimi) provide several peculiar services to refugees and migrants entitled to other forms of humanitarian protection. This permanent system is flanked by extraordinary reception centres-CAS, i.e. temporary structures used by the *Prefetti* (peripheral branch of the Executive) with the consent of the interested municipalities to provide additional (second) reception places in the event of a massive and close increase in flows[106].

Until 2001, the so-called second reception was left to private initiatives and the Third sector. With the piloting of the National

[104] Amongst others, Gianluca Mezzofiore, *The Italian Hilltop Village Fighting to Keep Its Migrants*, CNN (2018), and Thomas Saintourens, *En Italie, le Village qui Voulait Garder ses « Ragazzis » Migrants*, Le Monde (2nd March 2018); about the case, see L. Darboe, *The Roller-Coaster Ride of an African Child. From Gambia to Italy* (2018).

[105] These centres are established by decree of the Minister of the Interior, after consultation with bodies (Unified Conference and Coordination Tables) that are also shared by regional and local authorities. The migrant is received there for the "time necessary" to complete the identification operations, to record the application and initiate the procedure for examining it, as well as to ascertain the migrant's health conditions. However, in the event of temporary unavailability of places in second reception facilities, the applicant may remain in these governmental centres "for the time strictly necessary for the transfer" (Legislative decree n. 142/2015).

[106] Art. 11 of Legislative decree n. 142/2015.

Asylum Program, thinking and planning about migrant landing and asylum policy were framed as a "system" and reception for integration has moved from the private sphere into the public one. The latter led to a major breakthrough, as local public authorities and the State begun to be involved with taking responsibility in this regard. Since its institution[107], the Italian reception and integration system – recognized as best practice by the European Commission – has been able to produce positive experiences not only in terms of implementation of fundamental rights, but also as territorial development opportunities. Nevertheless, following the migratory crisis of 2015, the evolution was unbalanced. The temporary reception centres (CAS) were greatly expanded (80% of the financed places), while to the ordinary reception system, at the time named Sprar, was left only 18% of places[108]. The service offered in the Cas is a *quod minus* compared to that granted by the Sai. Yet there is a macroscopic distortion of the rules, given that two-thirds of migrants in Italy are accommodated in the Cas and the procedures are almost always 'accelerated' and impoverished in terms of legal guarantees. Nor has wider kind of abuse been lacking: up to EUR 1 million in 2019 and EUR 1.5 million in 2020 were diverted from their original allocation to finance integration projects for asylum seekers in reception centres and used to carry out the repatriations of irregular migrants[109].

Involved on a voluntary basis, the Italian municipalities that take part to the System to some extend (as project leaders[110], facility

[107] The original law provided for the institution of a «Protection System for Asylum Seekers and Refugees»-SPRAR (Law of the 30 July 2002, n. 189). The governance of the System is multilevel, as both the Ministery of Interior and the municipalities take part in implementing the reception services and facilities. The 2020 discipline brings the focus back to the permanent reception system, but in confirming the parallel reception in CAS, it does not entirely overcome the emergency approach to the issue and keeps the role of central authorities preponderant.

[108] 2018 data, the remaining 2% were places in private families or other form of so-called diffuse reception.

[109] L. Di Sciullo, *Modelli in frammenti…e frammenti di modello? Il singolare caso dell'Italia, tra segregazione esplicita e integrazione implicita*, in B. Coccia, L. Di Sciullo (eds.), *L'integrazione dimenticata. Riflessioni per un modello italiano di convivenza partecipata tra immigrati e autoctoni*, 19 (2020).

[110] Within the Reception and Integration System, 62.7% of the project-leading municipalities have less than 15 thousand inhabitants and offer a total of more than 10 thousand places (39% of the total). One third of the municipalities fall within the 15-100 thousand inhabitants' bracket and provide 32% of the total

owners or because they are part of an association of municipalities) are actually 1.614, the 20,4% of the total (among them, all the metropolitan cities and biggest regional cities). A large part of them (40%) belong to the so-called 'inner areas' – i.e. territories considered marginal and characterised by negative demographic/economic/social trends - and the majority (73%) to the so-called 'rural areas' – i.e. those territories whose economy is based on agriculture (non-intensive or specialised) and often experiences difficulties and limitations in development (see Table n. 2).

Table n. 2
Distribution of municipalities part of the Sai
and their population by demographic size and type of area, 2020

Characters	*Number of towns and villages*		*Population*	
Population density	Absolute amount	%	Absolute amount	%
up to 5000 inhabitants	868	53,8%	1.768.176	5,9%
5001-15.000 inhabitants	395	24,5%	3.478.531	11,7%
15.001-50.000 inhabitants	248	15,4%	6.599.264	22,2%
50.001-100.000 inhabitants	63	3,9%	4.342.238	14,6%
More than 100.000	40	2,5%	13.532.584	45,5%
Location				
Clusters	937	58,1%	26.471.928	89,1%
Inner Areas	677	41,9%	3.248.865	10,9%
Type of Area				
Urban hubs or intensive and specialised agriculture hubs	436	27,0%	20.959.097	70,5%
Mid-range rural areas or	1.178	73,0%	8.761.696	29,5%

number of places in the network, while the large municipalities with more than 100 thousand inhabitants number 38 and cover 28.5% of the total number of places (amounting at 794 in 2020; source Cittalia data). In 2022, as consequence of the Ukrainian crisis, the number of places in the SAI grow up to 44.591.

areas with development problems				
Total Municipalities	1.614	100%	29.720.793	100%

Source: Cittalia (M. Giovannetti, Il sistema pubblico di accoglienza e i suoi effetti nei territori, 2022, p. 29)

Taking part to the SAI (as Sprar was renamed by the law decree n. 130 of 2020) implies the providing of first-level services to which international protection applicants and asylum seekers have access, including – in addition to material reception services – healthcare, social and psychological assistance, linguistic-cultural mediation, Italian language courses and legal and territorial orientation services; and the providing of second-level services, accessed by all the other categories of beneficiaries of the system, who already have access to the first-level services and specifically additional services, aimed at integration, concerning work orientation and vocational training. In other words, asylum seekers receive a more limited range of services than beneficiaries of asylum and protection (any form, international, temporary, subsidiary, special)[111]. Further, as a result of the Ukrainian crisis, the admission to the System for Reception and Integration suffers from a selective attitude, by status, nationality and country[112].

In the framework of the National Recovery Plan municipalities have now opportunity and means[113] to implement projects responding to one of the six missions or political priorities identified by the EU, including the ecological and demographic transition, eco-system services and the digitalisation of the

[111] The second-level services are a privilege recognized only to migrants entitled to asylum and protection, while first-level services are for asylum or protection applicants and are intended to pursue basic elements for cultural inclusion, through the acquisition of language skills, assistance in administrative procedures, primary education concepts and cultural mediation.

[112] Ukrainians and Afghans and asylum or protection applicants and beneficiaries are most often present in the ordinary Reception & Integration System-SAI, while migrants from other countries, in the CAS.

[113] Around forty billion euros is the share of resources made available by the European Union (Recovery Fund) to finance public investments (and reforms) planned by municipalities (Anci, *Aggiornamento PNRR sugli investimenti che vedono Comuni e/o Città metropolitane come soggetti attuatori*, 5 January 2022, available at www.anci.it/wp-content/uploads/Aggiornamento-ANCI-PNRR-5-gennaio-2022.pdf and Dossier Anci, *Comuni e Città nel PNRR*, ottobre 2021).

economy, infrastructure and education. A number of local authorities have drawn up a series of innovative proposals, the so-called Political Manifesto of Welcome, endorsed by trade organisations with specific statements of commitment (Anci, Cittalia, Uncem and others)[114]. It aims at the innovation of municipal welfare and the combination of social, migrants' reception and integration policies through the interoperability (and co-governance) of the Sai network with the integrated social-welfare system[115] (with health facilities, community hospitals and community houses). Thus, small municipalities propose themselves as an experimental laboratory of new compensatory mechanisms of inequalities and socio-economic disadvantages or fragilities and new forms of inclusion, coexistence and solidarity[116] in territories often marginalized, abandoned and deprived of services and economic and cultural activities by decades of dysfunctional policies[117].

3.5. Welfare gaps

The long-standing failure to manage channelling irregular inflows was also combined with inertia and absence of any comprehensive reform of the Italian welfare system[118].

---

[114] Available at piccolicomuniwelcome.it/il-manifesto. See for instance, G.D. Giorgione, *Il Comune? Sociale e inclusivo. A Roseto Capo Spulico adesso decidono i cittadini*, Corriere della Sera (1 febbraio 2023) (www.corriere.it/buone-notizie/23_febbraio_01/comune-sociale-inclusivo-roseto-capo-spulico-ora-decidono-cittadini-bd321cb6-a07b-11ed-b6cb-0e3019005a4f.shtml?&appunica=true&app_v1=true).

[115] Introduced by the Law of the 8th November 2000, n. 328.

[116] They are made possible by the emerging instruments to fight poverty and for social inclusion, such as the Basic Income, the PON Inclusion, the National Strategy for Inland Areas.

[117] R. Pazzagli, *Un Paese di paesi* (2021). Most of southern Italy is historically characterised by weak development processes and a deep gap in the growth levels of the relevant regions compared to those of northern Italy. The weakness of development processes is determined, among other causes, by insufficient investment in basic infrastructure (airports, roads, waste and water management facilities). See E. Felice, *The roots of a dual equilibrium: GDP, productivity, and structural change in the Italian regions in the long run (1871–2011)*, 23:4 Eur. Rev. of Econ. Hist. 499–528 (2019).

[118] Consider, for instance, the social expenditure allocated to families (including the allowance for marriage leave, the ordinary shopping card, and the municipalities' household allowance), for which Italy ranks very low compared to the European average (twenty-third out of the twenty-eight EU members with a commitment equal to 5.97% of gross domestic product, compared to an average

On this front, the division of competences between State and regions, provided for in the Constitution, is of primary importance. In fact, the Fundamental Charter states that the former is responsible for regulating the condition of foreigners on national soil, while the latter, for regulating and providing housing, social welfare and other utilities and services related simply to the presence in the territory[119]. A substantial body of rules has been developed over time to implement constitutional norms[120] and constitutional caselaw has defined certain rights as 'financially conditioned'[121], the relevant guarantee depending on budgetary limits. However, the differentiation in quantity, quality and rules of access to the welfare services and facilities available in each Region is the characteristic of the system. More general the difference between law in action and law in books in this field is very large.

With regard to the range of recognised juridical situations, as the Constituents had personally experienced the condition of exiles during the fascist dictatorship and wanted to affirm the universal nature of fundamental freedoms, which were to be considered inalienable for every human being, a significant part of social rights and Welfare services is guaranteed to all individuals regardless for nationality. Furthermore, during the last 20 years the Constitutional Court played a major role interpreting the relevant provisions (i.e. articles 2, 3, 32, 34 and 38 Cost. on the right to equal treatment, health, education, social assistance and protection against illness,

---

of 9% of the other countries; EUROSTAt data, May 2019), as well as policies related to childcare services and to combating housing needs (see Senate of the Republic, Impact Assessment Office, *Chiedo Asilo. Perché in Italia mancano i nidi (e cosa si sta facendo per recuperare il ritardo)*, July 2018).

[119] Art. 117, par. 2, lett. *a)* and par. 3 and 4 Ital. Const.

[120] It includes, among others, the Unified Text on Immigration-UTI (Legislative Decree n. 286 of 1998), the Law n. 388 of 2000, the Legislative Decree n. 142 of 2015 (on the procedures to recognize international protection) and the Law Decree n. 130 of 2020. See H. Caroli Casavola, *L'integrazione dei migranti: gli ostacoli giuridici*, in M. Savino (ed.), *La crisi migratoria tra Italia e Unione europea: diagnosi e prospettive*, 104 ff. (2017).

[121] Their implementation is gradual and limited by the reasonable balancing with other interests or goods enjoying equal constitutional protection (see the It. Const. Court decisions n. 455 of 1990, 304 of 1994, 432 of 2005, 250 of 2017). On this subject, C.R. Sunstein, S. Holmes, *The Cost of Rights: Why Liberty Depends on Taxes* (2000).

disability and old age)[122], through the lens of international human rights conventions and other supranational bodies' acts[123]. As a result of the Court's constitutionality review, the subjective dimension of the scope of several types of protection was extended. In particular, the right to health consists of an «irreducible core» (on which the 'minimum content' of health services is calibrated) that is an «inviolable sphere of human dignity», as such, object of guarantees extended to all, including irregular migrants[124]. Several social benefits and rights are limited by law only to regular immigrant workers, refugees and beneficiaries of a form of protection, but granted to disadvantaged groups (as disable and old people) taking into account a person's «basic needs»[125]. Access to social housing and kindergartens is often subjects to long-residence conditions fixed by each Region: in several cases the Court declared them void because found unreasonable and discriminatory against non-indigenous people[126]. The social family allowance was by law limited to long-term resident foreigners whose family members reside in the national territory too: the CJEU in a preliminary ruling procedure found the provision incompatible with Directive No.

[122] S. Cassese, *I diritti sociali degli "altri"*, 4 Rivista di diritto della sicurezza sociale 677 ff. (2015), and G. Corso, *Straniero, cittadino, uomo. Immigrazione ed immigrati nella giurisprudenza costituzionale*, 3 Nuove Autonomie 377 (2012).

[123] Including art. 2, 4, 9 and 10 ECHR, Part I, Principle 11 and artt. 11 and 13, Part II of the European Social Charter (adopted in Turin in 1961), the 2003 EU directives (EC Reg. n. 343/2003, so-called "Dublino II" and dir. 2003/9/CE, so-called Directive Reception) that oblige Member States to guarantee first aid and essential treatment of illness to asylum seekers and a minimum core of health services to others (irregular migrants or those awaiting repatriation).

[124] See the It. Const. Court decision n. 252 of 2001.

[125] It. Const. Court decision n. 40 of 2013 and decision n. 50 of 2019.

[126] It. Const. Court decisions n. 106, n. 166 and 107 of 2018. It deserves attention here the EU anti-discrimination law with its *de facto* horizontal exclusion effect and the CJEU novel approach (grounded on art. 19 TFEU and developed starting from the *Kücükdeveci* case) by which - starting from directive 2000/43 (Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180/22; between 2000 and 2004 the Council of the EU adopted four directives on equal treatment) -, the general principle of non-discrimination applies also in «areas such as social protection, including social security and healthcare, social advantages, education and access to and supply of goods and services which are available to the public, including housing» (M. de Mol, *The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law?*, 18:1-2 Maastricht J. of Eur. and Comp. L., 109 ff., esp. p. 124 (2011).

2003/109 which has direct effect insofar as it requires equal treatment between third-country nationals as considered by the directive, and nationals of the Member State where they reside[127].

Among the few good Welfare innovations is the adoption of the universal child allowance («Assegno Unico Universale per i figli a carico»)[128]. This is a measure to support parenting, appreciable in its intention to recognise the value of children as resources for the community, and effective in acting on care needs without regard to the social background. However, it is not combined with measures to strengthen the childcare system and it has some critical aspects. In fact, it is a benefit paid to any parent, from birth until the age of 21 of each child, regardless of the parent's working status and income (universal basis) and it presupposes the ability to fill out a means test form (the one related to the *Indicatore di situazione economica* -ISE).

An indispensable pre-requisite for benefiting of most of the recalled social and public services is to be registered in the population official registry, which by law falls to each municipality (responsible for planning services). It is a paradigmatic case of the layering of partly political and partly judicial dynamics generating legal fragmentation in this field. The 2015 discipline clearly provided the right to be registered as resident for asylum seekers too (namely at the reception centres or protection facilities address), but at the time of the EU migratory crisis several local authorities denied it to foreigners without passport. The 2018 national legislator adopted new provisions explicitly excluding the right to be registered for asylum applicants on the grounds of the 'precariousness of the asylum application permit'[129]. In its 2020 decision n. 186, the Supreme Court ruled out the reasonableness of the mentioned regulation making it more difficult to detect foreign

[127] CJEU judgement 25.11.2020, case C-303/19, concerning art. 2, c. 6 bis, of Law n. 153 of 1988 (as for Italian applicants there is no obligation for their families to reside in Italy) and It. Const. Court, decision n. 67/2022 (decision of inadmissibility of the question of constitutionality). See the recent Court of Cassazione ordinance of 9.11.2022, n. 33016.

[128] Ital. Law n. 46 of 2021 and Law Decree n. 230 of 2021. With regard to families, since two years Italy data show that out of a total of 25 million families, the majority are one-person families (33,3%). In second place are families with children (32,1%), followed by those without children (19,8%) and finally by one-person/single-parent families with children (C. Tomassini, D. Vignoli, *Rapporto sulle famiglie*, cit. at 97, 10 ff.).

[129] Art. 13 d.l. n. 113/2018.

presence in the territory. The same pattern had occurred for access to social housing (services or benefits), made more difficult for EU protection beneficiaries with long-residence permit – despite of art. 40 UTI – by several regional legislators requiring eight or ten years' residence in their territory. The Constitutional Court first held that the duration of residence required was excessive[130], then, more recently it clarified that the long duration is not in itself indicative of a high probability of permanence, whereas other circumstances – such as type of employment contract, number of children, school-age children attending regional schools – are[131].

In this perspective, an initial examination of the decisions available to date suggests the importance of the legal protection of situations of «stability» achieved in Italy and manifest through a series of significant indexes: an employment contract, preferably a lifetime one, proficiency in the Italian language and the regular rental contract of an accommodation (room/flat/house) suitable for habitation[132]. As well as the importance of protecting persons in a state of vulnerability broadly intended (pregnancy, exposure to the potential sexual and labour trafficking danger)[133].

Even more than for natives, the achievement of a stable situation depends for foreigners on the use of education and training systems, which should start as early as the pre-school stage, in early childhood. The main limitation of the discipline is that the funded integration measures and the type of services to which foreigners have access are provided on the basis of having obtained a residence permit and are reserved exclusively for asylum or international protection beneficiaries. Thus, the asylum seeker's young child is the first and most likely to be adversely affected by the shortage of places in kindergartens. Kindergartens are important not only to support women, but above all to ensure that children, especially those with disadvantaged backgrounds, have an educational pathway that helps them overcome their initial

130 It. Const. Court decisions n. 106 of 2018 (about a law adopted by Liguria Region).
131 It. Const. Court decisions n. 44 of 2020 (about a law adopted by Lombardia Region).
132 It. Court of Cassation, III Civil Section, Ordinance 14 December 2020, n. 28436.
133 It. Court of Cassation, II Civil Section, Ordinance n. 1750/2021 and I Civil Section, decision n. 2039/2021. On the concept of vulnerability, J. Herring, *Vulnerability, Childhood and the Law*, 9-10 (2018). See also UNHCR, GMG, *Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations*, available at www.ohchr.org.

disadvantage. In this way, two important social objectives are met and inequalities are reduced.

Actually the data on the later stages educational pathways of pupils with a migrant background reflect the main inequalities suffered by these pupils in accessing, staying in and leaving the education and training: in terms of school delay, learning level and early school leaving rate, they are significantly worse than the national average[134]. These results are also often caused by the need to assume economic and care commitments and responsibilities towards the family.

A main welfare policies cross-cutting problem is the avoidance of an accurate targeting and tailoring measures on individuals deserving of support, and instead the choice of a windfall aid strategy. The reason of this (choice) is twofold: the broader easier political consensus and the lower administrative effort required to allocate benefits. But this way the improvement is minimal: neither absolute nor relative poverty is reduced[135]. Last but not least, there is also a lack of instruments and measures to strengthen young people's autonomy and the transition from school to work.

4. The administrative issue and policy implementation

As showed above, the condition of people with a migratory background in countries like Italy is clearly characterized by a marked imbalance in favour of social and economic rights, administrative procedural rights and judicial guarantees[136], to the

[134] Gruppo CRC, *I diritti dell'infanzia e dell'adolescenza in Italia*, Save the Children Annual Report 2021, November 2021, p. 6 (www.savethechildren.it; www.gruppocrc.net). See also the Osservatorio nazionale per l'integrazione degli alunni stranieri e l'educazione interculturale.

[135] Absolute poverty is the condition of those who lack the minimum resources that ensure the satisfaction of basic market needs, such as food, water, housing, clothing and medicine. Relative poverty consists in the inability to access social, political and cultural goods and services: those in relative poverty, therefore, while being able to have the minimum necessary for survival, are not able to take advantage of all available possibilities and services. The groups most affected by absolute poverty are children and foreigners (see the recent Istat Annual Report 2022, *La situazione del Paese* (23 November 2022) 236-7; available at www.istat.it).

[136] The recalled CJEU case C-502/10, *Staatssecretaris van Justitie v. Mangat Singh* (supra, n. 29) has regard to the legislative provisions concerning the treatment of non-EU citizens long-term residents, the Dir. 2003/109 which "harmonizes the criteria for acquiring the status of long-term resident and the rights which are

detriment of civic and political empowerment (participation and representation rights limited by access to citizenship)[137].

In general, the implementation of any public policy is hampered by the long-standing administrative issue. By this is meant a number of disadvantages: the resistance of an oversized bureaucratic apparatus to any innovation, modernisation and to the logic of streamlining activities, the tendency to centralise functions and competences in State authorities/bodies (or mistrust of infra-state entities) and the absolute lack of self-restraint in exercising discretion or political power and ineffective performance control-procedures. Even the most targeted policy risks being compromised in its implementation due to persistent dysfunctions in the administrative system.

A recent case is exemplary of this problem. Among the 69,700 immigrant workers set out in the Ital. flows decree 2021, several hundred were selected in the Italian embassies in Africa and there trained by attending language and specific training courses for the various employment sectors for which work applications had arrived (were received by the Executive), agriculture, construction, cultural mediation, home and personal care. Training courses were financed by the Italian government using national and EU funds[138], namely those assigned to a number of action-projects selected and financed in the framework of the Asylum, Migration and Integration Fund-AMIF[139]. Foreigners, mostly African citizens

attached to it on the basis of equal treatment with the citizens of the European Union".

137 Council of Europe, Directorate of Social and Economic Affairs, *Political and Social Participation of Immigrants through Consultative Bodies*. *Community Relations* (1999).

138 See, among others, the *Before you go* project launched by Arcs (www.arcsculturesolidali.org).

139 The first European programme aimed at achieving solidarity-based management of immigration, asylum and external border management policies, also in financial terms, dates back to 2005, the so-called Solid (see the Communication from the Commission to the Council and the EU Parliament establishing a framework programme on *Solidarity and Management of Migration Flows for the period 2007-2013*, 6.4.2005, COM(2005)123 final). It entailed the establishment of four funds with resources to be distributed among the Member States: the first is the European Return Fund, intended to finance national mechanisms for the voluntary or forced return of migrants to their countries of origin (Decision of the European Parliament and the Council n. 575/2007/EC of 23.5.2007); the second is the European External Borders Fund, aimed at ensuring uniform controls at the Union's borders and thus, efficient management of the

attended the courses for months and in many cases obtained an A1 certification in Italian language. They were told that they had been identified as part of a (often seasonal) work contract which would be effective once obtained the Italian language certificate and attended the training courses, and that the workplace would be in Italy. But they never arrived in Italy.

This was due to a legal obstacle: the failure of the administration depending on the Ministry of the Interior (including its territorial network organisation, "Prefetture", long understaffed) to issue the necessary paperwork, the "nulla-osta" or clearance. It is required for the employer's application for the visa allowing the legal entry of the chosen foreign worker. The waiting time for the preparation of documents are unreasonably long and prevent employers from getting them and seeing the procedures completed in time compatible with the bathing or agricultural harvest season. This is why the situation has in fact resulted in a lot of frustration on the employers' side as well. In the bathing facilities on the Adriatic Riviera and on farms in many central and southern regions, family firms and production chains suddenly found themselves short of labour and scrambling to find replacements among the natives. The simplification provisions adopted in the meantime, setting a maximum term of 50 days for the conclusion of the procedure[140], were to no avail[141].

flows of persons entering (Decision of the European Parliament and the Council 23.5.2007, n. 574/2007/CE); the third is European Refugee Fund, set up to finance national reception and social inclusion policies for international protection applicants and refugees through resources that, in Italy, have flowed into Sprar/Sai projects (Decision of the European Parliament and the Council, 23.5.2007, n. 573/2007/CE); the fourth is the European Fund for the Integration of Third-Country Nationals, which has resulted in the substantial addition of European funding to the limited national resources allocated to implement social inclusion initiatives for non-citizens (Decision of the European Parliament and the Council, 25.6.2007, n. 435/2007/CE). These programmes were valid for the period 2007-2013. The next development was the establishment of AMIF for the period 2014-2020 (Reg. UE 16.4.2014, n. 516/2014), aimed at strengthening common immigration and asylum policies as a step towards a Europe that is an area of freedom, security and justice (cons. 1-5 Reg.). About AMIF expenditure see L. Davis, *EU external expenditure on asylum, forced displacement and migration 2014-2019*, ECRE Working Paper (2021), available online at https://ecre.org/wp-content/uploads/2021/03/Working- Paper-14.pdf.

[140] Artt. 42-45 of the law-decree 21 June 2022, n. 73.

[141] After two years since the law decree 19 May 2020, n. 34, they are still not ready with processing the 200.000 applications for regularisation of foreigner workers present in Italy at the outbreak of the pandemic (A. Ziniti, *La burocrazia frena il*

This experience shows that the main issue is not the lack of training on behalf of migrant workers – as claimed by members of the Executive[142] –, but the inadequacy of the Italian competent offices to carry out the administrative procedures. A confirmation of this is offered by the fact that even for Italian citizens the administration is not able to readily guarantee the link between NRP-funded projects and employment services (given by Job centres). There is a shortage, for example, of thousands of simple workers to be employed in the completion of broadband (TLC sector), and despite the fact that in the 18-29 age group eleven thousand unemployed people only hold a primary school certificate (benefitting from the minimum income), no training has been offered them in time to meet this demand for work[143]. The lack of adaptiveness, readiness and capacity for action stems from the inadequacy of the existing administrative system, which is poor in competence and not open enough to civil society neither solicitous in intercepting its demands or suggestions and involving its components or stakeholders in defining which projects deserve promotion, support and financing.

The idea of involving civil society in public decision-making process – by administrators standing above sectional interests – form the basis of a broad movement that has characterised administrative law in recent decades and that in various contexts is known as *New Governance*, *Participatory Decision-making*[144] and as

decreto flussi: lavoratori formati ma senza nullaosta, La Repubblica (4 December 2022), 1, 8 e 9).

[142] Ansa, *Tajani, decreto flussi? Vorremmo lavoratori già formati* (3 December 2022).

[143] M. Ferrera, *Il reddito di cittadinanza e il lavoro che manca*, Corriere della Sera (20 January 2023).

[144] R.T. Bull, *Making the Administrative State Safe for Democracy. A Theoretical and Practical Analysis of Citizens Participation in Agency Decisionmaking*, 65:3 Admin. L. Rev. 611 ff. (2013); J. Boulois, *Représentation et participation dans la vie politique et administrative*, in *La participation directe du citoyen à la vie politique et administrative* 46, esp. pp. 50 ff. (1986); L. Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2 Wiscon. L. Rev. 297 (2010), and Id. *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Public and Stakeholder Voice*, 2 J. of Disp. Resol. 269 ff. (2009); J. Freeman, *Collaborative Governance in the Administrative State*, 45 UCLa L. Rev. 1 (1997); A.F. Popper, *An Administrative Law Perspective on Consensual Decisionmaking*, in 35 Admin. L. Rev. 255 (1983); R. Irvin, J. Stansbury, *Citizens Participation in Decision Making: Is it Worth the Effort ?*, 64 Pub. Admin. Rev. 55 (2004).

emerging function of the *enabling state*[145]. It did not find material implementation neither has produced relational tools aimed at connecting administrations with civil society' smaller groups representatives, the so-called Third Sector[146]. Although the collaborative governance' administration model has been formally legitimised in the Italian constitutional and legal system[147], the procedural instruments of synergic public-private actions in the field of migration law are finding it difficult to function 'at full

[145] N. Gilbert, B. Gilbert, *The Enabling State: Modern Welfare Capitalism in America* (1989); N. Gilbert, *The «Enabling State» from Public to Private Responsability for Social Protection: Pathways and Pitfalls*, Oecd Social, Emploiment and Migration Working Paper n. 26 (Sept. 2005); S. Cassese, *New paths for administrative law: A* manifesto, 10 Int.'l J. of Const. L. 603–613 (2012); J. Wallace, *The enabling state: where are we now?*, Rev. of policy development 2013-18 (2019), E. Chiti, *La rigenerazione di spazi e beni pubblici: una nuova funzione amministrativa?*, in F. Di Lascio, F. Giglioni (eds.), *La rigenerazione di beni e spazi urbani. Contributi al diritto delle città*, 13, esp. p. 27 ff. (2017). This expression nowadays means not only the shifting of the focus of public activities toward measures aimed at financing benefits through the market, but also a type of administrative activity aimed at facilitating action by private individuals and in which discretion is exercised according to an articulated scheme in which the weighing of interests coexists with negotiation between the administration and private actors with respect to the content of the intervention. In fact the importance of private input emerges very clearly over the past 50 years' economic development: collective progress in quality of life comes from individual decisions of entrepreneurs to invest in risky new ventures or experiments with a new ways of doing things.

[146] The so-called Third sector is understood to be the set of entities that act outside the market (the so-called first sector) and the state (the so-called second sector) in order to achieve purposes of general interest without making personal profit. See, on this topic, G. Arena, M. Bombardelli (eds.), *L'amministrazione condivisa* (2022), which takes stock of the 25 years that have passed since the pioneering theoretical formulation of the essay *Introduzione all'amministrazione condivisa*, by G. Arena, published, 117-118 Studi parlamentari e di politica costituzionale 29 (1997) and before, Id., *Amministrazione e società. Il nuovo cittadino*, 1 Riv. Trim. Dir. Pubbl. 43 (2017). More recently, E. Rossi, *Il fondamento del Terzo settore è nella Costituzione. Prime osservazioni sulla sentenza n. 131 del 2020 della Corte costituzionale*, Forumcostituzionale.it, 3 (2020).

[147] As expressly stated in the Ital. Constitutional Court decisions of 26 June 2020, n. 131 and 29 December 2021, n. 52. See, *ex multis*, E. Rossi, S. Zamagni (eds.), *Il Terzo settore nell'Italia unita* (2011); F. Alleva, *I confini giuridici del Terzo settore italiano* (2004); P. Michiara, *L'ordinamento giuridico del terzo settore. Profili pubblicistici*, 2 Munus 457 (2019). About the recent normative development, L. Gori, *La saga della sussidiarietà orizzontale. La tortuosa vicenda dei rapporti fra Terzo settore e P.A.*, federalismi.it, 181 (2020); D. Caldirola, *Il Terzo settore nello Stato sociale in trasformazione* (2021); A. Patanè, *Enti del Terzo Settore e principio di solidarietà. Le opportunità del PNRR per rigenerare una rete a sostegno della società*, 15 Soc. e dir. 55 (2023).

speed'[148]. Further the major administrative tool, the so-called integration contract, has a very limited subjective effect because most third-country nationals entering Italy is excluded by the relative field of application and practically abandoned to its fate in a no-rule zone, without any serious commitment on the side of public authorities facing the entire society[149].

5. An assessment

What then are the institutions in a country that have a major impact on the strategy and performance of integration? As the previous analysis shows, two sets of institutions are important. The first set consists of the regulations that govern the economic relationships of individual and firms (institutions that support market or market institutions). These include the regulations that govern labour markets and the behaviour of firms. As a result of these regulations, when a person reaches a contractually defined legal status i.e. as an employee of a firm, he knows what rights and obligations he takes on as a result. It is up to the state, as part of the political process, to define and enforce the specific rights/obligations structures on which market institutions are based. However, as we have seen above for Italy (§ 3.3), when the 'regular' access to labour market is unlikely to happen because very difficult, subject to quantitative restrictions, defined year-by-year and hampered by administrative dysfunctions, even these institutions end up being discriminatory and even extractive[150]. Those circumstances in fact exclude some potential workers from labour market and thus from exercising the contractual power associated with a lawfulness situation. Irregularity, on the contrary, condemn them to a minority situation which expose them to risks of exploitation and encourages the continued creation of revenues and castes.

The second set of institutions consists of countries' national education, training and Welfare systems, including their innovation system. Together these form the network of institutions in the public and private sectors whose activities and interactions

[148] L. Galli, *Rethinking integration contracts. The role of administrative law in building an intercultural society*, 44 ff. (2021).
[149] L. Galli, *Rethinking integration contracts*, cit. at 148, 146 ff.
[150] To use the words of D. Acemoglu, J.A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty*, cit. at. 50.

initiate, enable and diffuse social cohesion contributing to the well-being of both, population and foreigners, migrants, third-country nationals (institutions that support social cohesion in intercultural society). With regard to these institutions (inclusive and democratically oriented), private actors can play a decisive role cooperating to and orienting public decision-making processes. They can share ideas, funds, responsibility and push for more clarity on the public sector. Not all of these institutions are based on a rights/obligations structure (by i.e. the requirement of being a tax-payer). Several institutions are based on voluntary mechanisms, inspired by a meritocratic, long-term rewarding *ratio* and operate only after a basic investment of time/commitment and spontaneous behavior (which shows compliance or adherence to the internal legal order). These institutions aim at ensuring a continuing turnover of the country's ruling elite and policy-makers, and a power that is always in contention. But this *ratio* must be known, and this is not always the case.

Further, in specific national context, like the Italian one, there is a great need to improve rules and the general efficiency of civil service. Regarding the first, access to several socio-economic rights – with the exception of life-threatening situations – suffers from a strong time conditionality (such as all those linked to citizenship or subordinated to long-term residence), which condemns people in a limbo of legal and material uncertainty. As to the second, the administration has not the capability to carry out the tasks that it has been given[151], and existing procedures are complex and diverse, and they do not make always possible i.e. to fulfil requirements or re-establish rights after failure to observe a time limit (for exercising those rights). Thus, the rejecting pattern always looms on third-country nationals.

It is important to understand that both sets of institutions should be seen as infrastructure of pluralism (for an "open" society) and as common goods that EU and each Member state cannot exempt themselves from providing. Many migrants today come from national, war or other contexts where the culture of the common, priceless goods (such as the environment, hygiene, peace, health) is lacking. Their reception entails costs and disadvantages in the short term for the local host communities and considerable

[151] It might happen also that it is «captured» by the special interest groups who want to frustrate its efforts to uphold the public interests.

benefits in the long term for the entire state and continent. They fill the gap in generations capable of producing: the birth rate, a labor force for domestic and common markets, the continuity of rural art-crafts and traditions that Europeans do not guarantee, sustainability of pension systems, investments perspectives are some of these advantages. We need to acquire from them inputs, creativity, desire to do, enthusiasm, but we also need to transmit to them the culture of civic, common goods, access to decent living, learning conditions and opportunities for emancipation.

Last but not least, in order to reduce the impact of national dysfunctions, the drive towards a serious commitment to the widest possible sharing of objectives, cooperation and inter-administrative coordination between Member states at all levels (from the highest institutional and political to the operative ones) must be increased. In this respect, efficiency is a principle expressly laid down for the European administration in Article 298 of the TFUE, and it is to be correctly red as «*eine ressourcenschonende Zweck-Mittel-Relation*»[152] (a resource-saving purpose-mean relationship) having full legal relevance, and not as merely programmatic[153].

On this basis, commitment to the recalled aims should be pursued even where this represents a cultural challenge for those players lacking virtue politics[154] theory and practice.

[152] W. Hoffmann-Rief, *Effizienz als Herausforderung an das Verwaltungsrecht – Einleitende Problemsskizze*, in *Id.* and E. Schmidt-Aßmann (eds.), *Effizienz als Herausforderung an das Verwaltungsrecht*, 11 ff., 17. (1998).

[153] E. Schmidt-Aßmann**,** B. Schöndorf-Haubold, *Verfassungsprinzipien für den Europäischen Verwaltungsverbund*, in A. Voßkuhle, M. Eifert, C. Möllers (eds.), *Grundlagen des Verwaltungsrechts*, B. I and II, 247 ff., 320 (2022).

[154] J. Hankins, *Virtue Politics: Soulcraft and Statecraft in Reinassance Italy* (2019).

EUROPEAN UNION RULES GOVERNING ADMINISTRATIVE PROCEDURES

*Laura Muzi**

Abstract

Within EU legislation could be found several rules concerning administrative decision-making which have been drawn, during the decades, from the principles elaborated by the EU courts and now enshrined in Art. 41 CFEU. Currently, those affected by a final decision of the administration can only rely on these principles and on sector specific legislation, to have their rights to an administrative due process granted. The attempts to create a specific code on EU administrative procedure have failed, due to the hesitancy of the Commission. This article tries to comprehend, through both a quantitative and a qualitative analysis, to what extent sector specific legislation considers procedural requirements and how the global picture would be affected by a piece of legislation providing for some general rules concerning EU administrative procedure. The assumption laying in the background is that such kind of code would not only affect the backsides of judicial activism but would also benefit the EU administration both in terms of transparency and legitimacy.

TABLE OF CONTENTS

* Post-doc fellow, University of Rome "Tor Vergata"

1. An inquiry into administrative procedures according to sector-specific legislation

This paper illustrates the results of an inquiry into EU sector-specific legislation where the EU rule-makers addressed administrative procedural issues relating to a subject matter falling within the legislative competences of the European Union. It aims to provide an insight into EU legislation from the point of view of procedures, and thus to show how general principles on administrative procedure have been codified so far[1]. The study is based on a quantitative analysis of EU legislation that includes norms concerning administrative procedure in whatever form they are drawn up by the legislator. Its scope is broad, too, given that it encompasses direct, composite and indirect administrative procedures[2].

[1] Since the mid-'90s, scholars have shed lighton the lack in the European Union of an Administrative Procedure Act, the provisions concerning administrative procedure being scattered throughout sector-specific secondary legislation. K. Lenaerts-J. Vanhamme, *Procedural Rights of Private Parties in the Community Administrative Process,* in 34 Common Mkt. L. Rev. 531 (1997).

[2] S. Cassese, *Il diritto amministrativo europeo presenta caratteri originali?*, 53 Riv. Trim. Dir. Pubb. 35 (2003); S. Cassese, *European Administrative Proceedings*, in 68 Law & Contemp. Probs. 21 (2004); G. della Cananea, *The European Union's Mixed Administrative Proceedings,* in 68 Law. & Contemp. Probs. 197 (2004); H. Hofmann, *Composite Decision Making Procedures in EU Administrative Law,* in H. Hofmann, A. Türk (eds.), *Legal Challenges in EU administrative Law: Towards an*

From a methodological point of view, the backbone of the analysis consisted therefore in the collection of data through the official EU search engine EUR-lex[3], questioned with different keywords. The purpose was to have an insight into how the principle of, and the right to good administration have been declined in secondary, sector-specific legislation over the years, bearing in mind that this process of rule-making is the adaptation of the work of EU judges in decades of case-settlements during which principles of administrative procedure were progressively outlined[4].

As a starting point have been considered the three main features of good administration as they now are encompassed in Article 41 of the CFR[5], since this provision represents – thus far – the highest achievement and reference point of procedural rights generally applicable in European administrative law[6]. Therefore, the focus was on the right to a hearing – including both personal hearing and written observations – the duty to state reasons and the right to access one's file, and on a few selected the keywords[7].

The research was based on a few choices. First, it covers legislation; however, only two types of legislative acts, directives

Integrated Administration (2009); C. Harlow-R. Rawlings (eds.), *Process and Procedure in EU Administration* (2014); C. Eckes, J. Mendes, *The Right to Be Heard in Composite Administrative Procedures,* 36 Eur. L. Rev. 651 (2011); H. Hofmann-M. Tidghi, *Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks,* 20 Eur. Pub. L. 147 (2014).

[3] At http://eur-lex.europa.eu/

[4] P. Craig, *UK, EU and Global Administrative Law: foundations and challenges* (2015), 459-60. For some general remark see also M. Gnes, M. Macchia, *Administrative Procedure and Judicial Review in the European Union*, in G. della Cananea, M. Andenas (eds.), *Judicial Review of Administration in Europe: Procedural Fairness and Propriety* (2021), 45.

[5] P. Craig, *Article 41 – Right to Good Administration,* in S. Peers-T. Hervey-J. Kenner-A. Ward (eds.), *The EU Charter of Fundamental Rights. A Commentary*, (2014), 1069-1098; I. Rabinovici, *The Right to be heard in the Charter of Fundamental Rights of the European Union,* 18 Eur. Pub. L. 149 (2012).

[6] K. Kańska, *Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights,* in 10 Eur. L. J. 296 (2004).

[7] The keywords used were "access to file", "statement of reasons", with the variant "statement of the reasons", and "right to a hearing" with the alternatives of "hearing of the parties", "due process", "notice and comment". It must be highlighted that no record of the last of these was found by the search engine.

and regulations in force[8], including executive and implementing[9] ones, were considered. Decisions, instead, were not included, despite their possible normative content. The reason for doing so was, however, to maintain the focus on statutory pieces of legislation of general application[10]. Second, during the selection of the legislation to insert in the database it was also decided not to include all those where the mentioned keywords appeared only in the preamble[11].

This first, quantitative part of the research, is the basis to develop the second, focused on a qualitative insight into the collected data. The aim will be to provide a more in-depth inquiry into the legislation which has, in some way or another, interesting features. The relevance of the selected pieces of legislation was scrutinised using various criteria, which range from the subject matter of the rules, their quantitative relevance, their specific status (*e.g.*, their necessity, as it is for the financial rules), and their being frequently subject to the scrutiny of the European courts[12]. This qualitative analysis will be dealt with in the second part of the paper.

---

[8] A caveat is however required, as during the elaboration of data, the results of the research proved to have some faults, mainly due to the ability of the database to deliver an output exactly matching the query. This warning concerns an estimate of roughly 3% of pieces of legislation no longer in force, but which nevertheless appeared among the outcomes.

[9] P. Craig, *Delegated Acts, Implementing Acts and the New Comitology Regulation,* 36 Eur. L. Rev. 671 (2011).

[10] It is extremely important here to recall that the European Parliament conducted a "European Added Value Assessment" on a Law of Administrative Procedure of the European Union in 2012. The results highlighted an uncomfortable – though not surprising – situation where the most precise and comprehensive codification of administrative procedure within the EU can be found in the internal documents of the institutions, mostly based on the Ombudsman's Code – in particular their Rules of Procedure – and in soft law documents, such as code of conduct, which are not legally binding.

[11] Therefore, only the regulating part of EU norms has been considered relevant to the purpose of the research since the preambles have the aim of simply providing the proper interpretative framework for end users.

[12] To this end reference is made to a previous work of the author, where case law concerning administrative procedural rights was the issue. L. Muzi, *Administrative due process of law in the light of the jurisprudence of EU Courts: a quantitative and qualitative analysis*, in C. Harlow-P. Leino-G. della Cananea (eds.), *Research Handbook on EU Administrative Law* (2017), 468.

2. Coping with an original absence: the birth of an EU administrative procedural law

Broadly speaking, the development of general principles structuring the EU administrative legal order has been undertaken by the European courts[13]. The same applies to the principle of due process in administrative proceedings. It was the Council of Europe, the first supranational institution at European level, to address the issue concerning fair administrative procedures with two resolutions[14] which were meant to increase the protection of citizens' rights against phenomena of maladministration at national level. These efforts could draw more attention to this issue inside the European Union[15] as well, and despite the acknowledgement of national procedural autonomy. Not surprisingly, the case law of the ECJ made several references to Articles 6[16] and 13[17] of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") during those years, to highlight the role of procedural rights in protecting the four freedoms laid down by the EEC Treaty[18], though some of

---

[13] Cf. J. Rivero, *Vers un droit commun européen: nouvelles perspectives en droit administratif*, in M. Cappelletti (ed.), *Nouvelles perspectives du droit commun de l'Europe (*1978), 389; T. Tridimas, *The General Principles of EU Law* (2006); C. Harlow, *Three Phases in the Evolution of EU Administrative Law*, in P. Craig, G. de Búrca (eds.), *The Evolution of EU Law* (2011), 439-464. Cf. also the notorious C-26/62 *Van Gend en Loos v Aministratie der Belastingen,* ECLI:EU:C:1963:1.

[14] Resolution no. 31 of 28 September 1977 on the Protection of the Individual in Relation to the Acts of Administrative Authorities and Resolution no. 2 of 11 March 1980 on the Exercise of Discretionary Powers by Administrative Authorities

[15] C. Harlow, *Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot?*, in 2 Eur. L. J. (1996), 4.

[16] Article 6 of ECHR (the right to a fair trial) states: "[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

[17] Article 13 of ECHR (the right to an effective remedy) lays down: "[e]veryone whose rights and freedom as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

[18] Among others, C-222/84, *Johnston v Chief Constable of the Royal Irish Constabulary,* ECLI:EU:C:1986:206, para. 18 and C-222/86, *UNECTEF v Heylens*, ECLI:EU:C:1987:442, para. 14.

them[19] were already recognised by it.

Then, the preamble to the Maastricht Treaty clearly pointed out the importance of the rule of law[20] and set the goals of an enhancement of the democratic and efficient functioning of the institutions and of a decision-making process supposed to be as close as possible to citizens[21]. The Treaty of Amsterdam replaced this rather vague commitment with a clear duty, at Article 6 of TEU, to respect fundamental rights and stated for the very first time a right to access documents at the level of the treaties[22].

2.1 A principle of and a right to good administration in the EU

In the Nice Treaty the protection of citizens' administrative procedural rights went one step further, when the Charter of Fundamental Rights of European Union ("CFR"), adopted there in 2000, enshrined, with Article 41, the right to a good administration[23]. The CFR became binding only in 2009, with the entry into force of the Lisbon Treaty. Therefore, the EU now has a subjective public right to good administration[24] applied horizontally and standing beside the principle of sound (or good) administration. While Article 41 CFR serves to establish a minimum protection of certain elements generally accepted in the existing case law of the European courts, there still is a broader principle of fair administrative procedure, acknowledged by case law, which shall be respected beyond the narrower scope of application of the right in Article 41 CFR.

At present, their main difference relates to the limits of the protection offered: Article 41 CFR is applicable only to activity of the EU institutions and bodies, while references to good administration as a general principle also enable the European courts to invoke it against Member States when acting within the

[19] *E.g.,* the requirement for the statement of reasons and the duty to notify administrative decisions at Articles 190 and 191 EEC.
[20] C-294/83, *Les Verts v European Parliament,* ECLI:EU:C:1986:166, para. 23.
[21] Article A of Treaty of Maastricht.
[22] Cf. Article 255 TEU.
[23] P. Leino, *Efficiency, Citizens and Administrative Culture. The Politics of Good Administration in the EU,* 20 Eur. Pub. L. 681 (2014).
[24] K. Kańska, *Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights*, cit. at 6, 300.

sphere of EU law[25], within composite or indirect administrative proceedings.

On the other hand, despite the principle of good administration having a wider field of application, it offers weaker safeguards to complainants. It is not – as such – justiciable[26] and its infringement could not be invoked by a claimant in front of an EU court without making a clear reference to one of its components[27]. Besides this, the courts have a key role in defining the content and limits of every single procedural right referable to the principle of fair decision-making[28], because of the absence of a comprehensive act on EU administrative procedure. Lastly, provisions like those laid down by Article 41 CFR apparently show how "good administration" is largely an ungraspable concept[29].

The only other anchorage could be found where sector-specific legislation embraced procedural precepts from case law but, in these cases, the judicial principles are necessarily adapted

---

[25] H. Hofmann, G. Rowe, A. Türk, *Administrative Law and Policy of the European Union* (2011), 203.

[26] Case law has established that "the principle of sound administration, does not, in itself, confer rights upon individuals […], except where it constitutes the expression of specific rights such as the right to have affairs handled impartially, fairly and within reasonable time, the right to be heard, the right to have access to files or the obligation to give reasons for decisions, for the purposes of Article 41 of the Charter of Fundamental Right of the European Union". T-193/04 *Tillack v Commission*, ECLI:EU:T:2006:292, para. 127. Cf. also T-196/99 *Area Cova and others v Council and Commission*, ECLI:EU:T:2001:281, para. 43, "the applicants have not pleaded the infringement of a rule of law intended to confer rights upon individuals. The illegality they complain of, supposing it to be established, consists only in the infringement of the principle of sound administration".

[27] AG Maduro pointed out the diversity between the duties and obligations of the Commission rooted in the principle of sound administration and the right to good administration in his opinion to the *max.mobil* case. There, he makes clear that such obligations cannot create a subjective right to intervene directly in a procedure, to obtain a decision or, consequently, a right to institute proceedings against that decision. C-141/02 P, *Commission v T-Mobile Austria GmbH,* ECLI:EU:C:2005:98, and opinion of AG Maduro, ECLI:EU:C:2004:646, paras. 55-56.

[28] K. Lenaerts, J. Vanhamme, *Procedural Rights of Private Parties in the Community Administrative Process,* cit. at 1, 568.

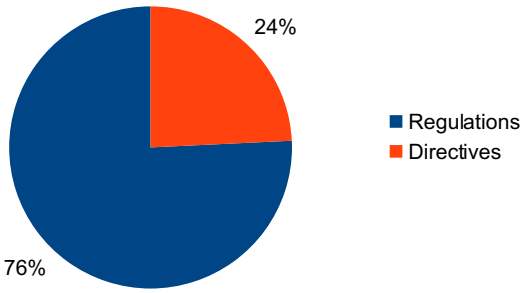
[29] R. Bousta, *Who Said There is a 'Right to Good Administration'? A Critical Analysis of Article 41 of the Charter of Fundamental Rights of the European Union,* 19 Eur. Pub. L. 481 (2013).

to the specific context where they would apply. This being the case, the margin of judicial interpretation of procedural rights would be narrower and would be limited to checking the fair application of legislative provisions.

To summarise, like a Cubist painting, the picture that emerges from this portrait is extremely fragmented and abstract, without any hint of perspective. Nevertheless, it is well known which role procedures play during the exercise of authoritative powers. To some extent, they could be even more important than substantive law[30] because the way procedures are drawn up can affect the outcome of the decision-making process to a significant degree[31]. It is no mystery that the legislator can adapt the procedures significantly to address the various – private and public – interests which are meant to be protected and to achieve its policy goals. However, this issue will be dealt with in the second part of this paper while the focus now turns to some quantitative data.

3. A quantitative analysis of due process rights in sector-specific legislation

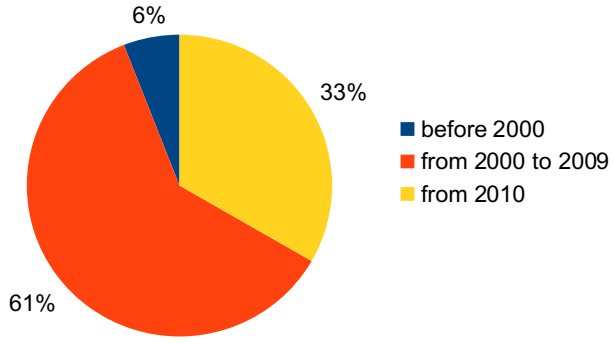
From a quantitative viewpoint, the very first and most apparent data is the overabundance of regulations in comparison with directives. This outcome seems to be self-explanatory in the light of the principle of the procedural autonomy of member states. In most cases – and according to that long-established principle – when the piece of legislation adopted is a directive every state is free to determine how to reach the given policy goals. On the contrary, when dealing with regulations – being self-applicable



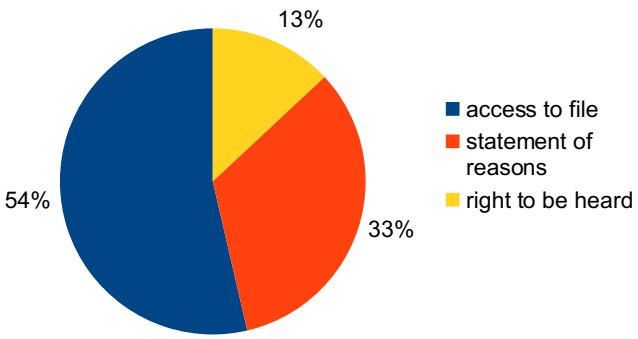
[30] J. Lever, *Why Procedure is More Important than Substantive Law*, Int'l. & Comp. L. Q. 285 (1999).
[31] G. della Cananea, *Due Process of Law Beyond the State: Requirements of Administrative Procedure* (2017), 7-8.

acts – the EU legislator may give a clear set of provisions both on the substantial and on the procedural side of the matter that is being dealt with.

When considering the timing of the adoption of the relevant legislation, most of it has been adopted during the decade from 2000 to 2009. However, comparing that number with the provisions enacted in the seven years from 2010 to 2016, it might be possible to foresee a comparable trend in the current decade. As concerns legislation enacted before 2000, the very low number of acts could be explained by at least two main reasons. First and foremost, it is reasonable to state that not many provisions adopted nearly twenty years ago are still in force, because of a normal rate of replacement of laws over the years, according to the evolving needs of any society. It also needs to be recalled that the adoption of the Charter of Fundamental Rights in 2000, with its Article 41, must be considered the tip of the iceberg of a long process of the acknowledgement of procedural rights as key features of the functioning of the EU legal order, as the previous paragraphs tried to explain. Therefore, before that year, there was undoubtedly a growing, but not still pervasive understanding of the need to address procedural requirements in decision-making within the boundaries of the EU administrative order.



Quite surprisingly, when looking more closely at the selected legislation), the most striking outcome is that only a very low percentage of proceedings mentions the right to a hearing. Probably, the reason lies in the acknowledgment of a far-



reaching principle of the right to defence that also encompasses the right to a hearing, which must be applied even though it is never mentioned in the provisions applicable to the case. On the other hand, most of the legislation analysed makes a brief reference to access to files and regulation 1049/2001, sometimes stating a commitment to transpose this right into internal regulations. As far as statements of reasons are concerned, a third of the legislative acts taken into consideration have a provision regarding this. This data should be compared with the much lower number of clauses concerning the right to a hearing, being the twin rights of the same principle. However, it seems to be hard to find a clear and satisfying explanation for this gap.

4. Efforts to achieve codification

So far, when adopting a decision affecting the interests of private parties, the EU authorities apply sector-specific legislation which often lays down not only substantive, but also procedural rights. The content of procedural rights has been developed by courts on a case-by-case basis, and the precepts laid down in the judgments have then been translated into secondary legislation and modelled in such a way as to fit the specificities of the area. When a *lacuna* on the procedural side occurs, the unwritten general principles of fair decision-making must be observed in order not to impinge on the legality of the decision adopted as a result of those proceedings. These principles are grounded in the legal traditions common to the Member States[32] and they took their legitimisation from there[33].

4.1 The proposal of the European Parliament for a regulation

The idea of a codification of EU administrative procedure made its first appearance in the mid-1990s[34] but the project actually began with the Research Network on EU Administrative

[32] C-17/74, *Transocean Marine Paints Association v Commission,* ECLI:EU:1974:106, opinion of AG Warner, ECLI:EU:C:1974:91.
[33] Cf. J.A. Usher, *The Influence of National Concepts on Decisions of the European Court,* 1 Eur. L. Rev. 371 (1976).
[34] Cf. C. Harlow, *Codification of EC Administrative Procedures? Fitting the Foot on the Shoe or the Shoe on the Foot,* 2 Eur. L. J. 3 (1996).

Law ("ReNEUAL")[35]. This multinational group of academics was motivated by the acknowledgement of a certain widespread distrust towards an administrative system where the rules on basic procedural issues are difficult to discern for the individual claimant and where administrators and draft legislators have to assemble a new package of procedural rules on each occasion. Therefore, the aim of the Model Code was – in their authors' minds – to improve the existing regime without eliminating the peculiarities of sector-specific legislation, but rather filling the gaps by putting together a boilerplate general law like the one proposed.

To reduce the fragmentation of the applicable law and foster compliance with the general principles of EU law, the European Parliament finally reached the decision to submit to the Commission a proposal of a regulation on administrative procedure drawing on the work of ReNEUAL[36]. As is made clear from the title[37], the field of application of the proposal is limited to administrative procedures implemented by EU authorities in "direct administration" and "composite procedure"[38], thus excluding not only the administrative procedure of the Member States but also legislative and judicial proceedings[39].

---

[35] E. Chiti, *Adelante, con juicio: la prospettiva della codificazione del procedimento europeo,* Gior. dir. amm. 677 (2014).

[36] D.U. Galetta, H. Hofmann, O. Mir and J. Ziller, *Context and Legal Elements of a Proposal for a Regulation on the Administrative Procedure of the European Union's Institutions, Bodies, Offices and Agencies,* Riv. It. Dir. Pub. Com. 312 (2016).

[37] "Proposal for a Regulation of the European Parliament and Council on the Administrative Procedure of the European Union's institutions, bodies, offices and agencies", which reproduces exactly the wording of Article 298 TFEU. The latter states "[i]n carrying out their mission, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration. […] the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end".

[38] Following Recommendation 1 annexed to European Parliament resolution EP 2012/2024.

[39] Delegated and implementing acts are also excluded. Therefore, the Proposal of the European Parliament has a narrower field of application in comparison with the Model Code of ReNEUAL, being directed only to individual decision-making. The Model Code instead also lays down rules on administrative rule-making, contracts, mutual assistance and administrative information management. More details can be found at http://www.reneual.eu/. Cf. also C. Harlow-R. Rawlings, *Process and Procedure in EU Administration* (2014), 331-

The goal of this proposed piece of legislation is to enhance legal certainty thanks to a specification of rights and duties and a simplification of the overall legislation dealing with procedural aspects of a particular complexity[40]. Furthermore, the aim of the proposal is to contribute to the compliance with principles of due process, trying to achieve a difficult balance between effectiveness in everyday administrative practice and the protection of individual rights. Finally, the definition of general rules on administrative procedure provides an opportunity to define a common parameter for the regulation of relations between citizens and public authorities.

However, the Commission has so far shown a cautious or, rather, reluctant attitude towards the resolution of the European Parliament soliciting a proposal for legislation grounded in Article 298 of the Lisbon Treaty. Despite the alleged readiness of the Commission to continue working with the Parliament in refining, improving, and streamlining EU administrative law and its openness, it admittedly still must be convinced about the opportunity of legislation providing for a horizontal framework[41], not being able yet to see the added value of such a proposal.

4.2 Sector-specific legislation

Broadly speaking, discretionary powers ought to be subject to procedural requirements to provide a proper balance between the primary interest of the administration and the secondary interests – both public and private – involved in the proceeding. Any decision-maker, complying with their duty to provide sound administration, ought to hear evidence and consider the affected parties' observations, performing with due diligence a so-called "interest representation model", which is meant to be better able than the political process to determine the most suitable decision

335, which considers the legislation contained in the proposal as "minimalist" and "residual".

[40] On this issue, cf. S. Cassese, *Legislative Regulation of Adjudicative Procedures: An Introduction*, Eur. Rev. Public L. 15 (1993), and J. Barnes, *Towards a third generation of administrative procedure,* in S. Rose-Ackerman-P. Lindseth (eds.), *Comparative Administrative Law (*2010), 336.

[41] Cf. the laconic answer given by First Vice President Timmermans on behalf of the Commission to a Parliamentary question on the Law of Administrative Procedure of the European Union on 11th May 2016, E-001249/2016.

in any case[42]. Moreover, a fair hearing could not take place if the parties are not allowed to view all the relevant information in their own file, and therefore no arbitrary limitation to scrutiny can be put in place by the deciding authority on the evidence used during the proceeding.

Only by complying with these procedural rules will the deciding authority be steered to a correct decision-making process, the most internalised and hidden features of which finally must be explained in a statement of reason. The latter is the tool the affected parties can rely on to have an insight into (all) the phases of the process and evaluate whether to bring an action against the decision or to ask for a review of the final decision[43].

The most important consequence of the absence of an all-embracing code of administrative procedure is the extremely low degree of transparency of procedural rights and obligations in administrative decision-making. Any infringement of an essential procedural requirement obviously allows the decision to be annulled[44] and claimants can refer to the principle of administrative due process or, since 2000, to Article 41 CFR, which enshrines a still very general right to good administration. But when facing more detailed provisions, it becomes quite an undertaking to evaluate their fair enforcement by public authorities. It should also be stressed that sector-specific legislation and practices on administrative procedure often differ from one another. Broadly speaking, secondary rules try to forge their own procedural standards, mainly to address the interests of the parties concerned. In some other cases, the legislator's aim is to

---

[42] G. Della Cananea, *Beyond the State: the Europeanization and Globalization of Procedural Administrative Law,* 9 Eur. Pub. L. 577 (2003).

[43] Cf. L. De Lucia, *A Microphysics of European Administrative Law: Administrative Remedies in the EU after Lisbon,* 20 Eur. Pub. L. 277-308 (2014). It must be recalled that recently several agencies have been equipped with boards of appeal in order to provide independent administrative reviews of first-instance hi-tech and scientifically complex decisions. For further reading cf. M. Navin-Jones, *A Legal Review of EU Boards of Appeal in Particular the European Chemicals Agency Board of Appeal*, 21 Eur. Pub. L. 143-68 (2015); L. Bolzonello, *Independent Administrative Review Within the Structure of Remedies under the Treaties: The Case of the Board of Appeal of the European Chemicals Agency,* 22 Eur. Pub. L. 569-82 (2016); M. Eliantonio, M. Chamon, A. Volpato, *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (2022).

[44] Article 263 TFEU.

establish *ad hoc* tailored procedural frameworks consistent with the subject matter at stake. Nevertheless, the way in which rules are applied practically may diverge to a certain extent from the positive provisions, making it even harder to assess whether the public official acted fairly.

5. Procedural rights: a comparison

The chart below summarises the content of the qualitative analysis which will be carried out in the following paragraph. Starting from the Model Code of ReNEUAL and the proposal of the European Parliament for an administrative procedure act, thirteen procedural safeguards have been selected which roughly correspond to the procedural steps common to many domestic laws on administrative procedures. In a second moment, these were matched with sector-specific legislation, to try to find out whether and how they were inserted and contextualised into the applicable, living rules of procedure[45]. In order to select the pieces of legislation to analyse, a further step was made by cross-checking the rules with case law and European Ombudsman inquiries[46] concerning the procedural guarantees enshrined in the legislative acts in question[47]. In some cases, the pieces of

[45] A similar analysis can be found in L. Saltari, A. Salvato, *Frammentazione dei procedimenti amministrativi di settore. Verso un loro completamento grazie ad una codificazione generale?*, in G. della Cananea, M. Conticelli (eds.), *I procedimenti amministrativi di adjudication dell'Unione europea: principi generali e discipline settoriali* (2017), 121.

[46] Cf. S. Cadeddu, *The Proceedings of the European Ombudsman,* in 68 Law & Contemp. Probs. 161 (2004) where the author labels the European Ombudsman as a "codifier of good administration". The target of the European Ombudsman's mandate is to detect "maladministration", a concept that encompasses failure to respect the law, failure to respect fundamental rights and the principles of good administration. It has the power to suggest both redress for individual cases and modifications to laws and administrative practices. For a more recent reading of the European Ombudsman's role cf. R. Rawlings, *Complaints system and EU governance – a new look*, in *Research Handbook on EU Administrative Law,* cit., part. 497.

[47] On the alternative use of the Ombudsman and judicial complaints cf. P.N. Diamandouros, *Legality and good administration: is there a difference?*, in J-P. Delevoye, P.N. Diamandouros (eds.), *Rethinking good administration in the European Union* (2008). Cf. also J. Söderman, *A Thousand and One Complaints: The European Ombudsman en Route*, 3 Eur. Pub. L. 351-361 (1997).

legislation encompass rules on more than just one administrative proceeding, therefore each of them was separately analysed and reported in the chart below.

	Right to receive		Duty of careful investigation			Duty to cooperate		Right to be heard	Right to access the file	Right to be given reasons for final decision	Right to respect linguistic identity	Duty to deliver the decision within time-limits	Reference to due process principles
	a notice	acknowledgement of receipt	hear evidence	request documents	carry out inspections	Reasonable time-limit to reply	Right against self-incrimination						
ReNEUAL's Model Rules	Art.III-5	Art.III-6	Art. III-13	Art. III-10	Art.III-16 ff.	Art.III-11	Art.III-14	Art.III-23 ff.	Art.III-22	Art.III-29	Art.III-31	Art. III-9	
EP proposal of APA	Art. 6	Art. 7	Art. 9	Art. 9	Art. 12	Art. 10	Art. 10	Art. 14	Art. 15	Art. 19	Art. 6	Art. 17	
Council Regulation (EC) No 1005/2008 [48]	Art. 23	x	Art. 10	Art. 10	Art. 10	Art. 26	x	Art. 27	x	Art. 26/27	x	x	
Council Regulation (EC) No 207/2009 [49]	Art. 79	x	Art. 78	Art. 78	x	x	x	Art. 77	Art. 123	Art. 75	Art. 119	x	Art. 83

[48] Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999. See also Commission Regulation (EC) No 1010/2009 of October 2009, laying down detailed rules for the implementation of Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing.

[49] Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trademark.

	Right to receive		Duty of careful investigation			Duty to cooperate		Right to be heard	Right to access the file	Right to be given reasons for final decision	Right to respect linguistic identity	Duty to deliver the decision within time-limits	Reference to due process principles
Regulation (EC) No 1907/2006 50													
registration	x	Art. 20,1	x	Art. 20,2	x	Art. 20,2	x		Art. 118	Art. 130	x	Art. 21	x
evaluation	Art. 50,1	x	x	Art. 41,3 Art. 46,1	x	Art. 41,4 Art. 46,2	x	Art. 50,1	Art. 118	Art. 130	x	Art. 43, 1 Art. 46,3	x
authorisation	x	Art. 64,1	x	Art. 64,3	x	Art. 64,3 Art. 64,5	x	Art. 64,5	Art. 64,2 Art. 118	Art. 64,9 Art. 130	x	Art. 64,8	x
restriction	x	x	x	Art. 69,4	x	Art. 69,4	x	Art. 69,6	Art. 118	Art. 130	x	Art. 73,1	x
Council Regulation (EC) No 1/200351	x	x	Art. 27	Art. 27	Art. 20-22	Art. 27		Art. 27	Art. 27				

[50] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC.

[51] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Art. 81 and 82 of the Treaty.

	Right to receive		Duty of careful investigation			Duty to cooperate		Right to be heard	Right to access the file	Right to be given reasons for final decision	Right to respect linguistic identity	Duty to deliver the decision within time-limits	Reference to due process principles
Regulation (EU, Euratom) No 883/2013 [52]		x	Art. 9,2		Art. 3,1	Art. 9,4	Art. 9,2	Art. 9,4		Art. 11,1	x		x
Council Regulation (EU) No 1024/2013 [53]	x	x	Art. 11	Art. 10	Art. 12	x	x	Art. 22	Art. 22	Art. 22	x	x	x
Regulation (EC) No 1107/2009 54	Art. 9,1	x	Art. 13	Art. 12,3	Art. 68	Art.9, 2	x	Art. 11,3 e 12,3	Art. 10	Art. 13,1	x	various	x
Regulation (EC) No 1829/2003 [55]	x	Art. 5,2	x	Art. 6,2	x	Art. 6,2	x	x	Art. 29	Art. 7	x	Art. 6	x
Directive 2001/18/EC[56]	x	Art. 6,5	x	Art. 15,1	Art. 5,5	x	x	x	Art. 9 e 24	Art. 15,2	x	Art. 6	x

[52] Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999.

[53] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

[54] Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC.

[55] Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed.

[56] Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organism and repealing Council Directive 90/220/EEC.

6. The economic interests within the EU

6.1 The procedure safeguarding intellectual property

Council Regulation (EC) no. 207/2009 of 26 February 2009 on the Community trademark rules on various procedures before the European Union Intellectual Property Office (EUIPO)[57], and more specifically on registration, opposition, renewal, revocation or declaration on invalidity and appeals relating to the European Union trademark. Notwithstanding that piecemeal procedural issues are spread throughout the text, Title IX is completely dedicated to setting general provisions concerning the procedures of EUIPO.

Article 75 specifies that the Office shall state reasons upon which its decisions are based and on which the parties concerned have had an opportunity to present their comments. Oral proceedings (Article 77) could be held at the instance of the Office or at the request of any party to the proceeding whenever the Office considers them expedient. As a rule, they shall be public only if they are second instance procedures and if they did not imply serious and unjustified disadvantages for a party to proceedings. Moreover, other details concerning the hearing can be found at Article 78 dealing with the investigative phase of the administrative procedure and, more precisely, the cross-examination of witnesses and experts. On the other side of the coin, when considering time limits, Regulation no. 207/2009 makes a *renvoi* to the delegated acts to be adopted by the Commission which specifies details regarding their calculation and duration. Finally, it is worth mentioning that Article 83 lays down that, whenever a regulatory vacuum occurs, reference shall be made to principles of procedural law generally recognised in the Member States.

6.2 The budgetary interest of the EU: the Financial Regulation

The Financial Regulation[58] of the European Union offers

[57] On procedures before the agencies of EU cf., among others, E. Chevalier, *La procédure devant les agences de l'Union européenne,* in J.B. Auby, T. Perroud (eds.), *Droit comparé de la procédure administrative* (2016), 565-77.

[58] Regulation (EU, EURATOM) no. 966/2012 of the European Parliament and Council of 25 October 2012 on the financial rules applicable to the general

some other opportunities to reflect on procedural standards, considering that Article 41 of the CFR applies to it[59]. As mentioned above, this piece of legislation catches the observer's attention mainly due to its special status determined by its necessity to the Union machinery[60]. At present, it is the reference point[61] for the principles and procedures governing the establishment, implementation, and control of the EU budget. Therefore, rules of procedure are spread throughout the text, even though there is a chapter dedicated to "Administrative principles" within Title IV, concerning "Implementation of the budget"; here, the heading of Article 96 refers to "good administration".

However, this article only concerns award procedures and it lays down precepts relating to the request of documents within the assessment of proposals. More specifically, the responsible authorising officer has the duty to make known to the applicant, without delay, the need to supply evidence and/or documents, their form and prerequisite contents, and an indicative timetable for doing so. In those cases where the applicant's failure to submit evidence or make statements is only due to clerical errors, the authorising officer or the evaluation committee shall ask the applicant to provide for the missing documents or information, making it clear that no substantial changes must occur to the original proposal.

The only provision explicitly mentioning a duty of the Commission to state reasons is Article 38, para. 3, lett. d, which concerns the funding of international organisations. In these cases, the Commission is required to attach to the draft budget a working document also containing the reasons why it was more

budget of the Union and repealing Council Regulation (EC, EURATOM) no. 1605/2002.

[59] Cf. The European Ombudsman's "Response to the Public Consultation on Review of the Financial Regulation" of 17 December 2009 issued as a preliminary work to the second review of the Financial Regulation in 2012, at https://www.ombudsman.europa.eu/resources/otherdocument.faces/en/4957/html.bookmark#_ftnref5.

[60] P. Craig, *A New Framework for EU Administration: The Financial Regulation 2002,* 68 Law & Contemp. Probs. 107-134 (2004).

[61] Together with Commission Delegated Regulation (EU) no. 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, EURATOM) no. 966/2012 of the European Parliament and Council on the financial rules applicable to the general budget of the Union.

efficient for the Union to fund those international organisations rather than act directly. Here, the duty to state reasons is applied to make clear the evaluations behind a purely discretionary choice[62] linked to the distribution of funding.

As far as the right to be heard is concerned – not surprisingly – perhaps the most interesting rules concern the shared management of the budget (Article 59) which implies that implementation tasks are delegated to Member States. In playing this role, Member States are subject to several accounting duties and to the scrutiny of the Commission, which can even interrupt payment deadlines or suspend payment where so provided in sector-specific legislation. However, the Commission shall end all or part of the interruption of payments as soon as a Member State has taken any measure to resolve the problem and submitted its observations. Therefore, this provision confirms the importance of allowing a sanctioned party to explain its reasons, this being the only efficient way to ensure a correct evaluation of all the interests involved in using the budget.

Some very interesting procedural provisions can also be found under Title VI, concerning grants. Article 135 regards payment of grants and controls, specifically pointing to the problem of a grant already awarded but award or implementation procedure of which prove to have involved substantial errors, irregularities, fraud, or breach of obligations. In these circumstances, the authorising officer may, provided that the applicant or beneficiary has been given the opportunity to make observations, refuse to sign the grant agreement, suspend implementation of the grant, or terminate the grant agreement. In cases where such irregularities are attributable to the beneficiary, or the beneficiary has broken their obligations under a grant agreement, the authorising officer could even decide to reduce the grant or recover amounts unduly paid, but in any case, the beneficiary must be given the opportunity to make observations.

Also, when systemic or recurrent errors, irregularities, fraud, or breach of obligations are shown at the end of controls or audits, the authorising official can adopt sanctions ranging from suspension to terminating the grant agreement, though not before

[62] On the intertwinement of discretionary powers and administrative procedures cf. G. della Cananea, *Beyond the State: the Europeanization and Globalization of Procedural Administrative Law,* 9 Eur. Pub. L. 563 (2003).

having given the beneficiary the opportunity to make their observations during a hearing. Moreover, the beneficiary must be given the chance to be heard regarding the method of extrapolation used or the flat rate applied to determine the amounts to be reduced or recovered whenever it should not be feasible to precisely quantify them.

6.3 The procedural powers of OLAF

A core role within this subject is played by Regulation no. 883/2013 which is applied during proceedings related to the fight against fraud, corruption and any other illegal activity affecting the financial interests of the Union being, as such, inherently linked to the Financial Regulation. This piece of legislation repealed and replaced Regulation (EC) no. 1073/1999[63] in order to make the activity of OLAF more effective, especially broadening its investigative powers both internally and externally.

External and internal investigations follow, in part, different rules. However, OLAF is allowed to combine external and internal aspects in a single investigation without having to open two separate investigative procedures. Procedural rights applicable to investigations are specified in the interest of legal certainty. Information should be treated in accordance with Union law on data protection[64], legitimate rights and procedural guarantees of the persons concerned, including the right not to self-incriminate. Conclusions referring to a person concerned by name should not be drawn, at the final stage of an investigation, without that person being given the opportunity to comment on facts concerning them, thus respecting the right of the person affected by the decision to be heard.

Reference to OLAF rules of procedures allows for a better understanding of a case decided by the European Ombudsman in the complaint 1871/2014/EIS concerning the handling by the European Commission of a request for access to documents

---

[63] Regulation (EC) no. 1073/1999 of the European Parliament and Council adopted to regulate investigations conducted by the European Anti-Fraud Office

[64] Regulation (EC) no. 45/2001 of the European Parliament and Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

following a fraud investigation. The complainant's concern was to have – among other things – their right to access their own file fully respected, claiming they had been given the chance only to apply for public access to the files according to Regulation 1049/2001. The Ombudsman decided that, when a request to access a file concerns decisions which adversely affect the interests of those seeking access, that request shall be assessed under Article 41, 2 of the Charter instead of Regulation 1049/2001. In settling the case, the Ombudsman made it clear that access according to Article 41, 2 CFR "would never be narrower than the access granted under Regulation 1049/2001 and may well, depending on the specific content of the documents, be broader"[65]. Therefore, the Commission, in failing to do so, was responsible for maladministration because, due to its behaviour, it gave rise to a material limitation of a fundamental right.

7. The interest connected to the environment and citizens' health

7.1 Authorisation of pesticides

The placing of plant-protection products on the market is another interesting procedure, governed by Regulation no. 1107/2009 aimed at removing obstacles to trade due to different levels of protection in Member States, to harmonise rules for the approval of active substances and the placing on the market of plant-protection products, including rules on the mutual recognition of authorisations and parallel trade. The decision on acceptability or non-acceptability of such substances is to be taken at EU level based on harmonised criteria.

A very detailed procedure concerns the assessment of the approval of an active substance. A first evaluation of the information provided by the interested parties is carried out by the Member State where the application is submitted, then a risk assessment is performed by the European Food Safety Authority, while a risk management assessment is performed by the

[65] Decision of the European Ombudsman in complaint 1871/2014/EIS concerning the handling by the European Commission of a request for access to documents following a fraud investigation of 15 March 2016, para. 29.

Commission which also the makes final decision regarding the active substance.

After this first procedure, any pesticide must have its approval renewed after a given time. Applications for renewal of approval are evaluated first by a rapporteur Member State and afterwards a peer review is carried out by the EFSA and other Member States. Whenever a producer of an active substance wants to obtain a renewal of the authorisation, they must submit an application to the designated rapporteur Member State (RMS) which will draft a Renewal Assessment Report (RAR). The Report is then submitted to EFSA which will peer review it in cooperation with the remaining Member States. During this phase, EFSA might organise a public consultation on the Report if asked to do so by any interested party[66]. Afterwards, EFSA drafts a scientific report which is submitted to the Commission, the final decision of which on the renewal of the approval needs to consider the conclusions of EFSA.

One of the most controversial provisions is that included in Article 17, where it is laid down that, when the duration of the procedure on renewal of the approval of an active substance is likely to expire before a decision is taken, the time limit for the decision can be extended on the basis of certain criteria. This could have dangerous effects on the environment and human health (it could even represent a breach of the precautionary principle). Glyphosate, an active substance suspected of being carcinogenic[67], for which the Commission decided to extend approval by 18 months after Member States failed to achieve a qualified majority

[66] Cf. Article 15(2) of Commission Regulation (EU) no. 1141/2010 of 7 December 2010 laying down the procedure for the renewal of the inclusion of a second group of active substances in Annex I to Council Directive 91/414/EEC and establishing the list of those substances, as amended by Commission Implementing Regulation (EU) no. 380/2013 of 25 April 2013 amending Regulation (EU) no. 1141/2010 as regards the submission of the supplementary complete dossier to the Authority, the other Member States and the Commission. On this issue the European Ombudsman delivered a decision in case 952/2014/OV on the public consultation procedure of the European Food Safety Authority for the renewal of the approval of the herbicide glyphosate where, however, it was affirmed that no breach of the right to participate in a public consultation could be found.

[67] The International Agency for Research on Cancer (IARC) judged it to be "probably carcinogenic". Cf. IARC, 2015, ASB2015-8421.

for or against the Commission proposal, has demonstrated this very clearly.

7.2 GMOs

Another sensitive administrative procedure concerning EFSA is laid down in Regulation (EC) no. 1829/2003 of the European Parliament and Council of 22 September 2003 on genetically modified food and feed, which establishes a single EU authorisation procedure for feed consisting of, containing, or produced from GMOs.

The cornerstone idea relating to genetically modified food and feed is that they should be authorised for placing on the EU market only after scientific evaluation. This must be undertaken under the responsibility of the European Food Safety Authority and has to detect any risk which GMOs could present for human and animal health and, if applicable, for the environment. The scientific evaluation should be followed by a risk management decision by the EU, under a regulatory procedure ensuring close cooperation between the Commission and the Member States[68].

An application shall be sent to the national competent authority of a Member State which shall acknowledge receipt of the application within 14 days, inform EFSA and make the application available to it. EFSA informs the other Member States and the Commission of the application, making all the information available to them, as well as making a summary of the dossier available to the public. In the case of GMOs or food containing or consisting of GMOs, the application shall be accompanied by the technical dossier required to carry out the environmental risk assessment according to Directive 2001/18/EC[69] or a copy of the authorisation and a monitoring plan for environmental effects.

According to Article 6, EFSA has 6 months from the receipt of the application to give its opinion, and the time limit shall be extended whenever supplementary information is sought. To

[68] M. Weimer, *Risk Regulation and Deliberation in EU Administrative Governance – GMO Regulation and Its Reform,* 21 Eur. L. J. 627 (2015).

[69] Directive 2001/18/EC lays down a procedure on the deliberate release into the environment of GMOs which is an alternative to the environmental risk assessment ruled by this Regulation when products containing or consisting of genetically modified organisms are concerned. In any case, the national competent authorities have to be consulted by the Authority.

prepare its opinion it may ask a food assessment body from a Member State to carry out a safety assessment of the food, and might also ask the competent authority of a Member State to carry out an environmental risk assessment according to Directive 2001/18/EC. EFSA forwards its opinion to the Commission, the Member States and the applicant, attaching a report describing its assessment of the food and stating the reasons for its opinion and the information on which this opinion has been based, including the opinion of the competent authorities, when consulted.

Within three months of receiving the opinion of EFSA, the Commission shall submit (Article 7) a draft of the decision to be taken to the Committee on the Food Chain and Animal Health. When the draft decision is not in accordance with the opinion of EFSA, the Commission shall provide an explanation for the difference. A final decision shall be adopted according to the regulatory procedure laid down by Article 5 of Decision 1999/468/EC and – at this final point – the Commission shall without delay inform the applicant of the decision taken.

The General Court had been asked to give its judgment on the application of this regulation in Case T-177/13 by three German non-governmental organisations. They went before the court to annul the dismissal of their request for an internal review of the decision of the Commission to authorise the placement on the food market of ingredients containing, consisting of, or produced from modified soybeans. That was the first time that the General Court ruled on a decision adopted by the Commission further to a request for internal review under "the Aarhus Regulation"[70]. However, the General Court rejected the argument put forward by the applicants, and precisely that the decision of the Commission would have been vitiated by a failure to state reasons. Not only did the judges consider the latter appropriate to the act in question, but the statement of reasons was considered capable of disclosing, in a clear and unequivocal fashion, the reasoning followed by the Commission so to enable the persons concerned to ascertain the reasons for the measure and the court to exercise its power of review.

---

[70] Regulation (EC) No 1367/2006 of the European Parliament and of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

Admittedly, it was the judgement itself that made clear, at para. 130, that the statement revealing the reasons for the decision should not go into all the relevant facts and point of law, since the question of whether it meets the requirements of the second paragraph of Article 296 TFEU must be assessed with regard not only to its wording, but also its contexts and all the legal rules governing the matter in question. Therefore, according to the judges, the Commission is not obliged to adopt a position on all the arguments submitted by the parties concerned, and it is sufficient if it sets out the facts and legal considerations having decisive importance in the context of the decision. The General Court concluded that the reasons given in the contested decision enable the applicant to understand why the Commission, in the exercise of its "broad discretion", rejected its argument. In other words, the judges decided not to interfere with the position adopted by the deciding authorities, most likely due to the complexity of the procedure concerning a highly technical evaluation and considering satisfying the reasons given to the claimant despite them not answering each of the observations submitted.

7.3 Paediatric pharmaceuticals

Regulation no. 1901/2006 lays down dispositions concerning medicinal products for paediatric use the aim of which is to improve the availability of pharmaceuticals for children, in order to meet the specific therapeutic needs of sick children. As a rule, pharmaceutical companies have to carry out a Paediatric Investigation Plan (PIP) to ascertain whether and how their products – intended for adults – could be used to treat children's diseases. However, the European Medicines Agency has the discretionary power to waive this duty under certain conditions to ensure that research, and funding, concerning children are channelled to meet their actual therapeutic needs.

Within this procedure a key role is played by the Paediatric Committee, which must issue an opinion on a Paediatric Investigation Plan (PIP) submitted by the interested party. When a PIP is submitted by a pharmaceutical firm in relation to a particular product, a receipt of application is sent by EMA. At first, the Agency verifies within 30 days if all the necessary data has been provided and when this is not the case, additional data is asked for. Then a rapporteur is appointed who shall deliver an

opinion in 60 days. The rapporteur can ask for a meeting and/or for additional data and make a request of changes to the plan.

The rapporteur transmits the dossier to the Paediatric Committee, which must rely on the rapporteur's preliminary investigation to deliver its opinion. The latter is used by EMA to adopt a draft decision either oriented to PIP adoption or the granting of a waiver. Before being adopted, each draft decision is transmitted to the applicant who has 30 days to ask for a re-examination. Whenever such a request is submitted, a new rapporteur is appointed and a supplementary investigation of a maximum of 30 days is carried out, eventually leading to supplementary data requests and new meetings. A final decision is transmitted to the applicant within 10 days from the end of the investigative phase.

In a case decided in 2013[71] concerning a procedure on medicinal products for paediatric use[72], though the Ombudsman considered that EMA was fully entitled to deny a waiver, they also found that the Agency was not able to grant suitable transparency throughout the procedure and failed to provide the reasons for its decision. The Agency was blamed not having acted fairly because it considered in different ways three similar applications for a product-specific waiver, all belonging to the same therapeutic class of medicinal substances and approved for the indication of heart failure in adults. In its statement of reasons, EMA, requiring only one of the applicants to conduct a paediatric study on heart failure, justified its decision referring not to the safety or efficacy of the product, but to its more pleasant taste. Therefore, the interested party submitted a claim to the European Ombudsman arguing that EMA was unable to ground its decision on an objective and fair assessment[73]. The Ombudsman found that the Agency was not able to clearly state its reasons, for the version

[71] European Ombudsman case: 2575/2009/(TS)(TN)RA against the European Medicines Agency, decided on 22 July 2013

[72] Regulation (EC) no. 1901/2006 of the European Parliament and Council of 12 December 2006 on medicinal products for paediatric use and amending Regulation (EEC) no. 1768/)2, Directive 2001/20/EC, Directive 2001/83/EC and Regulation (EC) No 726/2004.

[73] The decision should have to be considered arbitrary, considering how scientifically challenging a clinical study in paediatric heart failure would be due to the limited number of patients in the target population to be potentially enrolled.

publicly available of the decision made just a general and formal reference to the relevant grounds provided by the law to grant a waiver (Article 11) without specifying the reasons justifying it. In their draft recommendation to the Agency, the Ombudsman asked for the drafting of guidelines aimed at assisting the Paediatric Committee in its evaluative work and to provide the complainant with an adequate and consistent statement of reasons.

Therefore, this case shows that, even though Regulation no. 1901/2006 lays down a very detailed procedure when EMA is concerned with a market authorisation for a paediatric pharmaceutical, it nevertheless was unable to match its decision with an exhaustive statement of reasons. The grounds for the Ombudsman's recommendation were the need for clearer rules of procedure for its consultative body, the Paediatric Committee, whose work is at the root of the final decision of the Agency and whose lack of clarity had led to incomprehensible decisions from the applicant's point of view.

7.4 Marketing of chemicals

The REACH regulation (EC 1907/2006) lays down specific duties and obligations on manufacturers, importers, and downstream users of substances *i.e.*, chemical elements, (on their own, in preparations and in articles) to prevent adverse effects on human health and the environment. REACH oversees four different processes, namely the registration, evaluation, authorisation, and restriction of chemicals to ensure high levels of human health and environmental protection in all Member States. The decision-making process is led by specific due process rights and in some cases, according to Article 93, before submitting a claim to the judiciary, an internal review by the Board of Appeal of the ECHA must take place[74].

Despite that, authorisation process has, to some extent, a decision-making process that is slightly opaquer, since where a substance of very high concern is at stake, the decision concerning the authorisation involves the Commission, acting on the basis of a comitology procedure[75].

---

[74] Cf. A. Volpato, E. Mullier, *The Board of Appeal of the European Chemicals Agency at a Crossroads*, in *Boards of Appeal of EU Agencies,* cit. at 43, 85-103.

[75] In this case, the reluctance of the EU institutions to confer authorisation powers on ECHA should probably be linked to the *Meroni* doctrine, and the

The registration procedure requires the producer or importers to provide data on the substance, to use them in order to assess the risk related to this substance and to suggest those risk-management tools which they consider appropriate. They thus must submit a dossier containing all this information to ECHA (Article 20). The Agency must undertake a completeness check usually within three weeks of the submission date, but a longer deadline is allowed for registrations of phase-in substances. The Agency then must notify the competent authority of the Member State where the manufacturer or importer are based within a time limit of 30 days from the submission date that the registration dossier together with other information are made available in the ECHA database. If from the Agency there is no indication to the contrary within three weeks of the submission date, the registrant may start or continue the manufacture or import of the substance.

The registration is followed by an evaluation process which could lead to the decision of ECHA, together with the Member State Committee, to include a given substance in the EU rolling action plan (Article 44) relying on any clue of risks for human health or the environment. When a registration set out to do further tests to have more specific information related to possible threats to human health or the environment, the Agency takes a decision upon the testing proposal according to the procedure laid down by Article 50 and 51.

A draft decision could be released by the Agency – in the event the process ended with a simple evaluation of the dossier concerning the substance – or by the competent authority of a Member State – when a full evaluation of the substance has been carried out. Therefore, ECHA must notify any draft decision to the registrant who has 30 days to submit comments to the Agency. If the draft decision was issued by the competent authority of the

willingness not to delegate tasks demanding the exercise of wide discretionary powers, and therefore implying political evaluations, to bodies falling outside either any kind of democratic legitimation or other institutional control mechanisms; see Case 9/56, *Meroni v High Authority*, ECLI:EU:C:1958:7. Cf. M. Simoncini, *Administrative Integration beyond the Non-Delegation Doctrine,* 2018, 29-31. Anyway, regulating procedures *ex ante* and making room for participation and other safeguards in the procedure might, to some extent, counterbalance such reluctance.

Member State to evaluate the substance, ECHA must inform them, since in that case the authority, instead of the Agency, is responsible for taking any comments into account and possibly amending the draft decision. Moreover, in both cases, the draft decision, together with the comments of the registrant, must be circulated among the competent authorities of the Member States which can propose amendments within 30 days.

A revised draft decision is therefore to be referred to the Member State Committee within 15 days. Any proposals for amendment have also to be communicated to the registrants allowing them to comment within 30 days, and the Member State Committee shall take any comment received into account. If, within 60 days from the referral, the Member State Committee reaches a unanimous agreement on the draft decision, the Agency must take the decision accordingly, otherwise the procedure under Article 133,3 applies.

The authorisation only concerns the placing on the market and use of those substances which have been labelled "of very high concern" – following an identification procedure – with the aim of keeping them under control and progressively replacing them with alternatives considered more suitable. According to Article 60, in these cases the authority responsible for granting their placing on the market is the Commission and the proceeding applies only if the risks linked to their use can be kept under control, or their use is needed for socio-economic reasons and no alternatives are available. However, before the file is sent to the Commission, the Committees for Risk Assessment and Socio-Economic Analysis of the Agency must give their draft opinions. The deadline set by Article 64,1 is ten months from the date of receipt of the application; afterwards the draft opinion is sent to the applicant who may provide, within one month, a written notice that they wish to comment, and they have one more month to send their written argumentation to the Agency.

Here, again, the Committees ought to take into consideration the comments and have two months to adopt their final opinion which, within a further 15 days the Agency shall send to the Commission, the applicant and the Member States, with written argumentation. The decision is to be taken by the Commission, which shall prepare a draft authorisation within three months of receipt of the opinions from the Agency. After that and assisted by a committee within three more months, as set

out by Article 133, 3, the final decision is adopted according to the regulatory procedure laid down by Council Decision no. 1999/468/EC[76].

Finally, when a substance already on the market poses a risk to human health or the environment, the Commission may ask ECHA – or a Member State acting on its own – to prepare a dossier. An assessment of the risks is therefore laid down by those provisions concerning the restriction of substances which presents a risk needing to be addressed. Their aim is to make those substances subject to a total or partial ban or to other sorts of restrictions. Within 12 months of the receipt of the request from the Commission, the Agency or a Member State may suggest restrictions and the specific procedure here begins involving the Committee for Risk Assessment and the Committee for Socio-Economic Analysis.

At first, they must check whether the dossier submitted conforms to the requirements and, if not, ask the Member State or Agency to supply the missing information within 60 days. After that, the Committees for Risk Assessment and Socio-Economic Analysis shall formulate their opinions as to whether the suggested restrictions are appropriate, considering both the dossier prepared either by the Agency or the Member State and the views of the interested parties submitted during a six-month mandatory public consultation. The opinions are submitted by the Agency to the Commission which has three months to prepare a draft amendment to Annex XVII of the regulation, concerning restrictions, to be adopted by the Commission with the help of the Committees according to the regulatory procedure.

A decision taken according to REACH has been challenged in case T-134/13[77], due to an alleged infringement of the right of defence claimed by the two complainants, *Polynt and Sitre*, respectively a manufacturer and an industrial user of a substance called HHPA – alleged to be a respiratory sensitiser. The applicants challenged the decision contesting the appropriateness of the kind of procedure applied to their case, also invoking the different degree of procedural rights acknowledged to the parties when an authorisation instead of an evaluation proceeding is

[76] Article 5 of Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission.
[77] T-134/13 *Polynt and Sitre v ECHA*, ECLI:EU:T:2015:254, para. 93 ff.

used. They contested the choice taken by ECHA, following to the submission of a dossier prepared by the Kingdom of Netherlands, to label HHPA as a substance "of very high concern", according to an identification decision, possibly leading to listing HHPA among the substances subject to authorisation.

The applicants claimed, among other things, that the procedure followed was not the most appropriate one. An assessment under an evaluation procedure, compared to the authorisation procedure, would have allowed them to discuss the preliminary outcomes and provide relevant scientific data to the deciding authorities. The General Court rejected the plea of an infringement of the right of the defence underlining the different nature and purpose of an identification procedure applied – according to Article 59 – within an authorisation proceeding and that of an evaluation. Moreover, according to the judges, the intention of the legislator was precisely not to make the identification procedure carried out under Title VII of the regulation subject to the evaluation procedure ruled in its Title VI. Therefore, the judges concluded that "[b]y identifying HHPA on the basis of Article 57(f) of Regulation No 1907/2006, without first assessing it in the context of an evaluation procedure, the ECHA accordingly did not infringe the applicants' right of defence"[78]. Besides no manifest error of assessment took place according to the GC: all comments submitted by the applicants were properly taken into consideration during the identification procedure, since the authority had provided a response to each of them.

This case shows how hard it might be for stakeholders concerned by an agency decision to challenge the appropriateness of proceedings applied to them, and to have consequently different procedural guarantees to rely on. Especially when different proceedings would be equally suitable to achieve a given policy goal and highly complex scientific and technical facts need to be assessed, the discretionary power of the deciding authorities ends up prevailing. The latter is not only true relating to the wider or narrower extent of the judicial scrutiny into the challenged decision but can also prove to be true as regards the procedural pattern applied.

[78] *Ibid*, para. 101.

8. Indirect administration and fundamental rights

In this final paragraph the analysis shifts to the highly sensitive issue of migration law, where only indirect administration is applied. Nevertheless, procedural problems have emerged in the last few years during trials before the EU courts which appear to be quite close to those affecting direct and composite procedures. Unlike all the pieces of legislation considered thus far, the most interesting aspect of these procedures is that – affecting indirect administration – they involve the principle of the procedural autonomy of Member States. This gives the chance to see whether and how the Union can effectively assure common procedural standards to administrative tasks falling within its competences, despite them being implemented exclusively at national level. Some unpredictable steps forward have been made thanks to procedures concerning the acknowledgement of international protection status which have been under scrutiny[79] in the past, in the context of the migrant crisis.

A truly ground-breaking judgment was the one delivered by the Court of Justice in Case C-604/12[80] related to the

---

[79] In C-277/11, *M.M. v Minister for Minister for Justice, Equality and Law Reform* (Ireland), ECLI:EU:C:2012:744, the ECJ decided that a right to be heard must be guaranteed to an applicant for subsidiary protection even though the applicable legislation does not expressly provide for such a procedural guarantee. Cf. C. Hruschka, *The (reformed) Dublin III regulation – a tool for enhanced effectiveness*, 15 ERA Forum 479 (2014), were that case-law is linked to the new applicable Article 5 of the Dublin III regulation providing for the right to be heard in the form of a personal interview. See Article 5, regulation (EU) No 604/203 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, but also Article 14 and ff. of directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection.

[80] C-604/12, *H.N. v Minister for Justice, Equality and Law Reform* (Ireland), EU:C:2014:302. S. Bogojević, X. Groussot, M. Medzmariashvili, *Adequate Legal Protection and Good Administration in EU Asylum Procedures: H.N. And Beyond,* 52 Common Mkt. L. Rev 1635-60 (2015). The Irish Supreme Court raised the question of whether a Member State is allowed to lay down in its national legislation that an application for subsidiary protection status can be considered only after the applicant has applied for and been refused refugee status. Since Ireland decided for two separate procedures, one following the other, to examine asylum and subsidiary protection applications, Directive 2005/85 would not have applied to the former. Cf. Articles 12 and 13(3) of Council

procedural rights concerning Council Directive 2004/83/EC[81]. In this case the court applied the principle of effectiveness[82] in view of limiting national procedural autonomy. However, in doing so, it relied on "good administration" as a general principle and fundamental subjective right enshrined in Article 41 of the EU Charter of Fundamental Rights in a proceeding concerning the recognition of refugee status or, alternatively, subsidiary protection[83]. In its reasoning to explain the decision, the court not only recalled that a right to be heard is inherent as a fundamental principle of EU law – that is, the right of the defence – but it is now affirmed also in Article 41 of the CFR, which lays down the right to good administration, a provision considered by the ECJ to be of general application[84].

---

directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

[81] Council directive 2004/83/EC of 29 April 2004 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. This directive has been now repealed by Directive 2011/95/EU, of 13 December 2011 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, which further approximated the rights of persons who have been granted refugee status and those of persons with subsidiary protection status. Cf. on the latter H. Dörig, I. Kraft, H. Storey, H. Battjes, *Asylum Qualification Directive 2011/95/EU*, in K. Hailbronner, D. Thym (eds.), *EU Immigration and Asylum Law: a commentary* (2016), 1108-1283.

[82] Cf. H. Hofmann, *European administration: nature and developments of a legal and political space,* in *Research Handbook on EU Administrative Law,* cit., 32 "[f]rom the 'inside', however, the system is held together by procedural law. In this, an administrative space is created in which joint creation of law and its implementation is a reality. Limitations on autonomy of Member States arise from the fact that, in the fields of Union policy, the substantive and procedural administrative law of Member States is to be applied within the framework of EU law. This is set by reference to three basic factors. First, the substantive and procedural law of Member States is applicable as such only in the absence of any explicit requirements in Union law […]. Secondly, the application of national procedural rules in the implementation of Union law, […] must be exercised in strict compliance with the principles of *equivalence* and *effectiveness.* Thirdly, in all areas of the 'scope' of EU law, Member States are subject to general principles of EU law and fundamental rights".

[83] C-604/12, *H.N.,* paras. 49-50.

[84] Cf. C-277/11, *M.M.*, par. 83.

Although there were at that time no common rules determining what shall be the procedural standards to be followed by national administrations when examining an application for international protection, it was nevertheless made clear by the court that the Member States shall determine them ensuring that fundamental rights are observed and that EU provisions on subsidiary protection[85] are *fully effective*[86]. Accepting the opinion of A.G. Bot, the ECJ understood this fully effective protection in such a way that national law needs to grant the chance of simultaneous applications for refugee status and subsidiary protection status and is required to consider such applications "within a reasonable period of time"[87].

Thanks to this judgment the ECJ gave an example on how to use Article 41 CFR to limit national procedural autonomy. The judgment would have led[88] to the creation of a *ius commune*, at least whenever a procedure involving fundamental human rights is concerned[89], such as that applying to a third-country national with a view to granting them international protection status, according to international treaty law[90]. Therefore, reference to the principle of effectiveness, coupled with that to good administration, has led to an expansion[91] of the normative applicability of EU procedural rights well beyond the fields of direct or joint administrative proceedings, overturning settled case law[92].

---

[85] Cf. Article 78, par. 2 (a) and (b) TFUE.
[86] C-604/12, *H.N.*, paras. 41-42.
[87] *Ibidem.*, par. 45.
[88] S. Bogojević, X. Groussot, M. Medzmariashvili, *Adequate Legal Protection and Good Administration in EU Asylum Procedures: H.N. And Beyond,* 52 Common Mkt. L. Rev, 1659 (2015); see also J. Vedsted, Hansen, *Asylum procedures: seeking coherence within disparate standards*, in E. Tsourdi, P. De Bruycker (eds.), *Research Handbook on EU Migration and Asylum Law* (2022), 243-262.
[89] Cf. Directive 2004/83/UE at pt. 14 of the preamble, and now Directive 2011/95/UE, at pt. 21 of the preamble.
[90] The Geneva Convention of 28 July 1951 relating to the Status of Refugees and its New York Protocol relating to the Status of Refugees of 31 January 1967, affirming the principle of non-refoulement, and ensuring that nobody is sent back to persecution.
[91] M.P. Chiti, *Diritto amministrativo europeo* (1999), 145.
[92] On the opposite side, see Case C-482/10, *Cicala,* 21 December 2011 ECLI:EU:C:2011:868, concerning a purely internal situation, *i.e.*, a pension treatment. This circumstance explains why the ECJ answered that, though

However, the same reasoning has not found application in judgments relating to a different kind of indirect procedure – which is an example of an administrative decision adversely affecting the individual – even though it falls within migration policies like the previous one. The applicable legislation is Directive 2008/115/UE[93] concerning the decisions of Member States to return illegally resident third-country nationals[94]. The directive sets some procedural safeguards in its Chapter III, but it does not specify whether, and under what conditions, observance of the right of the third-country nationals to be heard must be ensured when the return policy is applied.

Since French law implementing Directive 2008/115/UE makes no reference to the conditions under which a foreign country national must be heard before a returning decision is issued in their regard, the referring court[95] asked whether national authorities should put third-country nationals in a position to be heard by virtue of Article 41, para. 2 (a) CFR[96]. The court, deviating from the opinion of the advocate-general[97], answered that an applicant for a resident's permit cannot derive any right to be heard from the Charter.

The court acknowledged the latter as a general principle of EU law which Member States ought to guarantee according to the

---

Article 1 of Law No 241/1990 contains a reference to principles deriving from EU law, that internal situation could not be treated as those falling within EU law would be. Cf. para. 29 of the judgment. In *H.N*, contrary to *Cicala,* the application of Article 41 CFR to a national procedure seems to rely on the fact that it involves a situation falling within EU law. Cf. also C-617/10, *Åklagaren v Åkerberg Franson*, paras. 19-21*,* ECLI:EU:C:2013:105 and C-390/12, *Pfleger and Others*, para. 34, ECLI:EU:C:2014:281.

93 Directive 2008/115/UE of the European Parliament and Council of 16 December 2008 on common standards and procedures in Member States for returning illegally resident third-country nationals.

94 C-166/13, *Mukarubega,* ECLI:EU:C:2014:2336 and C-249/13, *Boudjlida*, ECLI:EU:C:2014:2431.

95 C-249/13, *Boudjlida,* para. 33-34.

96 Relying on the case law of the ECJ in C-277/11, *M.M.*

97 AG Wathelet stated at para. 47 of his opinion: "[i]t seems to me neither consistent nor in accordance with the case law of the Court for the wording of Article 41 of the Charter to allow the introduction of an exception to the rule laid down in Article 51 thereof enabling the Member States not to apply an article of the Charter, even when they are implementing Union law. I am therefore clearly in favour of the applicability of Article 41 of the Charter to the Member States when they are implementing Union law". ECLI:EU:C:2014:2032.

principles of equivalence and effectiveness. But the judges also recalled that this general principle cannot be considered an unfettered prerogative and may be restricted, under certain circumstances, in view of its balancing with the need to implement an effective return policy. Thus, considering the right to be heard as a general principle of EU law, rather than a subjective procedural right enshrined in primary law, the ECJ succeeded in giving room to a more yielding interpretation of procedural requirements within national legislation. This condition, nevertheless, has a side effect. It gives more power to the EU courts which would exercise it on a case-by-case basis, undermining the predictability of the results, and boosting their judicial activism by adding even more relativism.

9. Concluding remarks

Considering the results of the inquiry, several points of weakness emerge from the absence of a general framework of rules concerning administrative procedures in the EU legal order. First, not all the institutions have the same understanding of how to apply the principles of good administration to an administrative procedure. Such an acknowledgment can be even more striking when making a comparison between procedures related to integrated administration – where committees and EU regulatory agencies ought to be seen as key supranational components – and indirect administration, leaving aside those cases where fundamental human rights are implied in the procedure because peculiar considerations seem to apply there. At a very first glance, these differences could be seen to add some flexibility for the benefit of the decision-making authorities, but they are usually detrimental to the parties which can hardly foresee and replicate the same behaviour moving from one sector-specific legislation to another[98]. Moreover, this being the case, there is far more space for judicial activism in reviewing decision-making, adding some uncertainty to the very outcome of a given

[98] Just to exemplify, there is still an underestimated difference between public access and access of interested persons in individual case decision-making; likewise, "reasonable time" in decision-making is still a difficult concept to define. Cf. T-347/03 *Branco v Commission,* ECLI:EU:T:2005:265, para. 114.

proceeding[99].

On the one hand, relying only on due process principles or Article 41 CFR could strengthen the discretionary powers of the institutional player but, on the other, such a choice could also prove to be inconsistent with the principle of proportionality or effectiveness, nor be reviewable as such, due to the extensive degree of technical discretion. For this reason, the role of the European Ombudsmen has been so important thus far[100], because they have the duty to detect whether administrative acts, even though lawful, could be disproportionate, burdensome, unfair, or unreasonable: the use of discretionary power is the core target of the EU Ombudsmen's control, and their intervention is sometimes much more effective than a judicial one.

Once the consequences of this gap in positive legislation became apparent, the issue concerning how the situation could improve thanks to codification ought to be tackled. First, officials could be obliged to adopt a sound conduct, to behave properly, according to minimum standards set by the general rules on administrative procedure in every case, even where no specific provisions apply to a given situation. This could also lead to a clearer definition of what is a standard procedure, allowing comparisons and self-improvement within institutions which should be called on to share their best practices.

Moreover, even though a codification could be considered a hazardous endeavour because of the fear of the public authorities of losing their discretionary powers, on the other hand, it would have the powerful consequence of increasing people's feeling of being treated fairly thanks to uniform procedural standards laid down in a single piece of legislation working as a general framework. This could foster a culture of openness, efficiency and accessibility in the EU administration to an extent that is not even foreseeable as long as uncertainties and scattered rules governing EU administrative activities persist, as this paper has tried to demonstrate.

---

[99] For an opposite conclusion, prizing the active role of judges, cf. C. Eckes, J. Mendes, *The Right to Be Heard in Composite Administrative Procedures,* cit. at 2, 670.

[100] M. Inglese, *The external projection of EU's agencies. An emphasis on the Ombudsman's role,* TARN working paper No. 13 (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3048222.

To some extent, a general act on administrative procedure could be one *tessera* in the more complex system of "accountability regimes"[101]. It would certainly constrain the decision-making public authorities to take all the steps needed to reach the most considered decisions, thanks to a proper evaluation and balancing of all the interests involved, leading to an overall improvement in bureaucratic effectiveness – implying cost savings – and accountability from the point of view of citizens.

As already mentioned, the position of the Commission is that any benefit arising from a codification would not outweigh the costs related to a revision of most existing legislation[102]. However, an APA would lead to several hidden cost savings insofar as future rule-makers or administrations will simply rely on the general provisions, concentrating their efforts in laying down those procedural details concerning sector-specific needs. In any case, it is self-explanatory that in those cases, sector-specific procedural rules should grant the same or higher levels of guarantee to citizens, even though the outline of the procedure would be – to some extent – modified.

However, this kind of reasoning is certainly true whenever facing a procedure that can be labelled as adjudicative – or first-generation procedures[103] – according to classical standards. But the picture becomes even more puzzling dealing with third-generation procedures, the most common ones in the EU landscape. As a reference point could be taken one of the many proceedings involving agencies which are becoming one of the main players in the EU administration, the proceedings of which acquire the greatest relevance considering that they are meant to overcome the issue of democratic accountability with a shift to a procedural one.

Agencies are often asked to provide for risk-assessment or risk-management decisions to be included within a rule-making procedure of the Commission, involving committees.

---

[101] E. Chiti, *Is EU Administrative Law Failing in Some of Its Crucial Tasks?,* 22 Eur. L. J. 590 (2016).

[102] Cf. the answer of the Vice-President of the Commission, Jyrki Katainen, during a debate on oral interpellation held at the European Parliament in Strasbourg 8 June 2016, CRE 08/06/2016 - 26.

[103] According to J. Barnes, *Towards a third generation of administrative procedure,* cit. at 40.

Here, the boundaries between legislation and adjudication are so blurred and proceedings are so complex and tailored[104] that those affected by the final outcome would obviously benefit from a standard-setting APA to look at, standing beside sector-specific provisions. From this point of view, the efforts made by ReNEUAL with its Model Code seems to better address the procedural entanglements within the EU administrative panorama than the proposal of the European Parliament. The reason is that, as already mentioned, the former includes in the project provisions concerning not only adjudication but also administrative rule-making, mutual assistance and administrative information management among other things, while the latter only focus on individual decision-making procedures. Despite that, the proposal contained in the resolution of the European Parliament – with its minimalist attitude – shows a more realistic and strategic approach considering the clear hesitancy of the Commission on this issue.

[104] Cf. U. Stelkens, *The European Administrative Space – From integration to implosion: A return journey?*, available at https://europeancommonwealth.org/2017/02/17/stelkens-the-european-administrative-space-from-integration-to-implosion-a-return-journey/.

THE EUROPEAN AND ITALIAN ECONOMIC CONSTITUTION(S) AFTER THE RECENT CRISES: TOWARDS A NEW ROLE FOR STATE POWERS?

*Monica Rosini & Marta Tomasi**

Abstract:

This paper aims to examine the crucial role of the European Union (EU) in shaping the economic system, with a focus on the main regulatory responses adopted to counteract the social and economic consequences of both the COVID-19 pandemic and the war in Ukraine. Additionally, it considers the significant measures introduced at the national level to understand the key features of the current Italian economic constitution and how its traditional open and mixed nature has been affected by the ongoing crises, or vice versa, how the principles of the Italian economic Constitution helped to mitigate the impact of the crises. Through this analysis, we aim to determine whether the new approach, characterized by more extensive state intervention in the economic field and a greater emphasis on protecting social rights, will become a permanent feature of the European and national economic landscapes.

TABLE OF CONTENTS

* Monica Rosini is Associate Professor of Public Law, Free University of Bolzano/Bozen; Marta Tomasi is Assistant Professor of Comparative Public Law, University of Trento.

Both Authors contributed to the article's conception. Monica Rosini drafted paragraphs 3 and 4, while Marta Tomasi paragraphs 2, 2.1 and 2.2. Introduction and conclusions were drafted together. The paper was written as part of the research project "Establishing Ethics and Human Rights as Elements for Economic Knowledge", funded by the Free University of Bolzano/Bozen.

1. Introduction

The 1948 Italian Constitution, like many modern constitutions, provides for a set of rules regulating economic relations. These rules are mainly enshrined in Title III of Part I of the constitutional text (articles 35-47) and aim to establish the milestones of the model of society envisaged by the founding fathers[1]. In order to describe these constitutional provisions relating to economic matters, the legal scholarship has developed the complex notion of 'economic constitution'[2].

In this paper, we do not intend to discuss the meaning, validity, and scope of such a complex and ambiguous notion[3], but we will mainly assume it in a descriptive sense to indicate the constitutional norms which regulate economic relations and *try* to outline the economic system to be set in our country. Indeed, the Italian economic constitution is "open"[4], as it does not draw on a specific economic model and is characterised by an intrinsic

[1] Cfr. O. Pollicino, *L'economia nella Costituzione: le scelte dell'Assemblea costituente,* in G.F. Ferrari (ed.), *Diritto pubblico dell'economia* (2019).

[2] The legal concept of economic constitution was originally developed by German public law scholars during the XX century (W. Eucken, *Der Wettbewerb als Grundprinzip der Wirschaftsverfassung,* in *Der Wettbewerb als Mittelvolkswirtschaftlicher Leistungssteigerung und Leistungsauslese* (1942); F. Böhm, *Die Bedeutung der Wirtschaftsordnung für die politische Verfassung: Kritische Betrachtungen Zu Dem Aufsatz Von Ministerialrat Dr. Adolf Arndt über Das «Problem Der Wirtschaftsdemokratie in Den Verfassungsentwürfen»*, 1 *Süddeutsche Juristen-Zeitung*, 6 (1946). *Contra* C. Schmitt, *Der Hüter der Verfassung* (1931). In Italy, G. Bognetti (*Il modello economico della democrazia sociale e la Costituzione della Repubblica italiana,* in G. Miglio, *Verso una nuova Costituzione*, 133 (1983) and *La Costituzione economica italiana. Interpretazione e proposte di riforma* (1993)) was the first to use in an effective way this category.

[3] See: P. Bilancia, *Modello economico e quadro costituzionale* (1996); M. Luciani, *Economia nel diritto costituzionale,* in *Dig. disc. pubbl.,* V, (1988); S. Cassese, *La nuova costituzione economica* (2021).

[4] U. Romagnoli, *Il sistema economico nella Costituzione,* in F. Galgano (ed.), *La Costituzione economica – Trattato di diritto commerciale e di diritto pubblico dell'economia,* 139 (1977).

flexibility, which stems from the essential compromise that the Italian Constitution represented, drawn up as it was by political forces with very different ideological backgrounds. This explains why its rules seem to implement extremely different, sometimes opposing, principles and views, such as market, guided or collectivist economy[5].

These economic rules cannot be compartmentalized but have necessarily to be read in a systematic perspective in the framework of the constitutional system as a whole and of the general configuration of the form of State. There is no 'economic constitution' that can be isolated in and from the Constitution *tout court*[6].

The adoption of this broad interpretative approach shows how the achievement of some objectives, such as substantive equality, equal social dignity, and the guarantee and promotion of social rights, play a key-role in the constitutional economic model.[7] Thus, private and public economic activities should be regulated in a way to pursue these social aims[8].

However, the welfare state is not fixed, but, in contrast, it adapts to the social, political, and economic transformations that are gradually taking place and that involve the evolution of the form of government as well as of the State.

The common thread of our economic constitutional regulation is the construction of a strong, indissoluble link between the production of wealth and the elimination of economic and social inequalities, in other words between wealth produced and the affirmation of equal social dignity. Thus, the Constitution identifies some guidelines that outline the boundaries within which the economic model has been left free to develop. Moving from these

[5] P. Bilancia, *L'effettività della Costituzione economica nel contesto dell'integrazione sovranazionale e della globalizzazione,* 5 Federalismi.it (2019).

[6] M. Luciani *Unità nazionale e struttura economica. La prospettiva della Costituzione repubblicana*, Rivista AIC (2011).

[7] See: M. Luciani *Unità nazionale e struttura economica. La prospettiva della Costituzione repubblicana*, cit. at 6; F. Angelini, *Costituzione ed economia al tempo della crisi…*, 4 Rivista AIC (2012).

[8] See especially Articles 41 ("Private economic enterprise shall have the right to operate freely. It cannot be carried out in conflict with social utility or in such a manner as may harm health, the environment, safety, liberty and human dignity. The law shall determine appropriate programmes and checks to ensure that public and private economic enterprise activity be directed at and coordinated for social and environmental purposes" and 43 Const.

guidelines different evolutions are possible, given that the constitutional economic model leaves the legislator *de facto* wide room for manoeuvre thanks to the choice of a merely guided economy, in an intermediate position between the 'pure' models represented by the liberal market economy, on the one hand, and by the socialist state economy, on the other one.

The flexible nature of the constitutional rules in this field has enabled (and still does) the adaptation of the Italian economic system to the principles and regulations of the European integration process, according to the principle of international openness *ex* article 11 Const. This impact is particularly significant, especially since the beginning of the 1990s (with the entry into force of the Maastricht Treaty), with the consequence that it has become increasingly necessary to interpret and redesign the national economic Constitution in the framework of the European context (*infra* section 2)[9].

In this regard, an enduring and irreducible tension between the national and European economic constitutions can be noted. Their starting assumptions are, in fact, almost opposite: the national economic constitution outlines an active role for the State in order to shape the economic system that has to pursue the aim of social utility; in contrast, the European economic constitution plans a more limited role for the public authorities in the economic sphere, in order to create a more competitive economic system[10].

The solution of this tension has been a reshaping of our economic constitution according to the European principles and rules[11].

Thus, in order to study and understand the national economic constitution, it is essential to look at the changes deriving from non-state rules, such as the obligations provided by European treaties, along with the developments brought about by non-state phenomena, such as globalization, technological progress and, more recently, Covid-19 and the Ukrainian emergencies.

The Covid-19 outbreak in early 2020, as a public health challenge, quickly became the most drastic economic crisis in European and national history. It changed the economic, social, and

[9] L. D'Andrea, *I principi costituzionali in materia economica*, Consulta online (2020), at https://www.giurcost.org/contents/giurcost//studi/dandrea1.pdf

[10] P. Bilancia, *Il modello di economia tra Stati e processi di integrazione europea*, 3 Rivista AIC (2014).

[11] G. Amato, *Il mercato nella Costituzione,* 1 Quad. cost., 16 (1992).

budgetary outlook in the EU and in the world, calling for an urgent and coordinated response both at Union and national level in order to cope with the economic and social consequences in all member states. In addition, in February 2022, the war triggered by Russia's invasion of Ukraine affected peace, the most precious achievement in recent European history, reviving the geopolitical logic of opposing blocs between the United States and Russia.

The aim of this paper is to consider some noteworthy effects of these dramatic scenarios on the European and national economic constitution. It intends to analyse how and to what extent the pandemic has reshaped European economic rules, setting aside the approach followed for decades based on the balanced budget and shifting the focus on the public intervention in the economy and social rights protection[12]. In such a way the objectives of the European economic constitution have come close to those of the Italian Constitution.

In particular, the paper intends to deal with the crucial role played by the EU in shaping the economic systems, considering the main normative responses adopted to contrast the social and economic consequences caused by both the pandemic and the war in Ukraine (sections 2, 2.1 and 2.2). Then, it will consider the more significant measures introduced at national level, to understand the main features of the current Italian economic constitution and to see how its traditional open and mixed nature has been changed by the crisis we are living in or, vice versa, how the former helped to contrast the latter (sections 3 and 4).

This analysis will allow us to verify whether this new approach, characterised by more intensive state intervention in the economic field and more attention for the protection of social rights, will become a permanent feature of the European and national economic scenarios.

2. The crucial role of the EU in shaping the economic system(s)

Among the elements that contribute to shape and orient the economic system defined by the Italian Constitution, a crucial role is played by the European Union's influence in the field of

[12] F. Scuto, *La dimensione sociale della Costituzione economica nel nuovo contesto europeo* (2022).

economic relations. Therefore, before proceeding to analyse the national response to the pandemic and the war, it is necessary to consider the framework that has been drawn up in the European Union in view of the economic policy choices that have been made there. In fact, although economic policy falls within the remit of each Member State, the EU offers room for multilateral coordination between individual countries, often significantly affecting the structure of internal models.

The preamble to the TEU states that Member States are "resolved to achieve the strengthening and the convergence of their economies". The basis for economic coordination can be found in Articles 2, 5 and 119 of the TFEU: they require the Member States to view their economic policies as a matter of common concern and to coordinate them closely. According to Articles 120 and 121 TFEU, Member States are required to conduct their economic policies with a view to contributing to the achievement of the objectives of the Union and in the context of the broad guidelines that the Council formulates. Furthermore, Article 146 TFEU provides that Member States are to implement employment policies that take into account the guidelines for employment. Coordination of the economic policies of the Member States is therefore a matter of common concern even if, from the very beginning, the European integration project was unclear about how to obtain this economic policy coordination, and many attempts remained vague and intergovernmental[13].

The shortcomings of the Economic and Monetary Union (EMU), characterized by an apparent asymmetry between its decentralised 'Economic' and the fully centralised 'Monetary' parts, were highlighted by the sovereign debt crisis[14].

Moments of crisis, in general, frequently activate change and trigger forces that challenge the *status quo*, leading to new political, economic and social arrangements[15]. In this sense, the financial and economic crisis of 2008-2012 exposed the existing weaknesses of the

[13] D. Howarth, A. Verdun, *Introduction to 'Economic and Monetary Union at Twenty: A Stocktaking of a Tumultuous Second Decade'*, 42 Journal of European Integration 3, 287 (2020).

[14] J.S. Haas, V.J. D'Erman, D.F. Schulz & A. Verdun, *Economic and fiscal policy coordination after the crisis: is the European Semester promoting more or less state intervention*, 42 *Journal of European Integration,* 3, 327 (2020).

[15] S. Mangiameli, *Covid-19 e Unione europea. La risposta alla crisi sanitaria come via per riprendere il processo di integrazione europea*, 2 Dirittifondamentali.it (2019).

European system, highlighting fundamental problems and unsustainable trends in many European countries, and made it clear that the EU's economies are strictly interdependent. Greater economic policy coordination across the EU was needed to achieve the aims of boosting economies and creating jobs. To this end, the system of bodies and procedures for economic coordination that was in place underwent a process of revision and reinforcement, a number of legislative acts have been adopted, and new institutions established[16].

As is well known, however, the easing of the economic and financial crisis has not led to an improvement in the EU's condition comparable to that of other areas of the world: the difficulties resulting from the economic and financial crisis, particularly due to the austerity policy implemented in the EU, have continued to be long felt. Furthermore, the process of political integration, based on the strengthening of supranational democracy, also due to other concomitant crises[17], has not fully achieved the desired results. All this, according to the Commission itself, has somehow produced "a growing disaffection with mainstream politics and institutions at all levels (...) easily filled by populist and nationalist rhetoric".[18]

The most recent crisis, that of Covid-19, has lent itself – in all its tragedy – as yet another opportunity for policymakers to re-think frameworks for decision-making and allow previously marginalized ideas to gain ground. The pandemic crisis - an exceptionally large exogenous shock affecting all EU member states - helped to highlight the importance of a joint and shared intervention by European institutions and Member States and of an intention aimed at the achievement of a "strategic autonomy"[19]. At least from the point of view of communicative rhetoric, the

[16] The legal framework of the EU economic governance is available at: https://www.europarl.europa.eu/factsheets/en/sheet/87/economic-governance.

[17] The Eurozone crisis, the refugee crisis, Brexit, and rule-of-law backsliding have presented distinct threats to European integration.

[18] European Commission, "White Paper on the Future of Europe. Reflections and scenarios for the EU27 by 2025", COM(2017)2025, 1° March 2017.

[19] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, "Europe's moment: Repair and Prepare for the Next Generation", COM(2020) 456 final, 27 May 2020, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0456&from=IT, p. 2.

approach seemed very different from past crises. "We must look out for each other, we must pull each other through this. Because if there is one thing that is more contagious than this virus, it is love and compassion. And in the face of adversity, the people of Europe are showing how strong that can be". These words, spoken by the President of the Commission, Ursula von der Leyen, at the plenary session of the European Parliament (26 March 2020), appear at the top of the Commission's institutional page dedicated to the *Timeline of EU action* to combat CoViD-19. From the beginning of the crisis, the emphasis placed on the individuality of states and austerity policies that characterized the 2008 crisis was replaced by frequent calls for solidarity[20] and the need to make investments[21].

After an initial moment of bewilderment, in fact, the EU institutions were quite responsive and intervened by revising different EU's policies to counteract the effects of what was - significantly - qualified as a 'syndemic'[22], a pandemic whose effects also depend on a number of considerations, not only health, but also economic, environmental and social. Actions were developed on different fronts: to contain the spread of the virus, support national health systems and counter the socio-economic impact of the pandemic by taking unprecedented measures at both national and EU level.

With regard to the economic response, the main measures adopted can be summarized as follows:

(i) The first important step was announced on 13 March 2020 by the ECB which adopted a key role in ensuring the crisis did not spill over to financial markets. The ECB's pandemic emergency purchase programme was started in March 2020[23] to inject liquidity into the financial system, with the aim to "counter the serious risks to the monetary policy transmission mechanism and the outlook for the euro area posed by the outbreak and escalating diffusion of the

[20] "The COVID-19 pandemic constitutes an unprecedented challenge with very severe socio-economic consequences. We are committed to do everything necessary to meet this challenge in a spirit of solidarity". See: Report on the comprehensive economic policy response to the COVID-19 pandemic.

[21] See the Communication from the Commission to the European Parliament, the European Council, the Council, the European and Social Committee and the Committee of the Regions, significatively titled *Coronavirus Response. Using every available euro in every way possible to protect lives and livelihoods* (2 April 2020).

[22] R. Horton, *Offline: COVID-19 is not a pandemic*, 396 The Lancet 874 (2020).

[23] Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17).

coronavirus". The initial € 750 billion envelope for the PEPP was increased by € 600 billion on 4 June 2020 and by € 500 billion on 10 December, for a new total of € 1,850 billion. As the President of the ECB, Christine Lagarde, said "Extraordinary times require extraordinary action. There are no limits to our commitment to the euro".

(ii) On 20 March 2020 the Commission proposed the activation of the general escape clause of the Stability and Growth Pact.[24] Once endorsed by the Council, it allowed Member States to undertake measures to deal adequately with the crisis, while departing from the budgetary requirements that would normally apply under the European fiscal framework, also making clear that the cost of the crisis would have fallen in the first instance on the shoulders of each government[25].

(iii) In addition, on 19 March 2020 the Commission adopted a Temporary Framework to enable Member States to use the full flexibility foreseen under State aid rules to support the economy in the context of the COVID-19 outbreak[26].

(iv) Furthermore, three EU safety nets for workers, sovereigns, and businesses were established, amounting to a package worth € 540 billion, to lessen the burden of the Covid-19 catastrophe for member states: a) the temporary Support to mitigate Unemployment Risks in an Emergency (SURE), the backstop for workers managed by the European Commission, supporting short-time work schemes and similar measures, to help Member States protect jobs and thus employees and self-employed against the risk of unemployment and loss of income[27]; b) the European Stability Mechanism's Pandemic Crisis Support, tailored to the needs of sovereigns and supporting countries to cover their

[24] European Commission, *Coronavirus: Commission proposes to activate fiscal framework's general escape clause to respond to pandemic,* Press release, 20 March 2020, available at: https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_20_499/IP_20_499_EN.pdf

[25] C. Domenicali, *La Commissione europea e la flessibilità "temporale" nell'applicazione del Patto di Stabilità e Crescita*, 19 Federalismi.it, 453 (2020)

[26] European Commission, Communication from the Commission, *Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*, C(2020) 1863 final, 19.03.2020.

[27] It is interesting to note that SURE finds its legal basis in art. 122 TFEU, the only article in the Chapter devoted to economic policy in which reference is made to the principle of solidarity.

direct and indirect health-care related costs; c) EIB's Pan-European Guarantee Fund (EGF), ensuring businesses have sufficient short-term liquidity available to face the crisis, and continue their growth and development in the medium to long-term.

2.1. An unprecedented exercise in solidarity?

Until the late spring of 2020, the responses proposed by the EU fitted into patterns well established over the past decades, presenting emergency instruments, apparently compatible with the Treaties, adopted with the intergovernmental method, promoting a model of solidarity mainly understood as a loan subject to "strict conditionality", (was introduced in 2011 in Art. 136 (para. 3) TFEU, referring to the granting of "any financial assistance" by the newly established ESM).

The pandemic seems to have changed views on fiscal probity that, in previous years, opposed a possible role for debt collectively backed by member governments.

The first European instrument that appears to be truly inspired by a different notion of solidarity is the EU Recovery Plan, described as an unprecedented exercise in solidarity. The new fiscal and governance framework, which allows for direct transfers to countries, in addition to loans, financed by borrowing in markets and temporarily lifting the 'own resources' EU ceiling, is based on two pillars. The European Council worked out an agreement on the EU budget for the next seven years, the multiannual financial framework for 2021–2027 (€1.1billion) and the € 750 billion recovery plan. The latter, also called Next Generation EU, consists of a Recovery and Resilience Facility (RRF), which will make € 672.5 billion available in the form of loans (€ 360 billion) and grants (€ 312.5 billion), and a further € 77.5bn, which will be spent on EU-wide programmes like React-EU, a top-up to the union's structural and investment funds. Resources of the RF are intended to finance national recovery and resilience programmes, which contain proposals for both investment and reform. The plans are not conditional on compliance with econometric parameters but are linked to the credibility and effective implementation of the programmes for which they are granted, and compliance with the commission's previously stated "country-specific recommendations": structural-reform proposals that governments have ignored for years. The deal breaks with the norms of no

common debt issuance and will result in significant redistribution across Member States through grants.

According to the Jacques Delors Centre, a Berlin think-tank, the creation of the fund marked an "irretrievable change in Europe's financial architecture"[28].

Some have argued that this is a "Hamiltonian moment"[29]. The reference is to the 1790 decision made by Alexander Hamilton to create a federal debt, which would strengthen ties between the entities brought together to form the United States of America, while increasing the authority and legitimacy of the federal power[30]. But scepticism soon set in, having the better of the argument. On closer inspection, in fact, despite clear progress, it seems that the EU recovery strategy will not lead to a radical, federally-oriented reorganisation of the European project but, at best, will institutionalise some changes while reopening crucial debates on the future of the Union[31].

This is due, in particular, to the temporary nature of the measures adopted, which must be repaid by 2058 at the latest, to their amount, which is helpful but not "a game-changer"[32], and to the lack of timeliness of the disbursements, which prevented states' being able to deal with the most acute phase of the crisis[33].

---

[28] Economist. 2021. Europe's radical economic response to COVID-19, March 31, https://www.economist.com/briefing/2021/03/31/europes-radical-economicresponse-to-COVID-19. More in general, F. Fabbrini, *The Legal Architecture of the Economic Responses to COVID-19: EMU beyond the Pandemic*, 60 JCMS, 1, 186 (2022).

[29] Olaf Scholz, German Minister of Finance , recalled the "Hamiltonian moment" in an interview to "Die Zeit" on 19 May 2020 (www.zeit.de/2020/22/olaf-scholz-europaeische-union-reformvereinigte-staaten). Eurogroup President Mário Centeno described it as "a big step toward fiscal union."

[30] As first Secretary of the Treasure, after a long deadlock, Hamilton managed to find a compromise in June 1790 with Thomas Jefferson and James Madison, who had long opposed the centralisation of fiscal power at federal level. On the 4 August 1790, the Congress passed the "Funding act", which allowed the establishment of the first stock of American public debt.

[31] S. Disegni (ed.), *Europe at a Crossroads After the Shock* (2020).

[32] S. Kapoor, *This isn't Europe's 'Hamilton' moment*, Politico, 22 May 2020.

[33] As stated in the EC's "Proposal for a Regulation" the financial contribution will "be paid in instalments once the Member State has satisfactorily implemented the relevant milestones and targets identified in relation to the implementation of the recovery and resilience plan" (EC. (2020). Proposal for a regulation of the European Parliament and of the council establishing a recovery and resilience facility, COM (2020) 408 final 2020/0104 (COD), Brussels, May 28., art. 17.4.a). EU countries should have officially submitted their recovery and resilience

Furthermore, it must be borne in mind that the final agreement was the result of long and complex negotiations, showing conflicts in particular around the choice of the fiscal instruments to be used and the extent to which access to resources from the NGEU and the MFF should be linked to democracy and the rule-of-law. This latter, in particular, is a telling demonstration that major differences persist regarding the foundations and objectives of the EU.

The existing EU solidarity mechanisms are of an interstate nature, remain highly conditional and depend on national governments' willingness to enter such relationships with other EU countries[34].

As some authors have pointed out[35], the true Hamiltonian innovation of the founding period in the United States was the conferral of taxing authority on the federal government in the US Constitution; similarly, only the power and legitimacy to mobilise fiscal resources on its own would have allowed the EU to smoothen the complex exercise in political and financial engineering that brought to the adoption of the NGEU.

Certainly, the year 2020 exposed the risks and weaknesses of the market-driven global system like never before[36]: the long-lasting, widespread Covid-19 pandemic imposed huge challenges, requiring governments at all levels to take an active role in designing and enforcing economic policies to address the various problems that pure market forces cannot resolve. Covid exposed the deficiencies in current arrangements and the need to build

plans "as a rule" by 30 April 2021 (see paragraph 38 of the Preamble and Article 18(3) of the RRF Regulation), but the deadline was flexible and the Commission has argued that countries can submit their plans up to mid-2022 (see the EC Questions and answers: The Recovery and Resilience Facility). As of February 2023, thirteen countries submitted their plans by the 30 April 2021 deadline or at most with a one-day delay. 24 countries submitted their plans by the end of June 2021, while Malta submitted its plan in July 2021, Bulgaria in October 2021, and the Netherlands in July 2022.

[34] S. Pornschlegel, *Solidarity in the EU: More hype than substance?*, European Policy Centre and Charlemagne Prize Academy, issue paper, 28 July 2021, online: https://epc.eu/content/PDF/2021/EU_solidarity_IP.pdf.

[35] C. Fasone, P. Lindseth, *Europe's Fractured Metabolic Constitution: From the Eurozone Crisis to the Coronavirus Response*, Working Paper Series, SoG Working Paper 61 (2020).

[36] A. Tooze, *Has Covid ended the neoliberal era?,* The Guardian, 2 September 2021.

relations not only between governments and the market, but also to involve other institutions within society[37].

The pandemic has revealed on the one hand the transnational interrelatedness of social life and the economy, highlighting the fundamental role of a solidarity-driven economy, and, on the other, the multiplication of territorial levels crucial to social politics[38].

It might be useful to recall that the EU Commission's 2021 Work Programme indicated "an economy that works for people" as one of its priority dimensions, meaning that ongoing health and economic crises have to be managed with a social dimension in mind, thus ensuring that "no one is left behind in Europe's recovery"[39].

Furthermore, the Commission adopted an action plan for implementation of the European Pillar of Social Rights, originally launched in 2017, and another to support the social economy, proposing a set of measures aimed at creating the conditions for the social economy to thrive and fulfil its potential to contribute to sustainable and inclusive growth.

Additionally, the fiscal flexibility granted by the activation of the SGP general escape clause is also reflected in the 2020-2021 country-specific recommendations, which widely diverge from those of the previous cycles. A quite recent analysis[40] shows how the focus of EU governance drifted away from policy reforms aimed at achieving financial sustainability and macroeconomic stability (e.g. the revision of wages, the inclusivity of the labour market, and the adjustment of pension systems); instead, the accent has been placed on policy areas which are usually considered not particularly compatible with the macroeconomic objectives of the EU (consider the attention given to adequate social protection systems and income support mechanisms).

---

[37] J.E. Stiglitz, *The proper role of government in the market economy: The case of the post-COVID recovery*, 1 JGE, 100004 (2021).

[38] S. Börner, *Practices of solidarity in the COVID-19 pandemic*, 6 Culture, Practice & Europeanization, 1, (2021).

[39] Remarks by Executive Vice-President Dombrovskis at the press conference on the Recovery and Resilience Facility, 28 May 2020, https://ec.europa.eu/commission/presscorner/detail/en/speech_20_961.

[40] S. Rainone, *An overview of the 2020-2021 country-specific recommendations (CSRs) in the social field. The impact of Covid-19,* Background analysis 2020.01, European Trade Union Institute (ETUI), (2020).

The 2020 Country Specific Recommendations (CSRs) represented a sea change from previous years, which were the result of extraordinary circumstances that brought with them the temporary suspension of the EU budgetary rules. It is therefore hard to tell whether this more social approach will be consolidated in the future or whether we are only witnessing a momentary, pandemic-induced deviation.

2.2. The war and the limits of "internal solidarity"

The evaluation of the scope of measures taken to respond to the pandemic, thus, cannot be separated from consideration of the ongoing war in Ukraine, which seems to have dimmed prospects of a post-pandemic economic recovery in Europe. The Russian invasion, which primarily caused a massive humanitarian crisis, forcing almost eight million Ukrainians to flee the country[41], also meant higher energy prices and trade disruptions for the EU.

Just as the pandemic was giving way to a new normal, the war required urgent action against an exogenous and security threat allied to efforts to address the immediate consequences of financial sanctions. The situation determined the EU leaders to adopt, on 10 and 11 March 2022, a declaration on the Russian aggression against Ukraine, as well as on bolstering defence capabilities, reducing energy dependencies and building a more robust economic base.

As many before, the shock brought by this crisis was evidently highly asymmetric, affecting some countries much more than others. Consider, for example, the uneven distribution of refugees on the EU territory[42] and the different degree of dependence on Russian energy sources of different European countries[43].

In this context, calls for solidarity were not long in coming and the recent post-COVID example appeared to be inspirational. The EU's Economic Commissioner Paolo Gentiloni, for instance,

[41] According to the data collected by the UNHCR, updated to 3 January 2023, refugees from Ukraine recorded across Europe are 7,915,287 (https://data.unhcr.org/en/situations/ukraine).

[42] For instance, the data collected by the UNHCR report a roughly ten-to-one difference between countries with similar populations (e.g. 1,500,000 refugees registered in Poland and 164,000 in Spain).

[43] See the data published by Statista: https://www.statista.com/chart/26768/dependence-on-russian-gas-by-european-country/.

called for European solidarity evoking the "experience we had in the previous crisis" which showed that "acting together, responding together you are not only able to avoid divisions among European countries but you have a strong, strong reaction"[44]. Similarly, Commission President von der Leyen, pointing to the Commission's proposals to address the energy crisis, said that the best response to the Russian war on energy is "European solidarity and unity"[45].

Beyond statements of principle, the most concrete expressions of solidarity can be said to have been with the Ukrainian population: the EU Commission unlocked unused regional and structural funds to be repurposed for humanitarian assistance and activated its Temporary Protection Directive for the first time[46]. Furthermore, governments beyond those neighbouring Ukraine opened their borders and offered emergency protection, showing an uncommon and evenly distributed welcoming attitude[47].

In contrast, solidarity among Member States has not been equally evident.

With regard to the changes in the framework of EU fiscal and financial integration, the suspension of the fiscal policy rule of the Stability and Growth Pact decided in March 2020 by the European Commission and the EU Council, due to last until the end of 2022, was again extended in May 2022 in light of the Ukraine invasion.

Furthermore, the Commission decided to prolong the possibility to grant investment support measures towards a sustainable recovery under the State aid COVID Temporary Framework until 31 December 2023 and, on 23 March 2022, provided for further measures to enable Member States to support the economy in the context of Russia's invasion of Ukraine, under

---

[44] See the interview released to CNBC at https://www.cnbc.com/2022/10/17/putins-war-on-energy-is-testing-solidarity-between-eu-nations.html.

[45] Press release at https://www.europarl.europa.eu/news/it/press-room/20221014IPR43215/act-decisively-at-eu-summit-on-energy-and-the-cost-of-living-crises-urge-meps.

[46] See the World Bank Group report "Social Protection for Recovery" Europe and Central Asia Economic Update, Office of the Chief Economist, Fall 2022.

[47] UNHCR. (2022). *Ukrainian refugee situation*, available at https://data.unhcr.org/en/situations/ukraine.

another Temporary Crisis Framework, whose duration was later also extended by one year, until 31 December 2023[48].

Finally, on 11 October 2022, the European Commission issued € 11 billion in a dual tranche transaction, which will be used to support Ukraine under the EU's Macro-Financial Assistance[49] programme and Europe's recovery under the flagship Next Generation EU programme. The deal consisted of a € 5 billion tap of the 7-year bond due on 4 December 2029 and a new 20-year bond of € 6 billion due on 4 November 2042.

A proposal for an EU "fiscal capacity" funded by common debt issuance and new income streams was put forward by the IMF. However, northern EU countries remained sceptical, pointing out that the pandemic fund was to be seen as a unique occurrence, and Germany's finance minister rejected common borrowing by the EU as a way to address the energy crisis, saying it was more advantageous for states to raise debt at the national level given the higher interest rates faced by the European Commission[50].

The more structural nature of the crisis produced by the war in Ukraine compared to that of the Covid, together with rising inflation, led to a more tempered response from European institutions.

Solidarity has been less pronounced, but a timid evolution of this principle can be glimpsed in the energy field.

At least since the Commission Communication 'Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy', from February 2015, solidarity is recognized – together with trust – as a necessary founding feature of energy security[51].

In the last year, the European Commission put forward a number of coordinated steps to gradually phase down the use of

[48] Communication from the Commission Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia (OJ C 426, 9.11.2022).

[49] On 10 December 2022 the Council reached an agreement on a legislative package which will enable the EU to help Ukraine financially throughout 2023 with €18 billion. All the details can be found at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6699.

[50] G. Chazan, S. Fleming, *Germany rejects push for fresh EU borrowing to battle energy crisis*, The Financial Times, 30 October 2022.

[51] Communication from the Commission to the European Parliament and the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, COM(2015) 80 final.

Russian energy sources, improve Member States' access to other suppliers, and ensure a more equitable division of resources among them. Initial proposals conflicted with national priorities, determining the Hungarian administration to decline to take part, the German government to push for fairer distribution[52] and the Mediterranean nations, who are less exposed to Russian gas, to argue for more of a self-help approach[53].

The landing point of the discussion was the approval, on 18 May 2022, of the REPowerEU Plan[54], aimed at reducing European dependency on Russian gas and oil, through energy savings, diversification of energy supplies, and accelerated roll-out of renewable energy to replace fossil fuels in homes, industry and power generation.

The basic principle of the Plan is that "no Member State can tackle this challenge on its own. By carrying out joint needs assessments and planning, joint purchases and greater coordination, we will ensure that the phasing out of our dependency on Russian fossil fuels is both achievable and affordable for all Member States". Within this framework, however, the European Commission has called on individual Member States to take autonomous measures right away to achieve immediate results[55]. According to some critics, moreover, these "timid and fossil-fuel-driven (…) proposals" are not able to address the scale of this crisis, which in turn has led to the current approach of uncoordinated national relief packages".[56]

Furthermore, in the summer of 2022, the Commission put forward some proposals under the title *Save Gas for a Safe Winter*[57].

---

[52] During the crisis Germany was often criticised for using fiscal power that many smaller Member States lack, especially after the €200bn energy aid package for businesses and households. See: https://www.ft.com/content/a14c4ae4-c513-46c1-b427-23a5e046703b.

[53] V. Anghel, E. Jones, *Is Europe really forged through crisis? Pandemic EU and the Russia – Ukraine war*, in *Journal of European Public Policy*, Special Issue: The COVID-19 Pandemic and the European Union. Guest Editors: L. Quaglia and A. Verdun (2022).

[54] COM/2022/230 final.

[55] See for example C(2022) 3219 final Commission Recommendation on speeding up permit-granting procedures for renewable energy projects and facilitating Power Purchase Agreements.

[56] See the declarations by The Greens/EFA parliamentary group at https://www.greens-efa.eu/en/article/document/eu-solidarity-fund-needed-in-the-face-of-pan-eu-energy-crisis-war

[57] See https://ec.europa.eu/commission/presscorner/detail/en/IP_22_4608.

The pack included the following: a) a communication (COM(2022) 360) aimed to review the current situation and the steps that have already been taken, as well as outlining the tools available to the EU to respond to the crisis; b) a proposal for a Council Regulation on coordinated demand reduction measures for gas (COM(2022) 361); c) a Communication about an Amendment to the Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia (COM(2022) 5342).

In particular, the proposed Regulation was adopted by the Council on 5 August 2022 (Regulation (UE) 2022/1369). With this act, Member States commit to "use their best efforts to reduce their gas consumption in the period from 1 August 2022 to 31 March 2023 at least by 15% compared to their average gas consumption in the period from 1 August to 31 March during the five consecutive years preceding the date of entry into force of this Regulation". The Regulation is a watered-down version of the plan originally proposed, it is hardly sufficient quantitatively, and it is full of carve-outs and exemptions, requiring for example a vote in the Council to mandate any cuts (art. 5)[58].

Another step was taken on 6 October 2022, when EU energy ministers reached a political agreement on a proposal for a Council Regulation to address high energy prices[59]. The Regulation introduces common measures to reduce electricity demand and to collect and redistribute the energy sector's surplus revenues to final customers. The Council agreed to a voluntary overall reduction target of 10% of gross electricity consumption and a mandatory reduction target of 5% of the electricity consumption in peak hours, to cap the market revenues for electricity generators, to set a mandatory temporary solidarity contribution on the profits of businesses active in the crude petroleum, natural gas, coal, and refinery sectors, which will apply in addition to regular taxes and levies applicable in Member States.

Maybe the most significant measures from the point of view of solidarity – and the ones that had the hardest time getting

[58] J. Rankin, *EU agrees plan to ration gas use over Russia supply fears*, The Guardian, 26 July 2022, https://www.theguardian.com/business/2022/jul/26/eu-agrees-plan-to-reduce-gas-use-over-russia-supply-fears.

[59] Council Regulation (EU) 2022/1854 on an emergency intervention to address high energy prices.

approved[60] – concern gas supplies. Regulation (EU) 2017/1938 already established provisions aiming to safeguard the security of gas supply in the EU by ensuring the proper and continuous functioning of the internal market in natural gas. Solidarity seems to represent one of the focuses of the whole Regulation which aims "to boost solidarity and trust between the Member States" (whereas 6) and to provide "transparent mechanisms, in a spirit of solidarity, for the coordination of planning for, and response to, an emergency at Member State, regional and Union levels". In this view, according to art. 12, par. 1, where a Member State has declared the emergency crisis level as defined in the Regulation (art. 10.1) any increased supply standard or additional obligation imposed on natural gas undertakings in other Member States shall be temporarily reduced to a certain level (established in art. 5.1). The troublesome aspect of the regulation is that details of gas-sharing under the described solidarity mechanism had to be specified in bilateral agreements between neighbouring countries, which until now have been rare and sparse[61]. The lack of additional European legislation to fill that gap, has confronted solidarity with obvious practical and political challenges. A step forward in the direction of solidarity was made at the Energy Council on 19 December 2022, when EU Member States reached an agreement on the Council Regulation establishing a temporary joint purchasing tool that will come into force in early spring 2023 and aims to ensure EU solidarity in purchasing and distributing gas, ensuring security of the supply, and acting on the level of gas prices[62]. In particular, because of the aforementioned lack of agreements among Member States, default rules for bilateral solidarity were introduced. The Council agreed on a default mechanism to ensure supply for 'solidarity protected consumers' – household customers connected to a gas distribution network,

[60] H. von Der Burchard, *Germany opposes EU price cap on all gas imports*, Politico, 30 September 2022 at: https://www.politico.eu/article/germany-oppose-eu-gas-price-cap-domestic-price-limit/.

[61] However, as of now, only six such agreements have been concluded (including Germany and Denmark; Germany and Austria; Estonia and Latvia; Lithuania and Latvia; Italy and Slovenia; Finland and Estonia). See European Commission, *Secure Gas supplies*, 2022, at: https://energy.ec.europa.eu/topics/energy-security/secure-gas-supplies_en.

[62] Council Regulation (EU) 2022/2576 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders.

district heating installations and essential social services – and critical gas-fired power plants.

A few days later, Council Regulation (EU) 2022/2578 establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices[63], was adopted. The market correction mechanism (MCM) aims to protect citizens and the economy against excessively high prices, limiting episodes of excessive gas prices in the EU that do not reflect world market prices, while ensuring security of energy supply and the stability of financial markets. The Regulation, taking stock of the differences in financial risks and benefits among various Member States, recognizes that "the MCM should constitute a solidary compromise, in which all Member States agree to contribute to the market correction and accept the same limits for the price formation, even though the level of malfunction of the price formation mechanism and the financial impacts of derivatives prices on the economy are different in some Member States". The MCM would therefore be able to "strengthen Union solidarity in avoiding excessively high gas prices, which are unsustainable even for short periods of time for many Member States. The MCM will help to ensure that gas supply undertakings from all Member States are able to purchase gas at reasonable prices in the spirit of solidarity".

Apart from the latter examples (in which solidarity is sometimes imposed to make up for the inactivity of member states), most of the measures taken to cope with the war-driven crisis seem to be characterised by a strong degree of decentralisation.

3. The Italian measures and the key role of the State in counteracting the impact of the Covid-19 and Ukrainian emergencies on the economic sector

The Covid-19 pandemic had a significant impact on the national rules relating to the form of State and government. Rights, fundamental principles, sources of law, government-parliament relationships, state-regions relations, were under stress and are still searching for new balances.

[63] Council Regulation (EU) 2022/2578 of 22 December 2022 establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices.

As in any crisis, the role of the State in the economic field expanded in order to minimize the social and economic consequences of the pandemic[64]. In response to this serious and unforeseen emergency, budgetary measures and interventions were timely adopted by the Italian government to increase the capacity of the national health system, halt the economic slide, keep markets and the economy functioning, and provide aid to those individuals and businesses that had been particularly affected. The severe impact of the pandemic required, therefore, substantial state support and new, large public expenditures.

Italy's response was fully in line with the broader European framework, starting with the coordinated economic response to the Covid-19 outbreak, set by the EU Commission in its Communication of 13 March 2020 (*supra* section 2.1)[65] and, similarly, emphasized the role of the State in the economic sphere in order to protect social rights.

Indeed, the main response, initially, came from member states' national budgets, even though EU state aid rules were adapted to allow member states to take swift and effective actions to support citizens and undertakings, in particular SMEs, facing economic difficulties[66]. It was possible also thanks to a loosening of fiscal policies and budgetary constraints, encouraged by financial markets and international or supranational organisations, which had always been the main supporters of budgetary discipline (*supra* section 2)[67]. Thanks to this normative framework, the Italian government and parliament allocated approx. 150 billion euro, through the approval of several acts of budget variances[68].

---

[64] Regarding the different ways in which States can influence the economy, see: J.E. Stiglitz, A. Heertje, *The Economic Role of the State* (1989).

[65] Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup on Coordinated economic response to the COVID-19 Outbreak, COM(2020) 112 final of 13.03.2020.

[66] Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, C(2020) 1863 final, 19.03.2020, underlined the need for appropriate State aid measures, listing the conditions for state aids compatible with the internal market (p. 3).

[67] See: F. Bassanini, G. Napolitano, L. Torchia, *Introduzione,* in F. Bassanini, G. Napolitano, L. Torchia (eds.), *Lo Stato promotore. Come cambia l'intervento pubblico nell'economia,* (2021) 13.

[68] The relative resolutions of Chamber of deputies and Senate have to be adopted by an absolute majority of members of both Chambers (according to article 6, para. 3, Law 24 December 2012 no. 243). See: Chamber of Deputies Resolution no.

The state intervention was launched in the early days of the pandemic emergency with the Decree-Law no. 18 of 17 March 2020, so-called *Decreto Cura Italia*[69], which provided for measures to strengthen the national health service and economically support families, workers and businesses. For the entrepreneurial system the government provided liquidity support through the banking system (i.e. enhancing state loan guarantees) and fiscal measures, including tax and social security contribution deferrals[70]. After a few weeks, the Decree-Law no. 23 of 8 April 2020, the so-called *Decreto Liquidità*[71], provided additional and stronger measures to favour workers and businesses. In particular, it authorized SACE S.p.A., a joint-stock company controlled by the Ministry of Economy and Finance (MEF), to grant public guarantees on bank loans at particularly favourable conditions in order to support liquidity to enterprises based in Italy.

In May, as the 'first wave' of the pandemic was coming to an end, the so-called *Decreto Rilancio*[72] established a number of measures aimed - again - at strengthening the health service and supporting the social and productive system. In the summer, the *Decreto Agosto* (Decree-Law no. 104 of 14 August 2020[73]) was enacted to allocate additional resources to the health sector and welfare system, and to provide for measures aimed at supporting the economic recovery phase.

During the 'second wave' of the pandemic, the government passed four *Decreti Ristori* over a period of a few weeks[74], which

6-00103 and Senate Resolution no 6-00102 of 11 March 2020 (20 billion); Resolution no. 6/00107 of the Chamber of Deputies, approved on 29 April 2020 and Resolution no. 6/00106 of the Senate, approved 30 April 2020 (55 billion); Resolutions no. 6/00123 of the Chamber and no. 6/00124 of the Senate, approved on 29 July 2020 (25 billion); Resolutions no. 6/00145 of the Chamber and no. 6/00138 of the Senate of 14 October 2020 (8 billion); Resolutions no. 6-00169 of the Chamber and no.6-00169 of the Senate, of 20 January 2021 (32 billion); Resolutions no. 6-00186 of the Chamber and no. 6-00187 of the Senate of 22 April 2021 (40 billion).

[69] It was converted with Law 24 April 2020, no. 27.

[70] Titles III and IV.

[71] It was converted with Law 5 June 2020, no. 40.

[72] Decree-Law no. 34 of 19 May 2020, converted with Law 17 June 2020, no. 77.

[73] It was converted with Law 13 October 2020, no. 126.

[74] Decree-Law no. 137 of 28 October 2020; Decree-Law no. 149 of 9 November 2020; Decree-Law no. 154 of 23 November 2020; Decree-Law no. 157 of 30 November 2020. The first Decree-Law was converted with Law 18 December 2020, no. 176, which repealed the other three decrees.

introduced a set of rapid and automatic measures, such as non-refundable aids; suspension and reduction of taxes, contributions, and other payments; and additional weeks of redundancy fund (*cassa integrazione*); in favour of those sectors most affected by the new restrictions.

This strategy remained unchanged by the new government, led by Mario Draghi. It adopted the so-called *Decreto Sostegni* (Decree-Law no. 41 of 22 March 2021[75]) providing for new non-repayable subsidies, the cancellation of taxes and the extension of the Covid redundancy fund, based on the resources of the last 32-billion-euro budget variance. Finally, a *Decreto Sostegni-bis* (Decree-Law no. 73 of 25 May 2021) was adopted[76].

In general, these decree-laws injected huge amounts of money into the economic system using different instruments. Although it is difficult to outline a coherent and precise pattern, a number of trends can be identified: generalised benefits for companies, economic aids for worst-hit sectors, bonus policy, outright grants, state guarantees[77], loans at low interest rates, capital injections, and deferral of tax and social security contribution payments[78]. Basically, the State dropped a form of helicopter money, which ensured an income for families, workers, businesses in a situation of economic paralysis in which their survival was at risk[79]. Many of these measures were inspired by an emergency logic, and, consequently, they had limited duration and were not able to meet the long-term needs of our country. However, some measures had a wider scope and could act as quasi-structural drivers for the economy[80]. For example, Article 27 of the abovementioned *Decreto Rilancio* authorised *Cassa depositi e prestiti S.p.A.* (CDP[81]) to set up an asset (so-called '*Patrimonio Rilancio*'),

[75] It was converted with Law 21 May 2021, no. 69.
[76] It was converted in Law 23 July 2021, no. 106. A. Riviezzo, *Fonti dell'emergenza e Costituzione economica*, 4 Osservatorio costituzionale, 133 (2021).
[77] See: article 1 of Decree-Law 8 April 2020, no. 23 (so-called *Garanzia Italia).*
[78] P. Nicolaides, *Unprecedented State Intervention: A Review of State Aid to Combat Covid-19 on the First Anniversary of the European Commission's 2020 "Temporary Framework",* Luiss. *Policy Brief,* no. 4. (2021),
[79] G. Amato, *Bentornato Stato, ma,* (2022), 38.
[80] G. Mocavini, V. Turchini, *Il sostegno alle imprese*, in F. Bassanini, G. Napolitano, L. Torchia (eds.), *Lo Stato promotore, come cambia l'intervento pubblico nell'economia* (2021).
[81] *Cassa depositi e prestiti* was set up in 1850 to finance, by means of special purpose loans, mainly public works by local authorities. See: M. De Cecco e G. Toniolo

financed mainly by the MEF, to carry out interventions and actions to support and relaunch the national productive system after the epidemiological emergency. These resources can be used for the subscription of convertible bonds, participation in capital increases, and the purchase of shares listed on the secondary market in the case of strategic transactions in joint-stock companies with registered offices in Italy (and not operating in the banking, financial or insurance sectors), which have "an annual turnover of more than EUR 50 million"[82]. The access requirements, criteria and procedures for the interventions of *Patrimonio Rilancio,* are established by a decree of the MEF, in compliance with the conditions of the *Temporary Framework on State Aid.* This decree[83] has provided three separate and autonomous subdivisions: a) National Temporary Support Fund (FNST), which provides financial resources in a manner consistent with the measures envisaged by the Commission to support the economy in the Covid-19 emergency; b) National Strategic Fund (SNSF), which can be used by *Patrimonio Rilancio* to participate, together with other market investors, in investment operations on the primary market (through capital increases or convertible bonds) or, directly or indirectly, on the secondary market (through the purchase of shares in strategic enterprises); National Fund for Enterprise Restructuring (FNRI) for direct and indirect investments in companies characterised by temporary financial difficulties but with prospects of future profitability.

This public intervention programme, outlined in Article 27, cannot be catalogued among the merely 'transitional' or 'exceptional' provisions of the Covid phase, considering the large number of potential beneficiaries and the time frame (12 years[84]) in

(eds.), *Storia della Cassa depositi e prestiti* (2014). On its more recent role: M. Giachetti Fantini, *La «straordinaria mutazione» del ruolo di Cassa Depositi e Prestiti nel passaggio dallo Stato azionista allo Stato investitore,* 6 Federalismi.it (2018).

[82] The allocation of state resources is significant: for 2020, the allocation of specially issued government bonds to CDP was planned "up to a maximum limit of EUR 44 billion". In the event of shortfall, on the bonds of *Patrimonio Rilancio* the state guarantee is granted. See: V. Minervini, *Il ritorno dello Stato salvatore. Nuovi paradigmi (post Covid) nel rapporto fra Stato e mercato,* in 3 *Mercato Concorrenza Regole,* 471 (2022).

[83] Decree the Minister of Economy and Finance no. 261 of 3 February 2021, published in *GU Serie Generale* no. 59 of 10 March 2021.

[84] This period may also be extended, pursuant to Article 27, by simple "resolution of the board of directors of CDP S.p.A.", at the "request" of the MEF.

which the effects of the intervention are intended to unfold. Article 27 has a general and transversal scope, aimed to set the way for the return to the model of the State as shareholder and the re-emergence of a system of state participations.

Other significant examples of this trend can be identified in the role played by SACE S.p.A. as guarantor of the entrepreneurial system; the extension of the so-called golden powers of the government[85]; the transitional (re)nationalisation of Alitalia[86].

In short, the Covid-19 pandemic has triggered the progressive consolidation of a different role of the State in the national economy, which seems likely to have a significant and long-lasting impact on the features of our economic constitution, as shown by the energy crisis that exploded in the second half of 2021 and was accentuated by the Ukrainian emergency in 2022[87]. To mitigate the effects on citizens, families and businesses of the price increases in electricity, gas and fuel, the government adopted a number of measures, using always the instrument of the decree-law.[88] Among the most significant ones, we can mention the allocation of substantial resources to temporarily reduce electricity and gas bills, mainly through interventions to offset the weight of general system charges; the strengthening of instruments to protect the most vulnerable customers, such as the social electricity and gas bonuses and the electricity bonus for the physically disadvantaged; instalment payments of energy bills for domestic users, as well as for companies based in Italy. In addition, some tax measures were introduced, such as tax credits in favour of companies for the expenditure they incur for the purchase of gas and electricity; the reduction of VAT on gas to 5 per cent, the reduction of excise duties on petrol, diesel and LPG, the reduction of VAT on gas for road

[85] Article 15, 16 and 17 of *Decreto Liquidità.*

[86] Article 202 of *Decreto Rilancio.*

[87] See: ARERA-Memoria 48/2022/I/COM and information available at www.consilium.europa.eu/en/policies/energy-prices-and-security-of-supply/

[88] See: Decree-law no. 73, 99 and 130 of 2021; budget law for 2022 (no. 234 of 2021) and Decree-law no, 4 of 2022 (so-called *"sostegni-ter"*, converted into law no. 25 of 2022. In the aftermath of Russian aggression against Ukraine, which began on 24 February 2022, other decree-laws were adopted: no. 17 (*"decreto energia"*, converted into law no. 34 of 2022), no. 21 (*"decreto Ucraina"*, converted into law no. 51 of 2022), no. 38 (repealed by law no. 51 of 2022), no. 50 (*"aiuti"*, converted into law no. 91 of 2022), no. 80 (repealed by law no. 91 of 2022), no. 115 (*"aiuti-bis"*, converted into law no. 142 of 2022) and no. 144 (*"aiuti-ter"*, converted into law. no. 175 of 2022).

transport and an extraordinary contribution obligation for energy companies.

Such a strong state role is considered an effective tool in reducing economic and social inequalities caused by emergencies. Such extraordinary and unforeseeable events justify a renovated state intervention in the economic sphere, enhancing its political role as promoter of equality, as guarantor of social rights and actor of development[89].

4. The Italian NRRP

The current economic scenario is dominated by the National Recovery and Resilience Plan (NRRP)[90], requested by the Next Generation EU programme (NGEU). The Italian NRRP is a long-term plan, consisting of € 68.9 billion in grants and € 122.6 billion in loans, aimed at relaunching the country's economy, after the disruptive impact of the Covid-19 outbreak. The amount of funds is particularly high, considering that our country was the most affected by the pandemic and its socio-economic repercussions.

In adopting this challenging plan, Italy, like other member states, has been subjected to severe 'external constraints'[91], which significantly limit the discretion of the national lawmakers and, therefore, domestic sovereignty[92]. Whilst the EU rules set the policy

[89] A. Papa, *Passato e (incerto) futuro delle "nazionalizzazioni" tra dettato costituzionale e principi europei*, in P. Bilancia (ed.), *Costituzione economica, integrazione sovranazionale, effetti della globalizzazione*, 5 Federalismi.it, 65 (2019).

[90] The full text of the *Piano Nazionale di Ripresa e Resilienza. Next generation Italia. Italia domani,* 29 Aprile 2021 is available at: https://www.governo.it/sites/governo.it/files/PNRR.pdf. See: G. De Minico, *Il Piano Nazionale di Ripresa e Resilienza. Una terra promessa,* in 2 *Costituzionalismo.it,* 2, 116 (2021); F. Fabbrini, *Next Generation EU. Il futuro di Europa e Italia dopo la pandemia,* 112 (2022).

[91] See: Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility; Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget; *Annual Sustainable Growth Strategy 2021* COM(2020) 575 final. As far Italy is concerned: Council Recommendation of 20 July 2020 on the 2020 National Reform Programme of Italy and delivering a Council opinion on the 2020 Stability Programme of Italy (2020/C 282/12).

[92] It is an old story: K. Dyson, K. Featherstone, *Italy and EMU as a "Vincolo Esterno": Empowering the Technocrats, Transforming the State*, 1 SESP, 2, 274 (1996). Recently, P. De Sena, S. D'Acunto, *Il doppio mito: sulla (pretesa) neutralità della politica monetaria della BCE e la (pretesa) non-vincolatività degli indirizzi di politica*

areas of at the European level covered by the Recovery and Resilience Facility[93] along with some percentages in the distribution of resources, which cannot be varied *in peius*[94], the accurate identification of the reforms and investments to be realized by 2026 were left to the decision of each member state.

On 30 April 2021, Italy submitted its NRRP to the European Commission, after a complex process led by two different governments[95] and characterized by the limited participation of the Italian Parliament[96]. Nevertheless, the Government drew up the plan after a consultation process of regional and local authorities, civil society organisations, and other relevant stakeholders. As a result of this process, the revised plan was presented to Parliament, which endorsed its transmission to the Commission.

The Commission successfully assessed the effectiveness, efficiency and coherence of the Italian recovery and resilience plan. According to its evaluation, the Italian NRRP represents to a large extent "a comprehensive and adequately balanced response to the economic and social situation, thereby contributing appropriately

economica dell'Unione, 3 Costituzionalismo.it, (2020); F. Bassanini, *Le riforme, il "vincolo esterno europeo" e la governance del PNRR: lezioni da un'esperienza del passato*, Astrid Rassegna (2021); F. Salmoni, *Piano Marshall, Recovery Fund e il containment Americano verso la Cina. Condizionalità, debito e potere,* 2 Costituzionalismo.it (2021).

[93] Article 3 of the Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility: "…structured in six pillars: (a) green transition; (b) digital transformation; (c) smart, sustainable and inclusive growth, including economic cohesion, jobs, productivity, competitiveness, research, development and innovation, and a well-functioning internal market with strong SMEs; (d) social and territorial cohesion; (e) health, and economic, social and institutional resilience, with the aim of, inter alia, increasing crisis preparedness and crisis response capacity; and (f) policies for the next generation, children and the youth, such as education and skills."

[94] The regulation provides for the climate target of at least 37% and for the digital target of at least 20% of the funds allocated by NRRPs (article 16).

[95] The first NRRP draft was presented on 15 January 2021 by the *Conte-bis* government; the second one by the Draghi government on 24 April 2021.

[96] The parliamentary activity was limited to the debate and approval of two resolutions: Chamber of Deputies, Resolution no. 6-00138 and Senate of the Republic no. 6-00134 of 13 October 2020.

to all six pillars referred to in Article 3 of Regulation (EU) 2021/241"[97].

Relating to such a plan, two aspects - among many others - seem interesting in order to identify the new features of our economic Constitution: (i) the same instrument used (a plan) and (ii) the role generally played by the State.

Firstly, the idea of a long-term plan is not new for our Constitution, which authorizes the law to provide for appropriate programmes and checks to ensure that public and private economic enterprise activity be directed at and, co-ordinated for, social – and also environmental[98] – purposes (Article 41, par. 3). Both the constitutional "programmes" and the European "plan" imply a lack of confidence in the self-regulating capacity of the market, which is considered unable to achieve optimum results from a social point of view[99]. Consequently, their common trait is the attribution of a substantial primacy to political decision-making in establishing the ultimate goals of economic activity. However, neither of them intends to realize integral planning, replacing the market completely as the regulator of economic life, but tend to coordinate and address public and private economic activities towards social goals.

Thus, the new European perspective embodied by the NGEU seems to revitalize the provision of Article 41, par. 3, Const., strengthening the "social purposes" towards which the entire economic system should be directed. They become more ambitious, aimed at driving the market towards environmental and social sustainability and at addressing some structural weaknesses of the Italian economy, identified by the country-specific recommendations (CSRs) of 2019 in the area of public administration, judicial system and competition[100].

---

[97] Commission's Proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Italy, COM(2021) 344 final, of 22 June 2021.

[98] The adjective 'environmental' was introduced into Article 41 by constitutional law no. 2 of 11 February 2022.

[99] The abovementioned constitutional rule had only a partial implementation in the 1960s when a general programming policy was set up, by Law no. 685 of 1967 on the first five-year plan 1966-1970. See: A. Predieri, P. Barucci, M. Bartoli, G. Gioli, *Il programma economico 1966-70* (1967); M. Giampieretti, *Art. 41,* in S. Bartole, R. Bin (eds.), *Commentario breve alla Costituzione,* 418 (2008).

[100] Council Recommendation on the 2019 National Reform Programme of Italy and delivering a Council opinion on the 2019 Stability Programme of Italy

More exactly, the Italian NRRP is divided into sixteen components, grouped into six missions. The latter are articulated in line with the six Pillars mentioned in the RRF Regulation although the formulation follows a slightly different sequence and aggregation: Digitalisation, Innovation, Competitiveness, Culture and Tourism (40.32 billion); Green revolution and Ecological Transition (59.47 billion); Infrastructures for Sustainable Mobility (25.40 billion); Education and Research (30.88 billion); Inclusion and Cohesion (19.81 billion); Health (15.63 billion)[101]. Cross-cutting objectives in all components of the NRRP are gender equality, the protection and development of young people and overcoming territorial disparities.

The NRRP is therefore a complex document, which not only details how Italy intends to use the EU resources of the NGEU, but also plans some long-awaited structural reforms to implement. These reforms are a key component of the recovery strategy, essential for the efficient and effective implementation of investments in that they provide a supportive business and administrative environment and prevent the misuse of EU funding. They should contribute, therefore, to increasing the structural impact of the NRRP in the medium and long term[102].

The Plan drops the idea of the public authority as a mere guardian of the markets and pursues instead the aim to recover the production process, together with real improvements in people's living conditions, especially of the most disadvantaged. The political objectives appear to have reached a turning point away from the prosperity of the market to well-being and social cohesion as the ultimate goals of a market economy.

(2019/C 301/12), 9 July 2019. See, also: Recommendation for a Council Recommendation on the 2020 National Reform Programme of Italy and delivering a Council opinion on the 2020 Stability Programme of Italy, COM(2020) 512 final, 20 May 2020; Recommendation for a Council Recommendation on the 2022 National Reform Programme of Italy and delivering a Council opinion on the 2022 Stability Programme of Italy COM(2022) 616 final, 23 May 2022.

[101] Basically, the green transition mission accounts for 30% of the spending, followed by digital transition and culture (21%), education and research (14%), social inclusion and infrastructure (both 13%) and healthcare (9%).

[102] Thus, the first years will be mainly devoted to reforms, with the focus shifting to investments only later. F. Corti, J. Núñez Ferrer, *Assessing Reforms in the National Recovery and Resilience Plans. Italy*. CEPS, 3 (2021).

Thus, thanks to the PNRR, the market/social justice hierarchy is reversed, with the former now contributing to the creation and distribution of wealth. In fact, the pandemic emergency has led to the emergence of a public interest of the European Union that is, for the first time, unrelated to the strictly economic context.

This new European and national approach implies a stronger role of state powers in the economy, even though the NRRP does not clarify this issue. More exactly, public authorities are certainly committed to the fulfilment of three types of reforms: horizontal, enabling, and sectoral[103]. *Horizontal reforms* are defined as structural innovations of the Italian legal system and include the reform of the public administration and the judiciary system. These reforms are of transversal interest to all the missions of the plan and are designed to improve equity, efficiency, and competitiveness. *Enabling reforms* are functional interventions to ensure the implementation of the NRRP and generally to remove administrative obstacles, regulations and procedures that affect economic activities and the quality of services provided to citizens and businesses. Two major groups of reforms are provided: simplification and rationalisation measures for existing legislation and the adoption of new rules to promote competition. *Sectoral reforms* are included in the NRRP as part of the individual missions. They consist of regulatory innovations related to specific areas of intervention or economic activities, intended to introduce more efficient regulatory and procedural regimes in their respective sectoral areas.

Thus, the State has, as essential task, the creation of the pre-conditions for a better implementation and development of the NRRP actions. It has basically three fundamental roles to play: (i) to indicate the direction of development, so that initiatives of public and private players contribute synergistically to this plan; (ii) to create the infrastructures and an appropriate set of rules; and (iii) to ensure compliance with these rules.

The NRRP seems to accept the idea of public deficit spending, even substantial, as long as it is virtuous; in other words, the idea of high public spending is acceptable, in the renewed institutional framework, if it is aimed at producing new and greater

[103] F. Corti, J. Núñez Ferrer, *Assessing Reforms in the National Recovery and Resilience Plans. Italy,* cit. at 102, 6.

wealth in the future, even if this leads to a significant deviation from the principle of balanced budgets.

In such a framework the private sector has an ancillary role: even though competitiveness is encouraged, public authorities strive to take over the strongest areas of the economic system as they are able to contribute significantly to the productivity of the economic system as well as citizens' social needs.

These interventions plus future scenarios point to an 'economic constitution', which - under the pressure of crises – appears to moving away from the previous defence of private autonomy towards one characterized by the predominance of the state (or public) intervention in the economic system.

The current moment could be the starting point of a new economic scenario, in which the state plays the main role, by carrying out activities of guidance, coordination, and planning, as well as of direct management. In short, a state that governs the economy, overturning its hegemony over politics.

5. Concluding remarks on how to value the centripetal force triggered by the recent crises

The pandemic and, more recently, the energy crisis, induced by the war in Ukraine, had (and still have) severe social and economic consequences which have triggered a significant change in the relationship between State and economic system. These crises have clearly shown the incapacity of the market to regulate itself properly thereby strengthening the role of the State in the economic sphere.

Surprisingly, the driving force behind this significant change is mainly the EU, which opted for a different approach, compared to its previous experience, characterized by a constant and progressive retreat on the part of the State. The measures and actions put in place by the EU to cope with the effects of the pandemic have no precedent in the process of European integration (*supra* par. 2 and 2.1.). Notwithstanding their extraordinary nature, they could form the basis for structural changes to the European model of the market economy and its main features[104].

[104] F. Fabbrini, *The Legal Architecture of the Economic Responses to COVID-19: EMU beyond the Pandemic*, cit. at. 28.

This new trend involves all member states as well, and it has been implemented in the Italian context thanks to both temporary and structural measures as well as NRRP which give public authorities a more significant role in the economy (*supra* par. 3 and 4). To face the current multiple crises – pandemic and energy – and their severe economic and social repercussions, new resources are not sufficient, but a new guiding role for public action is needed, in Rome as in Brussels. The conjunctural moments recently experienced have engendered renewed demands for welfare and social protection; a sense of belonging and trust in institutions (both at the national and supranational level) will ultimately depend on the extent these demands are met. This brings back to centre stage the value of planning to achieve and protect economic outcomes, pointing towards more socially inclined ends[105].

This turning point could reduce the enduring tension between the Italy's and Europe's economic constitutions. This convergence requires fully implementing Article 3(3) TEU, which stresses the social dimension of the EU, setting as its objective "a highly competitive social market economy, aiming at full employment and social progress". The aim of building a social Europe was confirmed by *The Porto declaration* of 8 May 2021[106], in which the Council called for intensified efforts to implement the European Pillar of Social Rights of 2017, by focusing on reducing inequalities, fighting social exclusion, and tackling poverty. To achieve these goals a strengthening of public intervention is necessary, and public authorities are inevitably called to return to the centre stage.

The coming years will be crucial to understand whether we are facing a one-off deviation imposed by the times of crisis or a structural evolution that will be able to assert itself, overcoming the reluctance shown by some countries.

Certainly, Next Generation EU and its national implementation through NRRP represent a unique opportunity to reconsider the economic model that has characterized Europe for the past 30 years. The centripetal force triggered by the recent crises, which makes it possible to reinforce the pursuit of solidarity and

[105] H. Lokdam, M.A. Wilkinson, *The European Economic Constitution in Crisis: A Conservative Transformation?*, in *The Idea of Economic Constitution in Europe* (2022).
[106] European Council, *The Porto declaration,* Press Release, 338/21, 08.05.2021, available at: https://www.consilium.europa.eu/en/press/press-releases/2021/05/08/the-porto-declaration/pdf.

sustainable growth goals, deserves to be preserved and enhanced. All the more so considering that, in contemporary society, moments of crisis seem to be destined to become almost inevitable physiological constants.

SHORT ARTICLES

THE JUDICIAL POWER: THE WEAKEST OR THE STRONGEST ONE? A COMPARISON BETWEEN GERMANY AND ITALY*.

*Angela Ferrari Zumbini***

Montesquieu, in his famous Spirit of Laws, stated that "Of the three powers above mentioned, the judiciary is next to nothing"[1]. One hundred and fifty years later, Alexander Hamilton confirmed this judgement, claiming that "the judiciary is beyond comparison the weakest of the three departments of power" [2].

Reading two recently published books leads one to question whether these definitions still reflect the reality of today's legal systems, particularly in Germany and Italy.

The German book is entitled "*Die schwache Gewalt?*"[3] that is precisely the weak power, while the Italian one is entitled "*Il governo dei giudici*"[4] that is the government of judges.

In the German book, the question mark at the end of the title plays a fundamental role. The authors wonder, in fact, whether the judiciary can still be considered "the weak power".

The book collects the contributions presented at a conference in Köln in September 2020. In the introduction, the editors clarify the theoretical sources from which they take inspiration to approach the question and the concrete cases that led them to ask this question. The cases are drawn from the national, European and international level.

* This article is a revised and translated version of a book review that is being published in Italian on the Rivista Trimestrale di Diritto Pubblico, n. 3/2023.

** Professor of Administrative Law, University of Naples Federico II

[1] Montesquieu, *Spirit of Laws* (1748) vol. I., p. 186.
[2] A. Hamilton, *The Federalist and Other Constitutional Papers* (1898) n. 78.
[3] T.P. Holterhus and F. Michl (eds), *Die schwache Gewalt?* (2022).
[4] S. Cassese, *Il governo dei giudici* (2022).

The elective source of inspiration for this volume is precisely Alexander Hamilton, who is later referred to in a more articulate and in-depth manner in several contributions, especially that of former constitutional judge Dieter Grimm. In the famous Federalist Papers, and particularly in No. 78, Hamilton states that the executive holds the "sword", the legislative holds the "purse" and sets the rules by which the rights and duties of citizens are regulated. In contrast, the judiciary "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments"[5].

The concrete cases that prompted the authors' reflections are briefly mentioned in the introduction but are then set out more analytically in various contributions.

At the national level, three cases from 2018 are recalled, which caused much uproar in Germany, in which the executive power did not execute final judgments of the judiciary by invoking the autonomy of politics with regard to political decisions, which must also respond to the people's sense of justice.

The first case takes place in Bavaria and is carefully reconstructed in Fabian Michl's contribution. A non-governmental organization for the protection of the environment lodges an appeal against the Bavarian Land to force it to adopt an "air quality plan" under Article 23 of Directive 2008/50 to ensure that the limit value set for nitrogen dioxide would be respected as soon as possible in the city of Munich. The administrative court upheld the appeal and in 2017 issued an injunction against the Land, ordering it to take the necessary measures to ensure that the limit values set by Directive 2008/50 were complied with, including "the imposition of driving bans on certain diesel-powered vehicles in certain urban areas"[6]. In the face of this res judicata decision, the Bavarian government decided not to execute the ruling and adopted an air quality plan in 2018 in which no bans on diesels were envisaged. To justify this non-compliance with the decision of the judiciary, the Bavarian President invoked the autonomy of politics, stating that it was an eminently political decision.

---

[5] A. Hamilton, *The Federalist and Other Constitutional Papers,* cit at. 2, emphasis in original text.

[6] *Bayerischer Verwaltungsgerichtshof*, Order of 27 February 2017.

The second case takes place in Bochum, Nordrein Westfalen and is analyzed in the chapter by Till Patrik Holterhus. The immigration authority decided to deport Sami A., because he was considered very dangerous, with simultaneous deportation to his country of origin, Tunisia. Following an appeal, the administrative court annuls this measure on the grounds that Tunisia does not respect the rule of law. Despite this annulment ruling, the administrative authority proceeds with the repatriation anyway. In an interview, the Minister of the Interior of Nordrein Westfalen recognized the extreme importance of the independence of the judiciary, but at the same time stated that judges should always bear in mind that their decisions should reflect the people's sense of justice.

The third case takes place in the town of Wetzlar in Hessen, the seat, moreover, in imperial times, of one of the most important courts of the First Reich, where Goethe also went to practice law and fell in love with Charlotte, as recounted in "The Sorrows of Young Werther", set in Wetzlar. This small town, as described in Christian Waldhoff's essay, even ignores a decision of the *Bundesverfassungsgericht* (BVG, the Federal Constitutional Court). The NPD (*Nationaldemokratische Partei Deutschlands*, a far-right party) wanted to use a municipal hall for an election rally in view of the upcoming elections. The municipality denied the permission on rather specious grounds and the NPD lodged an administrative appeal against this refusal. The administrative court ordered the municipality to grant the permit but the administration did not comply with the ruling. Therefore, NPD applied to the BVG for a precautionary measure. The First Senate of the Constitutional Court upheld the appeal and granted the precautionary measure, ordering the municipality of Wetzlar to grant the municipal hall to the applicant party. However, the municipality continued to deny permission to the NPD, with great support from civil society. The Vice-President of the First Senate, Ferdinand Kirchhof, also wrote to the municipal administration pointing out their misinterpretation regarding the enforceability of the judgments, but the administration continued on its way, with broad popular support.

At the European level, two cases are recalled, both of which are very well known and therefore do not need to be illustrated: the weakening of the judiciary in Poland made by the executive power, and the much-discussed BVG judgment of May 2020 on the Public

Securities Purchase Programme (PSPP), in which the weakening of the authority of judgments occurs at the hands of another judge.

Two cases are also recalled at the international level. The first is the strategic blocking of the WTO Dispute Settlement Appellate Body by the United States. Since the United States has long refused to cooperate in the necessary filling of judicial vacancies, this body no longer has the minimum number of three judges as of December 2019 and is therefore unable to make decisions.

The second example of damage to the authority of international jurisdiction is the People's Republic of China's blatant disregard for the arbitral award on the South China Sea dispute issued in 2016. The arbitral tribunal's award, based on the United Nations Convention on the Law of the Sea, states that Chinese claims and activities in the aforementioned Pacific Ocean Sea are contrary to international law, but China denied any relevance to this decision and did not even find it necessary to attend the proceedings, which were being conducted regularly, through its legal representation.

Starting from these cases, the various authors of the volume ask the question whether the judiciary can really be considered the weak power, i.e. whether the authority of its decisions is weakening in favour of a stronger executive power.

The volume does not propose a homogeneous view on this question, presenting on the contrary even very divergent opinions.

Angelika Nußberger (former judge of the European Court of Human Rights) uses the theory of abusive constitutionalism[7] to frame the problem in light of certain events in other countries. As it is well known, the executive power's use of constitutional amendment mechanisms to erode the democratic order is a phenomenon that occurred not only in Poland and Hungary, but also in Venezuela, Ecuador and Bolivia. After changing the composition of the constitutional courts, the government is awarded by the courts thus modified the so-called *Persilschein* (a German untranslatable term, we could call it a certificate of legitimacy, *Schein* means certificate and *Persil* is the brand name of a famous bleaching soap, which therefore "cleanses" the government of its illegitimate actions).

[7] On this phenomenon, see D. Landau, *Abusive Constitutionalism*, 47 U.C.D. L. Rev. 189 2013.

Apart from the more extreme phenomena of abusive constitutionalism, Nußberger argues that she cannot give a unified and homogeneous answer to the question underlying the volume. The answer must necessarily vary from country to country. An initial diversification emerges from the degree of trust that citizens say they have in the judiciary, which is rather high in northern Europe, but gradually decreases as one moves south or eastwards. Another fundamental element in assessing the weakening of the judiciary vis-à-vis the executive power is the latter's ability to influence the former. For example, in Germany the Minister of Justice (both federal and local) holds the power of direction over the prosecutors (*Weisungsrecht*), being able to give them instructions. Even more relevant is the influence of politics on the judiciary in Switzerland: all judges are members of a political party and have to make an annual financial contribution to the party that appointed them; moreover, they are appointed for a fixed period of time, but are re-eligible, so they could be influenced by politics during their term of office with a view to re-election.

Hans Vorländer's essay also proposes an articulated and non-unified response. On the one hand, authoritarian populism may pose a danger to the democratic order and weaken the judiciary. On the other hand, however, in Germany the *Grundgesetz* enjoys a very broad trust in the people, and the *Bundesverfassungsgericht* makes use of this trust when it declares certain choices made by the legislature illegitimate.

Other authors advocate a definition of the judiciary as a weak power. Dieter Grimm lists seven reasons to demonstrate the weakness of judicial power, while Fabian Michl and Christian Waldhoff focus on a specific profile, namely the non-enforcement of judgments. Examples are given of property owners who often fail to regain possession of their property despite an enforceable eviction order and the case of a famous cut in the pension system (the so-called Hartz 4 laws) declared unconstitutional by the BVG. In the aftermath of the ruling, the parliament passed a constitutional amendment, introducing Article 91e to the *Grundgesetz*, which made the pension reform constitutionally legitimate.

Martin Nettesheim's essay, on the contrary, highlights the power of the judiciary, especially the Court of Justice of the European Union. The author is very critical of the European judge, who exercises nearly an excessive power not conferred by the

Treaties. The desire to impose homogeneous constitutional values on all Member States is a very risky game according to Nettesheim. Indeed, there is no federal homogeneity clause in the Treaty, and the EU is not a federal state in which the Member States have renounced their constitutional autonomy. The Commission and the CJEU have over time tried to construct a "constitutionalism" from above, without a democratic consensus at the grassroots level and despite the failure of referendums. According to Nettesheim, Europe is arrogating to itself the right to prevent some countries from making constitutional mistakes (as in the case of Poland and Hungary), but this vision of good judges fighting bad ones stems from a black-and-white view of reality that obscures the complexity of society.

The book contains, therefore, a plurality of visions and opinions, and is focused on the examination of the German situation, while considering the European and international level, and while citing other countries such as Poland, Hungary, Switzerland, and Venezuela as examples of the weakness of the judiciary. The Italian reader cannot but wonder about the situation in Italy, a country never mentioned in the book.

In Italy, judicial power could be defined - to borrow the title of the German book - as a *superstarke Gewalt*, a very strong power, with an exclamation mark and not a question mark.

The power of the judges has not only not weakened over time, but has increasingly shown great strength against the executive and legislative powers. There are other examples in the world, such as Brazil, where judicial power has disrupted politics and changed the course of national policy. However, the Italian case remains unique: only in our country the judicial power brought down an entire political system, erasing from the political scene the five parties that had governed the nation for decades in different compositions (DC-Democrazia Cristiana, PSI-Partito Socialista Italiano, PSDI-Partito Socialista Democratico Italiano, PRI-Partito Repubblicano Italiano, PLI-Partito Liberale Italiano).

The growth and distortions of the judges' power are well illustrated in Sabino Cassese's book *Il governo dei giudici*[8]. In addition to providing data on the growing ineffectiveness of the

[8] S. Cassese, *Il governo dei giudici*, cit. at 4.

judicial system, Cassese reconstructs the path of the rise of judges' power[9], highlighting its criticalities.

We could say that in Italy we are witnessing an inverse process to the one that emerges from the German volume, with judges and prosecutors acquiring a preponderant power, a "leading role" (p. 66)[10] so much so that it led the author to speak of a "Republic of Prosecutors" (p. 6). A series of distorting phenomena and mechanisms are linked to this excessive power of the judges, which Cassese highlights with great accuracy.

Among the phenomena on which Cassese focuses his attention is the "monstrous union" (p. 50) between legislative power and judicial power that takes place through the constant and widespread presence of judges in the various ministries.

Cassese also denounces the instrumentalization of the constitutional dictate concerning the mandatory nature of criminal prosecution, which he even calls a "fictitious cloak" (p. 5). The power of the judiciary became decisive in political life when the independence of the judiciary became self-governing and the judiciary obtained a popular consensus favoured by the "direct circuit between the holders of the prosecution power and the media" (p. 80), so much so that Cassese goes so far as to define the Italian judiciary as the "first populist force"(p. 81).

A decisive role in this process is attributed to the Consiglio Superiore della Magistratura (CSM), which has "exercised neither of its two functions" (p. 7), i.e. the function of defending judges from being influenced and that of guaranteeing the containment of their function within the judicial sphere. Moreover, the CSM is "dominated by small groups called currents" (p. 45) mainly led by prosecutors.

Historically, it is interesting to note that we have privileged documentation on the failure of the CSM, which dates back to 1984. It is the volume *Soliloquio sulla magistratura*, by Giuseppe Ferrari[11], magistrate, professor of constitutional law, member of the CSM and then constitutional judge. This book provides an insider's account of the CSM, reproducing and commenting on all of Ferrari's

[9] A strong critique of judicial activism of the US Supreme Court in the early XX Century can be found in E. Lambert, *Le Gouvernement des juges et la lutte contre la législation sociale aux États-Unis* (1921).

[10] All the following citations are referred to the book of Sabino Cassese *Il governo dei giudici*, cit. at 4.

[11] Giuseppe Ferrari, *Soliloquio sulla magistratura* (1984).

speeches during his four-year membership of the CSM (1972-1976). Thus, deleterious phenomena come to light, such as the substantial elimination of the merit criterion for promotions, leading to an "anti-democratic egalitarianism" (p. 101)[12]. A particularly alarming phenomenon is that of magistrates showing evident mental imbalances in court, of which Ferrari documents the events and the length of time they spent as judges (pp. 110 ff.). Ferrari states that the evolution of the role of the judiciary has led to a deviation from the constitutional system prefigured by the Constituent Assembly "also due to the fact that the CSM has abdicated all power" (p. 109).

In conclusion, the German volume, despite the question mark in the title and nuances in the opinions of the various authors, qualifies the judiciary in Germany as a weak power. On the contrary, from the two Italian surveys mentioned above, a picture emerges that goes in the opposite direction, moreover confirmed several decades later: judicial power in Italy appears as a very strong power. Perhaps too much?

[12] All the following citations are referred to the book of Giuseppe Ferrari, *Soliloquio sulla magistratura,* cit. at 11.